



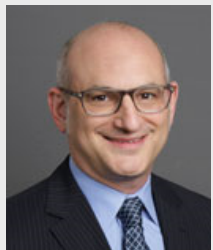
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# Managing Employees in a Time of Chaos: A 2021 Employment Law Overview

# 2021

Friday, January 29, 2021



Dan Handman



Michelle Freeman



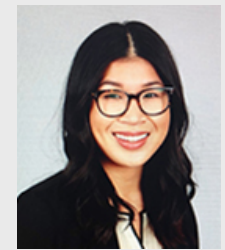
Alison Hamer



Ferry Lopez



Adam Maldonado



Anna Pham



# Welcome to 2021!

- 1. Cal/OSHA Emergency Temporary Standards, COVID Notices**  
*(Michelle Freeman)*
- 2. DLSE & Whistleblower Claims / New Pay Data Reporting Requirements**  
*(Anna Pham)*
- 3. “No Rehire” Clauses / Crime Victim Leave** *(Adam Maldonado)*
- 4. Sick Leave Protected Designation, CFRA Expansion, and Adjunct Professor Exemption** *(Alison Hamer)*
- 5. Diversity, Equity, and Inclusion** *(Ferry Lopez)*
- 6. The Biden Administration** *(Dan Handman)*



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# 1. Cal/OSHA Emergency Temporary Standards, COVID Notices



Michelle Freeman



# Cal/OSHA Emergency Temporary Standards (ETS)

- Went into effect November 30, 2020
- Sets out rules and procedures for employers to comply with to limit the spread of COVID-19 in the workplace
- Starting February 1, 2020, Cal/OSHA will begin to assess monetary penalties for violations of the ETS
- Even if an employer's workforce is vaccinated, ETS must still be followed



# Key Takeaways from Cal/OSHA ETS

- COVID-19 Prevention Plan
- Exclusion of Employees from the Workplace
- Notification to Employees
- Exclusion Pay
- Testing
- Reporting to Local Health Authorities

(Other requirements not discussed include training, recordkeeping, investigation of workplace following a positive test, social distancing and mask requirements, cleaning and disinfecting requirements, and engineering requirements.)



## A.B. 685 (Labor Code §6409.6)

- **Notice to all employees** who may have been exposed to COVID-19
  - Notice must be given with 24 hours and cannot contain personal identifying information of any employee(s)
  
- **Notice to local health officials** where there is an outbreak
  - Outbreak = 3 or more confirmed cases of COVID-19 in 14 days
  - Notice must be given within 48 hours



# A.B. 685 Notice Content Requirements

- Written notice to exposed employees
  - Advise the employee he/she “may have been exposed to COVID-19”
  - Identify benefits employee may be entitled to
  - Identify antiretaliation and antidiscrimination protections
  - Identify employer’s disinfection and safety plan
- Notice to local health officials
  - Name, number, occupation, worksite of the qualifying individual, and employer’s NAICS code



## **S.B. 1159 (Labor Code §3212.88)**

- Provides a rebuttable presumption for certain workers and workplaces that an employee's COVID-19-related illness is an occupational injury entitling the employee to Workers' Compensation benefits
- Implements reporting requirements to employer's Workers' Compensation administrator where there is an "outbreak"
  - Report must be within 3 days and be made via email or fax





# S.B. 1159 Reporting Requirements

- **Applies when there is an “outbreak”**
  - If 100 employees or fewer, 4 employees test positive
  - If more than 100 employees, 4% of employees test positive for COVID-19
  - Ordered to close by a local public health department, the State Dept. of Public Health, Cal/OSHA, or a school superintendent
  - If an employee worked at multiple worksites, the positive test is counted at each worksite the employee worked for the past 14 days.
- **Information to be provided to Workers’ Compensation Adjuster**
  - An employee has tested positive (no PII should be included)
  - The date of the positive test
  - The address(es) of the employee’s workplace for the preceding 14 days
  - Highest number of employees who reported to affected workplaces during the preceding 45 days



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## **2. DLSE & Whistleblower Claims**

### **New Pay Data Reporting Requirements**



**Anna Pham**



## A.B. 1947 - Overview

- **Pertains to:**

- Complaints filed with Division of Labor Standards Enforcement (“DLSE”)
- Whistleblower actions

- **Purpose:**

- Likely created and signed in part due to COVID–19

- **Two Substantive Changes:**

- Provides additional time for claimants to file a claim with DLSE
- Permits court to award reasonable attorney’s fees for whistleblower actions



## A.B. 1947 – What Changed?

### Amends California Labor Code § 98.7

#### ■ Old Law

- Discrimination or wrongful discharge complaints under DLSE must be filed within **6 months** after occurrence of the alleged violation

#### ■ New Law

- Discrimination or wrongful discharge complaints under DLSE can now be filed within **1 year**

#### ■ Impact?

- Keeping employers on the hook for a longer period of time = more DLSE complaints
- Provides more time to employees to collect evidence (documents and witnesses), talk with counsel, evaluate their rights



# A.B. 1947 – What Changed?

## Amends California Labor Code § 1102.5

### ▪ Old Law

- Prohibits employers from making, adopting or enforcing any policy that prevents an employee from disclosing state or federal law violations to a government or law enforcement agency
- Prohibits an employer from retaliating against an employee
- Violation of Section 1102.5 – reinstatement, backpay, civil penalty of \$10,000 per violation

### ▪ New Law

- Permits attorney's fees to plaintiff who prevails on whistleblower action pursuant to this Labor Code section.

