LIEBERT CASSIDY WHITMORE

PRIVATE EDUCATION LEGISLATIVE ROUNDUP

News and developments in education law, employment law, and labor relations for California Independent and Private Schools and Colleges

2020

INDEX

LCW NEWS

Private Education Matters is published monthly for the benefit of the clients of Liebert Cassidy Whitmore. The information in ***Private Education Matters*** should not be acted on without professional advice.

40 years
1980 - 2020

The Private Education Legislative Roundup is a compilation of bills, presented by subject, which were signed into law and have an impact on the employment and student related issues of our clients. Unless the bills were considered urgency legislation (which means they went into effect the day they were signed into law), bills are effective on January 1, 2021, unless otherwise noted. Urgency legislation will be identified as such. Several of the bills summarized below apply directly to independent and private schools. Bills that do not directly apply to independent and private schools are presented either because they indirectly apply, may set new standards that apply or would generally be of interest to our school clients.

STUDENTS

BILLS UNIQUE TO K-12 SCHOOL STUDENTS

STUDENT ATHLETES

AB 2300 – Authorizes Emergency Medical Technician, Paramedic Or Higher-Level Licensed Medical, Who Must Be Present At All Contact Football Games, To Provide Student Athletes With Pre-Hospital Emergency Medical Care Or Rescue Services Consistent With Their Certification Or License.

AB 2300 revises the California Youth Football Act to expand the ability of an emergency medical technician, paramedic or higher-level licensed medical professional to "evaluate" student athletes participating in tackle football games provided by a "youth sports organization," and instead, specifies that a "certified emergency medical technician, state-licensed paramedic or higher-level licensed medical professional" may provide prehospital emergency care or rescue services consistent with their certification or license.

The California Youth Football Act defines a youth sports organization broadly as "an organization, business or nonprofit entity that sponsors or conducts amateur sports competition, training, camps, clinics, practices, or clubs." This bill applies to a school district, charter school, private school, or any organization or nonprofit entity that sponsors or conducts amateur youth tackle football competitions, training, camps, clinics, practices, or clubs or participate in a youth football league. In 2019, the Legislature passed AB 1, which required youth sports organizations to put in place a number of safety measures by January 1, 2021, such as limiting full-contact portions of practice to 30 minutes in a day; annual training coaches on tackling and blocking; regular safety inspections of equipment; dissemination of information to parents about concussions and opioid use; and a number of other program requirements.

One of these safety measures was a requirement that at least one ***state-licensed emergency medical technician, paramedic*** or higher-level licensed medical professional shall be present during all preseason, regular season and postseason games. AB 2300 modifies this requirement slightly to state that at least one ***certified emergency medical technician, state-licensed paramedic*** or higher-level licensed medical professional (Professional) shall be present during all preseason, regular season and postseason games.

Further, AB 2300 gives the Professional the authority to not only "evaluate and remove any youth tackle football participant from the game who exhibits an injury," but expands this authority to provide "prehospital emergency medical care or rescue services consistent with their certification or license."

(AB 2300 amends section 124241 of the Health and Safety Code.)

SEX OFFENDERS

SB 145 – Exempts From Automatic Registration Certain Offenses Involving Minors If The Convicted Individual Is Not More Than 10 Years Older Than The Minor.

The Sex Offender Registration Act requires a person convicted of one of certain crimes, as specified, to register with law enforcement as a sex offender while residing in California or while attending school or working in California, as specified. A willful failure to register, as required by the act, is a misdemeanor or felony, depending on the underlying offense. SB 145 exempts from mandatory registration under the Act, and instead provides judges with discretion regarding registration requirements, to a person convicted of certain offenses involving minors if the person convicted is not more than 10 years older than the minor and if that offense is the only one requiring the person to register.

(AB 145 amends sections 290 and 290.006 of the Penal Code.)

BILLS UNIQUE TO COLLEGE AND UNIVERSITY STUDENTS

CRIMINAL BACKGROUND

SB 118 – Prohibits Postsecondary Educational Institutions From Asking Prospective Students About Criminal History On An Application Or During The Admissions Process.

SB 118 prohibits a postsecondary educational institution in this state, except for applications for a professional degree or law enforcement basic training courses and programs, from inquiring about a prospective student's criminal history on an initial application form or at any time during the admissions process before the institution's final decision relative to the prospective student's application for admission.

SB 118 provides that postsecondary educational institutions must make any necessary changes to their application form to comply with subdivision (b) by the Fall term of the 2021–22 academic year.

(SB 118 amends sections 4021.5, 4187.2, and 4187.5 of the Business and Professions Code, adds section 66024.5 to the Education Code, amends sections 15402, 15420, 15421, 15422, and 15819.403 of, and repeals section 15403 of, the Government Code, amends sections 290.5, 851.93, 977.2, 1170, 1203.425, 11105, 16532, 18010, 30400, 30405, 30406, 30412, 30414, 30442, 30445, 30447, 30448, 30450, 30452, 30454, 30456, 30470, 30485, 30515, 30900, and 30955 of, add sections 3000.01, 5003.7 and 30685 to, and repeal Article 5 (commencing with section 2985) of Chapter 7 of Title 1 of Part 3 of, the Penal Code, and amends section 1731.7 of the Welfare and Institutions Code.)

STUDENT LOANS

AB 376 – Expands Protections For Student Loan Borrowers With Respect To Student Loan Services By Creating The Student Loan Borrower Bill Of Rights.

AB 376 only applies to student loan servicers as defined below. While not directly applicable to private nonprofit postsecondary educational institutions, postsecondary students have new rights pursuant to this new legislation. AB 376 amends the existing California Student Loan Servicing Act ("SLSA"), which was enacted in 2016, and requires student loan services to obtain a license and to comply with routine oversight from the Department of Business Oversight ("DBO"). AB 376 seeks to build on the SLSA by enacting a student loan borrower bill of rights, setting certain minimum standards for student loan servicing and providing additional protections for borrowers.

AB 376 defines a "student loan servicer" as any person engaged in the business of servicing student loans. "Servicing" is defined as (1) "receiving any scheduled periodic payments from a [student loan] borrower or any notification that a borrower made a scheduled periodic payment" and "applying payments to the borrower's account pursuant to the terms of the student loan or the contract governing the servicing;" (2) during a period when payments are not due, "maintaining account records for the student loan" and "communicating with the borrower regarding the student loan on behalf of the owner of the student loan promissory note;" or (3) "interacting with a borrower related to that borrower's student loan, with the goal of helping the borrower avoid default on their student loan or facilitating the activities described" in (1) or (2). Excluded from the definition of "student loan servicer" are debt collectors collecting on defaulted loans, federally chartered credit unions, and guaranty agencies engaged in default aversion pursuant to an agreement with the federal government.

Students may have questions about how these new standards will impact them when they go into repayment on their student loans.

Below is a brief summary of just some of the new requirements that servicers must comply with:

- Post, process and credit borrower payments within specified timeframes;
- Apply overpayments consistent with the "best financial interest" of the borrower (for example, by allocating overpayments to loans with the highest interest rate);
- Apply partial payments to minimize late fees and negative credit reporting;
- Discontinue the use of "minimum late fees," which are not assessed as a percentage of the amount past due;
- Maintain records, timely process paperwork and diligently oversee any third-party service providers that a provider may contract with to engage in any aspect of the servicing;
- Provide specialized training for customer service personnel who advise military borrowers, borrowers in public service, borrowers with disabilities, and older borrowers; and
- Not engage in unfair, deceptive or abusive acts or practices in connection with the servicing of a student loan, a long list of examples of which are included in AB 376 (e.g., misapplying payments or misrepresenting the amount owed).

Another very significant aspect of AB 376 is that it creates a private right of action by a consumer against the student loan servicer for failing to comply with AB 376 or other applicable federal laws relating to student loan servicing. A borrower may seek, through such an action, actual and punitive damages, injunctive relief, restitution, attorney's fees and other relief, including treble damages in certain circumstances. However to maintain an action for damages or injunctive relief, a consumer must first comply with certain notice provisions that provide an opportunity to the servicer to cure the violations of law at issue.

Finally, AB 376 also establishes a Student Loan Ombudsman within the DBO who, starting on July 1, 2021, will be responsible for receiving complaints and referring them to the appropriate unit within the DBO or outside agencies for investigation. For example, the Ombudsman will refer complaints regarding private postsecondary educational institutions licensed by the Bureau for Private Postsecondary Education to the Bureau for Private Postsecondary Education's Office of Student Assistance and Relief.

(AB 376 adds sections 1788.100, 1788.101, 1788.102, 1788.103, 1788.104. and 1788.105 to the Civil Code, amends sections 28104, 28112, 28130, and 28140 of the Financial Code, and repeals sections 28134 and 28136 of the Financial Code.)

AB 2416 – Allows Consideration Of Homelessness For Determinations Of Satisfactory Academic Progress.

Student financial aid programs including the Cal Grant Program, the Chafee Educational and Training Vouchers Program, the Willie L. Brown, Jr. Community Service Scholarship Program, the California State Work-Study Program, the Middle Class Scholarship Program, and the California DREAM Loan Program, require students to make satisfactory academic progress to qualify.

AB 2416 requires that determinations of "satisfactory academic progress" by the institutions participating in these student aid programs consider homelessness as an extenuating circumstance for students who are otherwise unable to meet the requirements deemed to constitute "satisfactory academic progress." Extenuating circumstance may be considered by the institution to alter or excuse compliance with progress requirements.

AB 2416 borrowed the definition of "homeless" from the McKinney-Vento Homeless Assistance Act which defines a "homeless individual" as:

- an individual who lacks a fixed, regular and adequate nighttime residence;
- an individual with a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings;
- an individual living in a supervised publicly or privately operated shelter;
- an individual who resided in a shelter or place not meant for human habitation and who is exiting an institution where he or she temporarily resided; or
- an individual who will imminently lose their housing as evidenced by:
    - a court order;
    - the individual having a primary nighttime residence that is a room in a hotel or motel and they lack the resources necessary to reside there for more than 14 days;
    - credible evidence indicating that the owner or renter of the housing will not allow the individual to stay for more than 14 days; or
    - any oral statement from an individual seeking homeless assistance that is found to be credible.

(AB 2416 amends sections 69432.7, 69519, 69731, 69956, 70032, 78220, 88931 of the Education Code.)

EMPLOYEES

BILLS APPLICABLE TO K-12 SCHOOLS, COLLEGE, AND UNIVERSITY EMPLOYEES

WORKERS' COMPENSATION

SB 1159 – Presumes COVID-19 Qualifies For Workers' Compensation If Employees Test Positive Within 14 Days Of Reporting To Work, Or After A Workplace Outbreak (Urgency Bill Effective Immediately On September 17, 2020).

SB 1159 amends existing workers' compensation laws to address the impact of employees who contract COVID-19 and the extent that such illness is considered industrial, and therefore entitles the employee to workers' compensation benefits.

SB 1159 is an urgency bill which became effective immediately upon the Governor's approval of the law on September 17, 2020.

Employees injured in the course and scope of employment are generally entitled to receive workers' compensation benefits for their injuries. Recognizing the unique challenges posed by the coronavirus ("COVID-19") global pandemic, SB 1159 now creates a similar presumption for illness or death resulting from COVID-19 in the following three ways:

- Codifies Executive Order N-62-20, issued by Governor Newsom on May 6, 2020, and expands the workers' compensation presumption to ANY employee who reported to their place of employment between March 19 and July 5, 2020, and who tested positive for, or was diagnosed with COVID-19 within the following 14 days.
- The rebuttable presumption extends beyond July 6, 2020 and only applies if the employee works for an employer with five or more employees and the employee tests positive for COVID-19 within 14 days after reporting to their place of employment during a COVID-19 "outbreak" at the employee's specific work place. For purposes of this presumption, a COVID-19 "outbreak" exists if within 14 calendar days one of the following occurs at a "specific place of employment" (which excludes the employee's home):
    - If the employer has 100 employees or fewer at a specific place of employment, four employees test positive for COVID-19;
    - If the employer has more than 100 employees at a specific place of employment, 4% of the number of employees who reported to the specific place of employment, test positive for COVID;
    - A specific place of employment is ordered to close by a local public health department, the State Department of Public Health or the Division of Occupational Safety and Health due to a risk of infection with COVID-19; or
    - For purposes of administering this "outbreak" presumption, SB 1159 requires employers to report to their workers' compensation claims administrator in writing within three business days when they know or reasonably should know that an employee has tested positive for COVID-19, along with other relevant information.
- The Workers' Compensation Appeals Board ("WCAB") is bound by these presumptions unless presented with controverted evidence to dispute the presumption. Workers' compensation awarded for covered COVID-19 related illness or death includes full hospital, surgical, medical treatment, disability indemnity, and death benefits. The bill also makes a workers' compensation claim relating to a COVID-19 illness presumptively compensable, as described above, after only 30 days, rather than the standard 90 day time period for all other types of workers' compensation claims.

However, SB 1159 requires an employee to exhaust any COVID-19 related supplemental paid sick leave benefits (e.g., FFCRA's Emergency Paid Sick Leave or for private employers with 500 or more employees, California's supplemental paid sick leave under AB 1867) and meet certain certification requirements before receiving temporary disability benefits or an industrial injury leave of absence.

In addition, the effective timeframe for workers' compensation benefits under SB 1159 based on illness or death due to COVID-19 is limited, as the law will remain in effect only until January 1, 2023, after which the law will sunset and be repealed unless extended further by the Legislature.

SB 1159 also requires the Commission on Health and Safety and Workers' Compensation to conduct a study of the impact of COVID-19 on the workers' compensation system, to deliver a preliminary report to the Legislature and Governor by December 31, 2021, and to deliver a final report to the legislature by April 30, 2022.

As SB 1159 is now law, private school and college employers need to be vigilant and prepared to respond to any indication that an employee has contracted COVID-19 and should coordinate with their workers' compensation insurance carriers and claims adjusters to establish best practices for reporting and responding to potential workers' compensation claims based on COVID-19.

(SB 1159 adds sections 77.8, 3212.86, 3212.87, and 3212.88 to the Labor Code.)

EMPLOYEE AND WORKPLACE SAFETY

AB 685 – Expands Cal/OSHA Enforcement Powers And Enacts Stricter Health And Safety Rules Relating To COVID-19.

In response to the COVID-19 pandemic and its impact on maintaining a safe workplace, AB 685 amends the Labor Code in several areas to require employers to adhere to stricter occupational health and safety rules and empowers Cal/OSHA with expanded enforcement powers to address such standards as follows.