### ▪ Impact?

- May incentivize plaintiffs' attorneys to bring more whistleblower lawsuits
- May discourage early resolution due to financial incentive to proceed to court
- Increase cost of settlement



# S.B. 973 - Overview

## ■ **Background:**

- Employers with 100+ employees are required to annually report demographic information to Equal Employment Opportunity Commission (“EEOC”)
- In 2016, the Obama Administration tried to expand the EEOC reporting requirements to include pay data by race, sex, and ethnicity but the proposed rule was never implemented
- California passed SB 973, which requires private California employers with 100+ employees to submit this pay data information to California Department of Fair Employment and Housing (“DFEH”) annually

## ■ **Purpose:**

- Identify discriminatory pay gaps and strengthen equal pay laws in California

## ■ **Confidentiality:**

- Confidential except as necessary for administrative enforcement or through normal rules of discovery for civil action



## S.B. 973 – Reporting Requirements

- The number of employees by race, ethnicity, and sex in the following job categories:
  - *Executive or Senior-level Officials and Managers*
  - *First or Mid-level Officials and Managers*
  - *Professionals*
  - *Technicians*
  - *Sales Workers*
  - *Administrative Support Workers*
  - *Craft Workers*
  - *Operatives*
  - *Laborers and Helpers*
  - *Service Workers*
- Calculate based on single pay period between October 1 and December 31 for the Reporting Year



## **S.B. 973 – Reporting Requirements** (cont'd.)

- **What else needs to be reported?**
  - The number of employees by race, ethnicity, and sex whose annual earnings fall within each pay band used by U.S. Bureau of Labor Statistics
  - The total number of hours worked by each employee in each pay band
- **When is the first Annual Pay Data Report due?**
  - March 31, 2021
- **What happens if you fail to report?**
  - DFEH can enforce through a court order and recover associated costs with seeking the order for compliance





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## 3. “No Rehire” Clauses Crime Victim Leave



Adam Maldonado



## “No-Rehire” Clauses – Revisiting the Old to Understand the New (A.B. 2143)

- What is a “No-Rehire” Clause?
- Were they ever “okay”?
- What changed?



## “No-Rehire” Clauses – If the law changed in 2020, why are we talking about this now?

- Two words: “unintended consequences”
  
- So, what did A.B. 2143 do to A.B. 749?
  - First – cleans up the “overbroad” nature of A.B. 749
  - Second – adds a “good faith” requirement to the complaint



## A.B. 2992 – Major Expansion in Leave Protections for Victims of Crime

- What does A.B. 2992 do?
  - Prohibits an employer from discharging, discriminating, or retaliating against an employee who is a **victim** of **crime** or **abuse**
- Why does this matter for employers?
  - Because it significantly expands **who** is eligible for protected leave and **under what circumstances** eligible employees may take that leave



## **A.B. 2992 – Major Expansion in Leave Protections for Victims of Crime:**

- Who is an eligible “victim”?
- What constitutes a “crime”?
- What constitutes “protected” leave?
- Documentation required?



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## **4. Sick Leave Protected Designation, CFRA Expansion, and Adjunct Professor Exemption**



**Alison Hamer**



# Sick Leave Protected Designation (A.B. 2017)

- California Labor Code Section 233
  - Prohibits employers from:
    - Denying employee use of protected sick leave
    - Taking discriminatory action against employee for using or attempting to use protected sick leave
  - Originally permitted employees to use sick leave to care for a sick family member (“kin care”)
  - Expanded in 2016 when the Paid Sick Leave Law passed to also cover:
    - Diagnosis, care or treatment of an existing health condition of, or preventative care for an employee;
    - Diagnosis, care or treatment of an existing health condition of, or preventative care for a family member; or
    - Purposes relating to being a victim of domestic violence, sexual assault or stalking
  - Protection limited to the amount of sick leave an employee accrues in 6 months



## Sick Leave Designation as Protected Sick Leave (A.B. 2017)

- A.B. 2017 amends Labor Code 233 to allow employees the sole discretion to specify whether to designate used sick leave as being protected under the law
  - What if an employer provides the minimum sick leave required by the Paid Sick Leave Law?
  - What if an employer's sick leave policy does not limit the amount of sick leave permitted for certain purposes?
  - Who does this impact?