A. New COVID-19 Employer Notice and Reporting Requirements

AB 685 requires employers to comply with certain reporting requirements and provide the following four notices related to potential COVID-19 exposures in the workplace within one business day of being informed of the potential exposure:

1. New COVID-19 Employer Notice Requirements of a Potential Exposure to COVID-19 in the Workplace

If an employer or the employer's representative receives a notice of a potential exposure to COVID-19 in the workplace by a "qualifying individual," the employer must provide a written notice to all employees, and to the employers of subcontracted employees, who were present at the same worksite within the infectious period (as defined by the State Department of Public Health), stating that they may have been exposed to COVID-19. For purposes of this requirement, a "qualifying individual" means a person who can establish any of the following requirements:

- The individual has a laboratory-confirmed case of COVID-19;
- The individual has a positive COVID-19 diagnosis from a licensed health care provider;
- The individual is subject to a COVID-19 related isolation order issued by a public health official; or
- The individual has died due to COVID-19, as determined by the County public health department.

The notice must be sent in a manner the employer normally uses to communicate employment-related information. This can include personal service, email or text message so long as it can be reasonably anticipated that employees will receive notice within the one business day requirement. The notice must be in both English and the language understood by the majority of employees.

2. Potential COVID-19 Exposure Notice to Exclusive Representative of Represented Employees

For those schools with unionized employees, if the affected employees who are required to receive the COVID-19 exposure notice include represented employees, the employer must send the same notice to the exclusive representative of any affected bargaining unit.

3. Notice of COVID-19 Related Benefits and Employee Protections

An employer must also provide all affected employees and the exclusive representative, if any, with information regarding any COVID-19-related benefits or leave rights under federal, state and local laws, or pursuant to employer policy, as well as the employee's protections against retaliation and discrimination.

4. Notice of Safety Plan in Response to Potential COVID-19 Exposure

Finally, the employer must notify all employees, the employers of subcontracted employees, and any exclusive representative, of the employer's plans for implementing and completing a disinfection and safety plan pursuant to guidelines issued by the federal Centers for Disease Control.

Failure to comply with these four requirements may subject the employer to a civil penalty. AB 685 also prohibits employers from requiring employees to disclose medical information except as required by law, and prohibits employers from retaliating against an employee for disclosing a qualifying case of COVID-19.

In addition, where employers are notified of a number of cases that meet the definition of a COVID-19 "outbreak" as defined by the California Department of Public Health ("CDPH"), the employer must also notify the applicable local public health agency within 48 hours of the names, number, occupation, and worksite of any "qualifying individuals" related to the "outbreak".

An "outbreak" is currently defined by CDPH as "three or more laboratory-confirmed cases of COVID-19 within a two-week period among employees who live in different households." (See CDPH's "COVID-19

Employer Playbook – Supporting a Safer Environment for Workers and Customers – available online at https://files.covid19.ca.gov/pdf/employer-playbook-for-safe-reopening--en.pdf)

The CDPH also imposes additional notification requirements for COVID-19 exposures at schools, as set forth in the COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year, which is accessible at https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Schools%20Reopening%20Recommendations.pdf.

CDPH is also required to make workplace statistics received from local health departments under this provision – other than personally identifiable employee information – available on its website, such that members of the public can track the number of cases and outbreaks by industry.

B. Cal/OSHA Will Be Authorized to Shut Down A Workplace, Operation or Process that Creates an Imminent Hazard Due To COVID-19 Exposure Risk.

Under current law, whenever Cal/OSHA finds that a place of employment or specific equipment in the workplace creates an imminent hazard to employees, Cal/OSHA has the authority to prohibit entry into the affected part of the workplace or to prohibit the use of the dangerous equipment in the workplace.

AB 685 expands and clarifies Cal/OSHA's authority within the context of COVID-19 related issues in the workplace. Under AB 685, if Cal/OSHA finds that a workplace or operation/process within a workplace exposes employees to a risk of COVID-19 infection and thereby creates an imminent hazard to employees, Cal/OSHA now has authority to prohibit entry to the workplace or to the performance of such operation/process. If Cal/OSHA uses its authority to apply such a workplace restriction, it must then provide the employer with notice of the action and post that notice in a conspicuous place at the worksite. Any restrictions imposed by Cal/OSHA must be limited to the immediate area where the imminent hazard exists and must not prohibit any entry into or operation/process within a workplace that does not cause a risk of infection.

This expanded authority sunsets on January 1, 2023, and will be repealed automatically on that date unless further extended by the Legislature.

C. Amends Cal/OSHA Procedures for "Serious Violation" Citations Relating to COVID-19

Currently, before Cal/OSHA can issue a citation to an employer alleging a "serious violation" of occupational safety and health statutes or regulations, it must make a reasonable attempt to determine and consider whether certain mitigating factors were taken by an employer to rebut the potential citation. Cal/OSHA satisfies this requirement by sending an employer a description of the alleged violation at least 15 days before issuing a citation, and provides the employer an opportunity to respond. Even if an employer does not provide information in response to Cal/OSHA's inquiries, an employer is still not precluded from presenting such information at a later hearing to contest the citation.

AB 685 modifies this procedure until January 1, 2023 as applied to serious violation citations Cal/OSHA issues related to COVID-19. For COVID-19-related serious violation citations, Cal/OSHA is not obligated to provide an alleged violation at least 15 days prior to issuing the citation to allow an employer the opportunity to respond and can instead issue the citation immediately. The employer would still be able to contest the citation through the existing Cal/OSHA appeal procedures.

D. Impact of AB 685 on Employers

Because AB 685 is not effective until January 1, 2021, employers have some time to prepare for its new notice and reporting requirements. Employers should review and revise their existing procedures related to notification of COVID-19 exposures in the workplace in order to ensure they are ready to comply with the new notice and reporting requirements imposed by AB 685 once it becomes effective.

(AB 685 amends sections 6325 and 6432 of and adds sections 6325 and 6409.6 to the Labor Code.)

SB 275 – Establishes A PPE Stockpile Of Personal Protective Equipment.

During the COVID-19 global pandemic, California quickly experienced a severe supply shortage of personal protective equipment ("PPE"), such as surgical masks, respirators and eye protection.

SB 275 requires the State Department of Public Health and the Office of Emergency Services, in coordination with other state agencies, to, upon appropriation and as necessary, establish a personal protective equipment (PPE) stockpile. AB 275 requires the Department to establish guidelines for the procurement, management and distribution of PPE, taking into account, among other things, the amount of each type of PPE that would be required for all health care workers and essential workers in the State during a 90-day pandemic or other health emergency. Essential workers as defined by AB 275, includes primary and secondary school workers and childcare providers.

(SB 275 adds section 13101021 to the Health and Safety Code and adds section 6403.1 to the Labor Code.)

LEAVES OF ABSENCE

SB 1383/AB 1867 – Expands CFRA Family And Medical Leave To Smaller Employers And Expanding Overall Uses Of CFRA Leave; Creates Small Employer Family Leave Mediation Pilot Program.

SB 1383 significantly expands the California Family Rights Act ("CFRA") family and medical leave law under Government Code section 12945.2 by now applying it to all private sector employers with five or more employees, adding the ability to care for a serious health condition of more family members, and eliminating other previous restrictions on the use of CFRA leave. By doing so, this means that CFRA will now deviate further from the federal Family Medical Leave Act ("FMLA") that it otherwise generally ran concurrently with, and could potentially create entitlements for employees under both laws for up to 24 weeks of protected leave in a 12-month period under certain circumstances.

A. CFRA Leave is Now Applicable to All Employees Who Work for Private Sector Employers With Five or More Employees.

Currently, CFRA only applies to private sector employers with 50 or more employees. However, any employee could only qualify to take CFRA leave if their worksite had 50 or more employees in a 75-mile radius. This matched the FMLA standard, which uses the same definitions.

In addition to lowering the private sector employer threshold to five or more employees, SB 1383 also eliminates the 50 or more employees in a 75-mile radius definition for an employee to qualify for CFRA leave. The impact on this for smaller employers with more than five employees is that they now must provide CFRA leave to all of their qualified employees. An employee of an employer with five or more employees now only has to meet the following criteria in order to qualify for CFRA leave:

- Worked for the employer for at least 12 months of service (can be nonconsecutive work for employer over a 7-year period, except that any military leave time while employed counts towards this 12 months of service); and
- Worked at least 1,250 hours in the 12-month period prior to taking CFRA leave.

Therefore, any employers with less than 50 employees who were not previously covered under CFRA are now covered once this law becomes effective on January 1, 2021 and will have to provide qualified employees the following leave entitlements:

- Up to 12 weeks of unpaid family and medical leave for qualifying purposes in a 12-month period;
- Continuation of health insurance benefits at the same level as if the employee had been continuously employed during the CFRA leave; and
- Right to reinstatement to the employee's same or comparable job position to the extent that the employee would have remained in that position if they had been continuously employed during the CFRA leave.

Because of SB 1383's expansion of CFRA leave to private sector employers with five or more employees, the existing New Parent Leave Act ("NPLA") that became law in 2018 and provided CFRA-like bonding leave rights to smaller employers with 20-49 employees under Government Code section 12945.6 is being repealed as it is no longer needed.

While the federal FMLA remains unchanged and still does not apply to smaller private employers with less than 50 employees, CFRA leave will now apply to all employers with five or more employees effective January 1, 2021.

B. Expanded Uses of CFRA Leave

The other major impact of SB 1383 that is applicable to all employers – including those that have already been covered under CFRA – is the expansion of the types of leave that can be used under CFRA.

Under SB 1383, CFRA leave to care for a family member with a serious health condition has been expanded to include more family members of the qualified employee. Covered family members now include grandparent, grandchild and sibling – in addition to the existing parent, child, spouse, or registered domestic partner. This brings CFRA in line with both California's Paid Sick Leave Law (Labor Code sections 245, et. seq. – effective January 1, 2015) and the revisions to California's Family Sick Leave law (Labor Code section 233 – effective January 1, 2016), which already includes these family members. However, this change also expands CFRA's deviation from the FMLA, which does not cover leave to care for a grandparent, grandchild, sibling, or registered domestic partner.

In an interesting twist, SB 1383 also adds a definition of "parent-in-law" to CFRA, but does not reference the term anywhere else in the statute and therefore does not actually provide an employee a new right to take CFRA leave to care for the serious health condition of a parent-in-law. It is unclear at this time if future legislation may expand CFRA leave to also cover an employee taking leave to care for a parent-in-law with a serious health condition.

In addition, SB 1383 eliminates the previous restrictions under CFRA, which indicated that an employee could not take leave to care for their adult child over 18 years of age with a serious health condition unless that child was incapable of self-care because of a physical or mental disability. This restriction had mirrored the FMLA's definition of "child," but now will deviate from that FMLA standard and allow a qualified employee to take CFRA leave to care for an adult child who has a serious health condition.

In a move that now brings CFRA more in line with FMLA, SB 1383 also is adding "qualifying exigency" leave related to the covered active duty or call to covered active duty for an employee's spouse, registered domestic partner, child, or parent in the United States Armed Forces. This generally mirrors the FMLA's "qualifying exigency" family military leave that was added in 2008, and only slightly expands it beyond the FMLA to also include an employee's registered domestic partner who is in the United States Armed Forces.

With SB 1383's new additions to CFRA leave use, a qualified employee can take CFRA leave for one of the following reasons (with the new additions in **bold text**):

- Leave for reason of the birth of a child of the employee or the placement of a child with an employee in connection with the adoption or foster care of the child by the employee;
- Leave to care for a child (**including an adult child over 18 years of age**), parent, **grandparent, grandchild, sibling,** spouse, or registered domestic partner who has a serious health condition;
- Leave because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee, except for leave taken for disability on account of pregnancy, childbirth or related medical conditions; or
- **Leave because of a qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, registered domestic partner, child, or parent in the United States Armed Forces.**

The end result here is that CFRA qualified employees will now have the ability to use CFRA leave for more reasons, including some that will not run concurrently with FMLA

C. Other Significant Changes to CFRA

Finally, SB 1383 also makes two additional significant changes to the terms and conditions of CFRA leave that will also deviate from the FMLA:

- Eliminates the existing restriction in CFRA that allows an employer who employs both ***parents*** to limit their total amount of CFRA leave for both individuals to a total of 12 weeks for bonding with a newborn child, adopted child or foster care placement. The FMLA has a similar provision allowing such a limitation of a total of 12-weeks for bonding leave where both ***spouses*** are employed by the same employer. As a result of this change, where both parents are employed by the same employer and take CFRA bonding leave, they are now both entitled to a total of 12 weeks individually for such leave.
- Eliminates the "key employee" exception to an employee's right to reinstatement. Currently under CFRA (which mirrors the FMLA), there is a very limited "key employee" exemption that allows an employer the ability to deny reinstatement to an employee who takes CFRA leave where the employee is among the highest paid 10% of the employer's employees, the denial is necessary to prevent substantial and grievous economic injury to the operations of the employer, and where the employer notifies the employee of its intent to deny reinstatement. SB 1383 now eliminates this limited "key employee" exemption and requires an employer to provide a right to reinstatement to all employees. Following this change, the only other permissible defenses for an employer to deny a right to reinstatement is where the employee's employment would have otherwise ceased or been modified independent of the CFRA leave (e.g., layoff, reduction in hours or disciplinary action unrelated to CFRA leave), or where the employee fraudulently took CFRA leave when they did not otherwise qualify for the leave. The burden is on the employer to establish both such defenses.

D. Small Employer Family Leave Mediation Pilot Program (AB 1867)

In a companion budget trailer bill to SB 1383, AB 1867 establishes a small employer family leave mediation program, for employers between 5 and 19 employees. This pilot program would allow a defined small employer or employee who is newly covered under the expanded CFRA to request mediation to resolve an alleged CFRA violation within 30 days of receipt of a right-to-sue notice based on such violation. If an employer or employee requests mediation, the employee is prohibited from pursuing a civil action until the mediation is complete. In exchange, the employee's statute of limitation on claims will be tolled until the mediation is complete.
This provision of AB 1867 will take effect when SB 1383 does on January 1, 2021, and will automatically sunset on January 1, 2024.

E. Impacts of SB 1383's Changes to CFRA on its Interaction With FMLA

Because SB 1383 makes significant changes to CFRA, a number of these changes also create a greater potential for an employee who is covered under both FMLA and CFRA to have their leaves not run concurrently, and therefore be entitled to a greater amount of protected leave.