## Protected Leave Coverage Expanded to Smaller Employers and Additional Family Members (S.B. 1383)

- S.B. 1383 expands the California Family Rights Act (CFRA)
- Smaller employers are now covered
  - Previously 50 or more employees within 75 miles of the worksite
  - Now private employers with 5 or more employees, with no mileage requirement
- 12 weeks unpaid leave during a 12-month period for:
  - Family care and medical leave
  - Baby bonding
  - Qualifying military exigency



## Protected Leave Coverage Expanded to Smaller Employers and Additional Family Members (S.B. 1383)

- Expansion of “Family Members” Definition
  - “Family member” was previously defined to include a spouse, parent, or child (if a minor or dependent adult)
  - Now includes domestic partners, siblings, grandparents, grandchildren, children of a domestic partner, and adult children (regardless of dependent status)



## Protected Leave Coverage Expanded to Smaller Employers and Additional Family Members (S.B. 1383)

- New “stacking” issue with the federal FMLA
  - Potential issue for employers with 50 or more employees
  - The CFRA’s definition of “family member” is more expansive than the FMLA’s definition of spouse, child, or parent with a serious health condition
  - May result in employee taking 12 weeks’ leave under the CFRA and another 12 weeks’ leave under the FMLA



## CFRA Deletions (S.B. 1383)

- Deletions from Existing Law
  - If both parents are employed by the same employer, an employer was previously not required to provide more than 12 weeks' total leave for baby bonding
  - Now required to provide 12 weeks' leave to each employee
  - Removes language permitting an employer to refuse to reinstate a highly compensated employee where necessary to prevent substantial economic injury



## Adjunct Professor Exemption (A.B. 736)

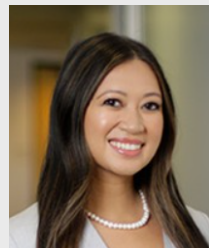
- Historically adjunct professors performed exempt duties, but not the California exempt salary threshold
- Labor Code Section 515.7 expands the California professional exemption to include part-time faculty who meet the existing professional exemption duties test and new salary test
- Salary test:
  - Monthly salary at least two times the state minimum wage for full-time; or
  - Paid per course or laboratory in accordance with rates set forth in Labor Code Section 515.7 (i.e., \$126 per hour for 2021, with increases each year coinciding with increases in the state minimum wage).



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## 5. Diversity, Equity, and Inclusion



Ferry Lopez



# Diversity, Equity, and Inclusion

- California A.B. 979
  - Adds Corporations Code §301.4
  - By the end of 2021, California-headquartered public companies must have at least one director on their boards who is from an underrepresented community



## A.B. 979

- **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.”





## A.B. 979

- Directors from underrepresented communities must increase by the end of calendar year 2022, depending on the size of the board:

<i>Number of Directors on Board</i>	<i>Minimum Number of Directors from Underrepresented Communities</i>
<b>Nine or more</b>	<b>Three</b>
<b>Five to Eight</b>	<b>Two</b>
<b>Four or fewer</b>	<b>One</b>



## Failure to Comply with A.B. 979

- \$100,000 fine for the first violation and \$300,000 for each additional violation.
- Each required director seat not held by a member who meets the diversity requirements will count as a separate violation, but a seat held by a diverse director for at least a portion of the year will be deemed to satisfy the requirement.



## DEI in the Corporate Sphere

- Microsoft and Wells Fargo pledged to double their ranks of Black leaders over the next five years.
- Under Armour announced its commitment to filling 30% of director level and higher positions with Black, Indigenous and People of Color, and filling 12% of those roles with Black talent specifically by 2023.



# Diversity in Hiring

## ■ Set Goals instead of Quotas!

- *Gratz v. Bollinger*, 539 U.S. 244 (2003)
  - Use of fixed racial quotas in college admission was discriminatory
- *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016)
  - “[A]lthough admissions officers can consider race as a positive feature of a minority student’s application, there is no dispute that race is but a ‘factor of a factor of a factor’ in the holistic-review calculus.”



# What To Expect in the Biden Administration: DEI at the Federal Level

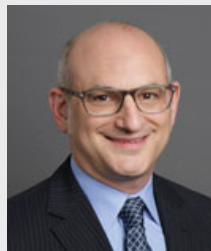
- Trump Administration's Executive Order on Combating Race and Sex Stereotyping
- Biden Administration's Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government
  - *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020)
    - Title VII protects employees against discrimination on the basis of sexual orientation and gender identity



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## 6. The Biden Administration



Dan Handman



# What Else to Expect in the Biden Administration

- Two Main Focuses:
  - **Arbitration Agreements:** Major reform to the Federal Arbitration Act. Will Congress finally exempt employment actions from the FAA's coverage?
  - **Labor Organizing:** Major reform to the NLRB to make organizing easier and to bring it into the 21<sup>st</sup> century



## Other Potential Activity in the Biden Administration

- Minimum wage increase; increase in minimum salary for “white collar” exemptions
- Paid family leave
- Revision of rules on independent contractors





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# Questions?

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