With SB 1383's changes, an employee's CFRA leave does not run concurrently with FMLA under the following circumstances (with the expanded reasons in **bold text**):

- Leave due to pregnancy related conditions – which is considered a "serious health condition" under FMLA – is generally not considered a "serious health condition" under CFRA unless the employee has already exhausted their separate Pregnancy Disability Leave ("PDL") entitlement under California Government Code section 12945;
- Leave to care for a serious health condition of a registered domestic partner, **adult child who is not incapable of self-care, grandparent, grandchild, or sibling;**
- **Leave because of a qualifying exigency related to the covered active duty or call to covered active duty of an employee's registered domestic partner in the United States Armed Forces;** and
- Leave to care for an employee's parent, child, spouse, or "next of kin" who is a covered servicemember with a serious injury or illness for up to 26 weeks under FMLA *(although, CFRA leave may run up to 12 weeks to the extent such leave also qualifies as leave to care for a parent, child or spouse with a serious health condition).*

The impact of these expanded leave areas where CFRA leave does not run concurrently with FMLA is that a qualified employee may be therefore be able to receive up to 12 weeks of CFRA leave and a separate 12 weeks of FMLA leave – for a total of 24 weeks of protected leave – in a 12-month period. For example, if a qualified employee takes 12 weeks of CFRA leave to care for a grandchild with a serious health condition (something that is not covered under FMLA), that employee would then still have 12 weeks of FMLA leave available in the relevant 12-month period. As a result, SB 1383 will create more scenarios where an employee can be out on a protected unpaid leave of absence with continued health insurance benefits and a guaranteed right to reinstatement for up to 24 weeks in a 12-month period.

F. Employer Preparations for SB 1383

Because SB 1383 is not effective until January 1, 2021, employers do have some time to prepare for its changes. Here are some suggested preparations that employers should make:

- For smaller private sector employers with 5-49 employees who have not been previously covered under CFRA, it is important to modify existing policies and procedures to provide for CFRA leaves of absence. CFRA is a very complex law and there are a number of specific issues such as application of accrued paid leaves, concurrent use of SDI/PFL benefits, medical certifications and specific employee notice requirements that must be properly implemented. Supervisors and Human Resources staff should be trained on the application of CFRA leaves and applicable forms and procedures should be implemented so the school is prepared to provide CFRA leaves to qualified employees upon the implementation of this new law.
- For larger employers with 50 or more employees who have already been covered under CFRA (and FMLA), revisions should be made to existing FMLA/CFRA leave policies to incorporate these revisions to CFRA. In addition, employers should examine how they track FMLA and CFRA leaves to ensure they properly track when such leaves run concurrently or separately, as referenced above. Supervisors and Human Resources staff should also be trained on the changes to CFRA and the new qualifying uses of the leave.

It is also important to note that the existing CFRA regulations promulgated by the Department of Fair Employment and Housing ("DFEH") (2 C.C.R. §§ 11087-11097) are drafted to the existing CFRA law and will have sections that are inconsistent with the changes made under SB 1383. Until the DFEH's Fair Employment and Housing Council can propose and implement revisions to these regulations in accordance with the changes made by SB 1383, employers should be cautious in their reliance on such regulations and seek legal counsel to ensure compliance with the law.

(SB 1383 amends sections 12945.2 and 12945.6 of the Government Code. AB 1867 adds section 12945.21 to the Government Code.)

AB 276 – Conforms State Law To Federal CARES Act Increase On The Amount That May Be Borrowed Against A Qualified Employer Retirement Plan Without An Adverse Tax Penalty.

This bill brings California's tax treatment of retirement account loans in line with the federal Coronavirus Aid, Relief and Economic Security Act ("CARES Act"). The CARES Act was an economic relief package passed by Congress and signed into law by President Trump in March. The economic relief package includes many provisions to help Americans with the economic impacts of the COVID-19 pandemic. One such provision allows

qualified borrowers impacted by COVID-19, to borrow up to $100,000 from qualified employer retirement plans (such as 401(k), 403(b), 457(b) or 401(a) plans), without facing a federal income tax penalty. This is an increase from the standard limit of $50,000. This bill applies these same rules to California's personal income tax laws, allowing qualified borrowers impacted by COVID-19 to borrow up to $100,000 from a qualified employer retirement plans without facing an adverse tax penalty under state law.

(AB 276 amends section 17085 of the Revenue and Taxation Code.)

AB 2017 – Clarifies That The Designation Of Sick Leave As Protected Sick Leave Under Labor Code 233 Is Solely At The Employee's Discretion.

Prior to 2016, Labor Code section 233 provided employees an entitlement and protection to use accrued and available sick leave (including paid time off (PTO) leave that can be used for sick leave purposes) in an amount no less than that accrued over a six-month period in a calendar year to care for a parent, child, spouse, or registered domestic partner who was sick. This law was frequently referred to as the "kin care" law.

Following the 2015 implementation of the Paid Sick Leave Law (Labor Code section 245, et. seq.) and its protections for additional sick leave uses (including the employee's own need to use sick leave), Labor Code section 233 was amended in 2016 to broaden its protections to any sick leave use covered under the Paid Sick Leave Law. Instead of just being limited to protecting sick leave use to care for a family member who is sick, section 233 expanded those protections to the following sick leave uses provided in the Paid Sick Leave Law:

- Diagnosis, care, or treatment of an existing health condition of, or preventive care for an employee;
- Diagnosis, care, or treatment of an existing health condition of, or preventive care for an employee's family member (parent, parent-in-law, child, spouse, registered domestic partner, grandparent, grandchild, or sibling); or
- For various specific purposes as provided in Labor Code sections 230 and 230.1, for an employee who has been the victim of domestic violence, sexual assault or stalking.

Under the current Paid Sick Leave Law, use of sick leave now protected under Labor Code section 233 is not just limited to care for covered family members as was the case with the prior version of the law. Further, under the current Paid Sick Leave Law, employees must receive 24 hours of frontloaded paid sick leave, or at least one hour of sick leave for every 30 hours worked on an accrual basis, to be used for specified sick leave purposes consistent with the law. The Paid Sick Leave Law and Labor Code section 233 also permit employers to cap an employee's annual use of sick leave to the greater of 24 hours or half of the amount of sick leave an employee accrues in a year.

As a result, where the greater of either 24 hours of sick leave, or the first one-half of an employee's annual sick leave accruals (e.g., first 48 hours of sick leave where 96 hours are accrued annually) used were protected under Section 233, if such protected sick leave was used for the employee's own need for sick leave, any additional sick leave used later in the calendar year to care for a covered family member would be technically unprotected.

To address this issue, AB 2017 amends Labor Code section 233 to allow employees the sole discretion to specify whether to designate used sick leave as being taken for one of these protected reasons under the law. For example, an employee can now indicate that sick leave taken for their own illness not count towards the amount of sick leave protected under Labor Code section 233, so the employee can then have such protected sick leave available later for other purposes. In such circumstances, any sick leave not designated by an employee for protection under Labor Code section 233 would then be technically unprotected and subject to the impacts of an employee's absenteeism policies and procedures.

If an employer only provides the minimum amount of sick leave required under the Paid Sick Leave law, all use of sick leave is protected, and AB 2017 will not have an impact. Many employers have sick leave policies that do not limit the amount of accrued sick leave employees are permitted to use for authorized purposes, and AB 2017 will also not impact these employers.

It is important to note that there may also be local sick leave ordinances that have additional requirements and protections. For example, many local ordinances, such as the San Francisco and Oakland Paid Sick Leave Ordinances, do not permit an annual use cap on the ability of an employee to use their accrued sick leave.

As a result of AB 2017, employers with sick leave policies that provide annual use caps may need to implement sick leave tracking procedures to better differentiate between an employee's sick leave use that is designated as protected under Labor Code section 233 versus any such other sick leave used by the employee.

(AB 2017 amends section 233 of the Labor Code.)

AB 2399 – Makes Technical And Clarifying Changes To Paid Family Leave Provisions For Qualifying Exigency Leave Related To Active Duty Military Service.

In 2018, SB 1123 was signed into law and expanded California's Paid Family Leave ("PFL") wage replacement benefits program administered by the EDD to also provide such benefits to include time off to participate in a "qualifying exigency" related to covered active duty or a call to covered active duty for an individual's spouse, domestic partner, child, or parent in the Armed Forces of the United States. Such "qualifying exigency" leave is one of the leave of absence entitlements already made available to covered employees under the federal Family and Medical Leave Act ("FMLA"). AB 2399 makes several technical and clarifying amendments to this law, including the addition of a list of "qualifying exigencies" and definitions of covered military members who would create a "qualifying exigency" to qualify an employee for PFL benefits.

It is important to remember that PFL is not an actual leave of absence entitlement, but rather a wage replacement benefit that covered employees can use while out of work for a specified reason. As applied to "qualifying exigency" leaves of absence, any such leave of absence entitlement would be covered under FMLA or the California Family Rights Act ("CFRA") [as revised by SB 1383].

(AB 2399 amends sections 3302 and 3307 of the Unemployment Insurance Code.)

AB 2992 – Expands Labor Code Sections 230 And 230.1 Protections For Any Employee Who Is A Victim Of A Crime, Or Whose Immediate Family Member Is Deceased As A Direct Result Of Crime.

Currently, Labor Code section 230 prohibits employers from discharging or in any manner discriminating or retaliating against an employee who is a victim of domestic violence, sexual assault or stalking, to allow such employees to take time off to obtain legal relief to help ensure their health, safety and welfare, or that of their child. For employers with 25 or more employees, Labor Code section 230.1 also currently extends these leave protections for several additional specified purposes directly relating to an incident of domestic violence, sexual assault or stalking, including seeking medical attention, psychological counseling or certain social services. In addition, California's Paid Sick Leave Law (Labor Code §§ 245, et. seq.) also allow for the use of paid sick leave for victims of domestic violence, sexual assault or stalking for the reasons noted in Labor Code sections 230 and 230.1.

AB 2992 now extends eligibility for these protections under Labor Code sections 230 and 230.1 to a broader category of employees who are a "victim," defined as:

- A victim of stalking, domestic violence or sexual assault;
- A victim of a crime that caused physical injury, or that caused mental injury and a threat of physical injury;
- A person whose immediate family member is deceased as the direct result of a crime.

The bill also makes corresponding changes to the types of counseling and social services that are eligible for leave protection. The bill does not, however, provide a clear definition of when a family member's death is the "direct result of a crime."

In an interesting twist, AB 2992 did not amend the provisions of the Paid Sick Leave Law to use the expanded definition of "victim" for paid sick leave purposes. Accordingly, only victims of domestic violence, sexual assault or stalking are entitled to use statutory paid sick leave for the purposes set forth in Labor Code sections 230 and 230.1. However, Labor Code Section 230.2 does allow an employee who is either a victim or an immediate family member of a victim of a crime that is a serious or violent felony, or a felony involving theft or embezzlement to use paid sick leave to attend judicial proceedings related to that crime.

Employers should review and revise their policies and procedures to incorporate this expanded definition of "victim" for purposes of Labor Code section 230 and 230.1 and ensure that supervisors and managers are aware of these expanded protections for employees.

(AB 2992 amends sections 230 and 230.1 of the Labor Code.)

AB 1867 – Requires Private Employers With 500 Or More Employees Nationwide To Provide COVID-19-Related Supplemental Paid Sick Leave To Their California Employees.

The Families First Coronavirus Response Act ("FFCRA") requires employers with less than 500 employees to provides up to 80 hours of Emergency Paid Sick Leave (EPSL) to full-time employees. AB 1867 adds Labor Code Section 248.1, which provides up to 80 hours of COVID-19 related supplemental paid sick leave ("COVID-19 Supplemental Paid Sick Leave") for private employers with 500 or more employees as these employers are exempted from providing EPSL benefits under FFCRA.

In addition to providing COVID-19 supplemental sick leave to private sector employers with 500 or more employers, who were also excluded from the federal law, AB 1867 codifies the governor's previously-issued executive order (No. N-51-20) providing similar paid leave and handwashing requirements for food sector workers.

AB 1867 also establishes a separate small employer family leave mediation pilot program for smaller employers who are now subject to the California Family Rights Act ("CFRA") based on its expansion under SB 1383. We have included a summary of this part of the bill as part of the summary of SB 1383, above.

As a budget trailer bill, this bill became law immediately upon the Governor's signature on September 9, 2020 and its supplemental paid sick leave provisions became effective 10 days later on September 19, 2020.

(AB 1867 adds section 12945.21 to the Government Code, adds section 113963 to the Health and Safety Code, adds sections 248 and 248.1 to the Labor Code, and amends section 248.5 of the Labor Code.)

INDEPENDENT CONTRACTORS

AB 2257 – Amends, Clarifies And Expands Exemptions To AB 5's "ABC" Test For Determining Independent Contractor Status. (Urgency Bill Effective Immediately On September 4, 2020.)

In 2018, the California Supreme Court issued its decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*), and applied a stricter "ABC" test for determining the status of an independent contractor under the Wage Orders. In response, the Legislature passed AB 5 last year (effective January 1, 2020) to codify this new "ABC" test in the Labor Code and Unemployment Insurance Code for purposes of employment, workers' compensation coverage, and eligibility for unemployment insurance benefits. AB 5 also included a number of exceptions to the application of the "ABC" test for certain types of work that could then be governed by the older and more flexible multifactor standard established in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*).

AB 2257 is clean-up legislation to AB 5, and amends certain exceptions to the "ABC" test, in addition to reorganizing its statutory structure in the Labor Code so it is easier to comprehend. **AB 2257 was designated an urgency bill, and so became effective immediately upon Governor Newsom signing it into law on September 4, 2020.**

First, AB 2257 reorganized the provisions in the previous Labor Code section 2750.3 that was added by AB 5, and separated them out into new Labor Code sections 2775-2787.

AB 2257 makes the following changes to some of the eligibility criteria for the "business service provider" exemption:

- Currently, the business service provider must provide services directly to the contracting business rather than to customers. AB 2257 modifies this restriction to clarify that it **does not** apply if the business service provider's employees are solely performing services under the name of the business service provider and the business service provider regularly contracts with other businesses.
- Specifies that a contract with a business service provider must include the payment amount, rate of pay and the due date for the payment.
- Allows for a residence to qualify as the separate business location of the business service provider.
- Previously, AB 5 required that the business service provider "actually" contract with other businesses and provide similar services. AB 2257 changes this requirement to "can" contract with other businesses.
- Clarifies that the business service provider may use proprietary materials of the contracting agency that are necessary to perform the services of the contract.

AB 2257 also amends the requirements for several other *Borello* exemptions AB 5 created for specific professions and occupations, and created several additional occupation-specific *Borello* exemptions. For example, AB 2257 exempts people engaged by an international exchange visitor program, consulting services, animal services, competition judges, licensed landscape architects, specialized performers teaching master classes, registered professional foresters, real estate appraisers and home inspectors, videographers, photo editors, translators, feedback aggregators, and a variety of occupations in the music industry. It also no longer requires that freelance writers, photographers and editors limit their work to no more than 35 submissions per year to each putative employer.

Finally, AB 2257 adds several cross-references to the amended "ABC" test to the statutes governing personal income tax and other employment-related taxes.

Even with this clean-up legislation, the application of the more stringent "ABC" test for independent contractors or whether one of the *Borello* exemptions may apply is a very fact-specific analysis. Employers should seek legal counsel to review these laws as applied to determining whether an individual is an independent contractor or employee.

(AB 2257 repeals section 2750.3 of the Labor Code, adds sections 2775 through 2787 to the Labor Code, amends sections 17020.12 and 23045.6 of the Revenue and Taxation Code, and adds sections 18406, 21003.5, and 61001 to the Revenue and Taxation Code.)

WAGE AND HOUR

SB 973 – Authorizes The DFEH To Investigate And Prosecute Complaints Alleging Discriminatory Wage Rate Practices And Requires Employers With 100 Or More Employees To Submit An Annual Pay Data Report To The DFEH.

Current law establishes within the Department of Industrial Relations, the Division of Labor Standards Enforcement, which is vested with the general duty of enforcing various labor laws, including provisions prohibiting wage rates that discriminate on the basis of gender or race. SB 973 authorizes the Department of Fair Employment and Housing (DFEH) to receive, investigate, conciliate, mediate, and prosecute complaints alleging practices unlawful under those discriminatory wage rate provisions. AB 973 further requires the DFEH, in coordination with the division, to adopt procedures to ensure that the departments coordinate activities to enforce those provisions.

AB 973 further requires private employers with 100 or more employees to submit an annual pay data report with specified wage information to the California Department of Fair Employment and Housing on or before March 31, 2021, and on or before March 31 each year thereafter.

The report must include the number of employees by race, ethnicity and sex by job category using the same job categories on the federal EEO-1 form. For purposes of establishing the numbers required to be reported, an employer must create a "snapshot" that counts all of the individuals in each job category by race, ethnicity and sex, employed during a single pay period of the employer's choice between October 1 and December 31 of the Reporting Year. The report also requires employers to provide the number of employees by race, ethnicity and sex whose annual earnings fall within each of the pay bands used by the United States Bureau of Labor Statistics in the Occupational Employment Statistics survey. For purposes of establishing the numbers to be reported, the employer must calculate the total earnings, as shown on the Internal Revenue Service Form W-2, for each employee for the entire Reporting Year, regardless of whether or not an employee worked for the full calendar year. The report must include the total number of hours worked by each employee in each pay band during the "Reporting Year."

Employers with multiple establishments in the state are required to file a report for each establishment, as well as a consolidated report.

An "Employee" for purposes of AB 973 means an individual on an employer's payroll, including a part-time individual, whom the employer is required to include in an EEO-1 Report and for whom the employer is required to withhold federal social security taxes from that individual's wages.

AB 973 requires the DFEH to maintain the pay data reports for a minimum of ten years and makes it unlawful for any officer or employee of the DFEH or the division to make public in any manner any individually identifiable information obtained from the report prior to the institution of certain investigation or enforcement proceedings, as specified. AB 973 further requires the Employment Development Department to provide DFEH, upon its request, as specified, with the names and addresses of all businesses with 100 or more employees.

(Amends section 12930 of, and adds Chapter 10 (commencing with section 12999) to Part 2.8 of Division 3 of Title 2 of, the Government Code.)

AB 1947 – Extends Deadline On Claims Before The Labor Commissioner To One Year, And Provides Attorneys' Fees In Successful Labor Code Section 1102.5 Whistleblower Retaliation Proceedings.

Currently, any person who has a claim against an employer under the Labor Code that is under the jurisdiction of the Division of Labor Standards Enforcement (DLSE or Labor Commissioner) has six months from the occurrence of the violation to file the claim. AB 1947 now extends the deadline for filing a complaint from six months to one year from the occurrence of the violation. This impact of this change is that current and former employees will now have more time to file any such applicable claims.

AB 1947 also adds a provision to Labor Code section 1102.5 that authorizes courts to award reasonable attorney's fees to a plaintiff who brings a successful action for a violation of that law's "whistleblower" protections that prohibit an employer from retaliating against an employee who discloses suspected violations of law to a government or law enforcement agency.

(AB 1947 amends sections 98.7 and 1102.5 of the Labor Code.)

SB 1384 – Authorizes The Labor Commissioner To Represent Claimants Who Are Financially Unable To Afford Legal Counsel In Arbitration Proceedings Arising From Claims Within The Commissioner's Jurisdiction.

Currently, in a superior court proceeding challenging a Labor Commissioner decision, the Labor Commissioner has discretion to represent a claimant who is unable to afford their own counsel and has requested such representation. In addition, if the claimant is only seeking to uphold an amount awarded by the Labor Commissioner and is not objecting to any part of the Commissioner's order, the Labor Commissioner must represent the claimant in the superior court proceeding.

SB 1384 now expands the Labor Commissioner's discretion to represent a claimant who is unable to afford their own counsel to also include arbitration proceedings that are applicable to the claim in lieu of a judicial forum. In addition, SB 1384 also provides that any claimant who is unable to afford legal counsel and has a claim normally adjudicated by the Commissioner that is now subject to arbitration, to have the Labor Commissioner represent them in the arbitration. In such cases, the Labor Commissioner, upon request, must represent such a claimant who is unable to afford counsel if the Labor Commissioner determines that the claim has merit after conducting an informal investigation.

Finally, SB 1384 requires that any petition to compel arbitration of a claim pending before the Labor Commissioner be served on the Labor Commissioner. The bill then gives the Labor Commissioner the authority to represent the claimant in any such proceedings to determine the enforceability of the arbitration agreement.

(SB 1384 amends section 98.4 of the Labor Code.)

UNEMPLOYMENT INSURANCE

AB 1731 – Temporarily Streamlines Application Process For Employers To Participate In The Unemployment Insurance Work Sharing Program. (Urgency Bill Effective Immediately On September 28, 2020.)

Currently, employers who are facing an economic downturn have the option to participate in the Employment Development Department's (EDD) Unemployment Insurance Work Sharing program as a temporary alternative to layoffs. The work sharing program allows an employer to reduce an employee's hours in lieu of layoff and allow the employee to receive partial unemployment benefits, even if the reduction of hours and compensation would not otherwise make them eligible for such benefits. However, this EDD program is not frequently used by employers because the application process can be administratively burdensome by requiring the submission of a detailed written plan to the EDD that can then take several days to be approved.

In response to the economic uncertainty following the COVID-19 pandemic, the Legislature enacted AB 1731 to minimize the risk of widespread layoffs and increase the use of this work sharing program by streamlining the application process. Under AB 1731, any work sharing plan application submitted by eligible employers between September 15, 2020 and September 1, 2023 is automatically deemed approved for one year unless the employer requested a shorter plan.

As an urgency bill, AB 1731 became effective immediately upon Governor Newsom signing it into law on September 28, 2020.

(AB 1731 amends section 1279.5 of and adds sections 1279.6 and 1279.7 to the Unemployment Insurance Code.)

CRIMINAL BACKGROUND CHECKS

SB 905 – Prohibits DOJ LiveScan Background Checks From Requiring Certain Applicants To Provide A Residence Address, And Expands LiveScan Access to FBI Background Checks.

Currently, employers with applicants seeking a license, employment or volunteer position where the applicant would have supervisory or disciplinary power over a minor, can request a LiveScan background check from the California Department of Justice ("DOJ") showing the applicant's conviction record and any arrest pending adjudication involving specific offenses. SB 905 clarifies that such a LiveScan background check request must include the applicant's fingerprints, but cannot require the applicant to disclose their residence address.

Under existing law, schools receive Federal Bureau of Investigation (FBI) criminal background information as part of the DOJ LiveScan process. SB 905 expands LiveScan background checks to enable all authorized agencies and entities who get such background checks from the DOJ to also include background check information from the FBI.

(SB 905 amends sections 11105 and 11105.3 of the Penal Code.)

EMPLOYMENT SETTLEMENT AGREEMENTS

AB 2143 – Makes Clarifying Changes To Law Prohibiting No-Rehire Provisions In Employment Settlement Agreements.

Last year's AB 749 (effective January 1, 2020) prohibited settlement agreements from containing a provision that restricts an employee from obtaining future employment with the employer (frequently referred to as a "no re-hire" clause) if that employee has filed a claim or civil action against the employer. However, AB 749 provided an exception to this restriction on no re-hire clauses in settlement agreements where the employer made a good faith determination that the aggrieved person engaged in sexual harassment or sexual assault.

AB 2143 makes several clarifying changes to this law as follows:

- Expands the sexual harassment/sexual assault exception to also allow no re-hire clauses in situations where the employer determined the employee engaged in any criminal conduct.
- Requires that the good faith determination of sexual harassment, sexual assault or any criminal conduct be made and documented before the aggrieved person filed the claim or civil action against the employer, thus preventing employers operating in bad faith from making an after-the-fact determination of such misconduct.
- Finally, the law now also requires that the aggrieved person files their claim or complaint against the employer in good faith, thus, avoiding the potential for an employee filing an unfounded complaint just to invoke the protections of this law and avoid a no re-hire clause.

Although AB 2143 further clarifies the application of these exceptions to the prohibition on no-rehire clauses in employment settlement agreements, the burden is still on the employer to meet the qualifications and establishment of "good faith" determinations for the reasons noted above in order to use a no re-hire clause. Employers looking to invoke such an exception should therefore do so cautiously, and we recommend consulting legal counsel to assist in making such determinations.

(AB 2143 amends section 1002.5 of the Code of Civil Procedure.)

MANDATORY REPORTING

AB 1963 – Requires Businesses That Employ Minors To Provide Mandated Reporter Training To Employees.

Existing law, the Child Abuse and Neglect Reporting Act, requires a mandated reporter, as defined, to report whenever they, in their professional capacity or within the scope of their employment, have knowledge of or observed a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect. Failure by a mandated reporter to report an incident of known or reasonably suspected child abuse or neglect is a misdemeanor punishable by up to six months of confinement in a county jail, by a fine of $1,000, or by both imprisonment and fine. Under existing law, employers are strongly encouraged to provide their employees who are mandated reporters with training in these duties, including training in identification and reporting of child abuse and neglect. We note that public schools are required to provide annual mandated reporter training to employees, and licensed childcare providers are required to provide employees mandated reporter training every two years.

AB 1963 adds to the list of mandated reporters, a human resource employee of a business with five or more employees that employs minors. AB 1963 defines a "human resource employee" as the employee or employees designated by the employer to accept any complaints of misconduct as required by the Fair Employment and Housing Act.

For the purposes of reporting sexual abuse, AB 1963 adds an adult whose duties require direct contact with and supervision of minors in the performance of the minors' duties in the workplace of a business with five or more employees to the list of mandated reporters.

AB 1963 further requires businesses with five or more employees that employs minors to provide their employees who are mandated reporters with training on identification and reporting of child abuse and neglect. This training must include training in child abuse and neglect identification and training in child abuse and neglect reporting. The training requirement may be met by completing the general online training for mandated reporters offered by the Office of Child Abuse Prevention in the State Department of Social Services. By imposing the reporting requirements on a new class of persons, for whom failure to report specified conduct is a crime, AB 1963 imposes a state-mandated local program.

As a result of AB 1963, schools who employ minors will be required to provide mandated reporter training to all of their employees who are mandated reporters.

(Amends section 11165.7 of the Penal Code.)

BUSINESS AND FACILITIES

AB 1577 – Extends CARES Act Exclusion Of Loan Amounts Forgiven Under The PPP From Gross Income Subject To Income Taxes To State Income Tax Rules.

The federal Coronavirus Aid, Relief and Economic Security Act ("CARES Act") established the Paycheck Protection Program ("PPP"), through which qualified borrowers could obtain low-interest loans that if used on certain things (such as payroll or utilities) could be forgiven in whole or in part, depending on whether the borrower met certain criteria for forgiveness. The CARES Act included a provision statutorily excluding amounts forgiven under the PPP from gross income for income tax purposes. For for-profit business, this means that they will not pay income taxes on the amounts forgiven. For nonprofit schools with 501(c)(3) income-tax exemptions, this means that the loan forgiveness amounts are also statutorily excluded from being considered unrelated business income, therefore, preventing 501(c)(3)s from having to pay unrelated business income taxes on forgiven amounts. This bill conforms state law to those provisions

of the CARES Act, thereby excluding from gross income for state income tax purposes, loan forgiveness amounts under the PPP.

(AB 1577 adds sections 17131.8 and 24308.6 to the Revenue and Taxation Code.)

AB 713 – Creates A New Healthcare Related Exemption From The California Consumer Privacy Act.

In 2018, California lawmakers passed the California Consumer Privacy Act ("CCPA"), giving California residents a number of consumer privacy rights, including the right to find out what personally identifying information for-profit companies are collecting about them, to opt out of having such information collected, and to have that information deleted.

The CCPA only applies to for-profit companies doing business in California that: (a) have annual gross revenues in excess of $25 million; or (b) receive or disclose the personal information of 50,000 or more Californians; or (c) derive 50 percent or more of their annual revenues from selling California residents' personal information.

Although nonprofit private schools are not required to comply with the CCPA when contracting with covered companies, nonprofit private schools should ensure that the obligations and risks of the CCPA rest squarely with the for-profit company. Specifically, where a nonprofit private school contracts with a for-profit company and that company will be collecting information relating to the school, make sure to include contract provisions that require the for-profit company to comply with all applicable privacy laws, including the CCPA.

We also recommend tracking changes in this area of law, to help in understanding what may be expected of vendors. For example, AB 713 creates a new healthcare-related exemption from certain requirements in the CCPA out of concerns that the CCPA was adversely impacting health care research and operations. Under the new exemption, information is not subject to the CCPA if it meets both of the following requirements in Civil Code section 1798.146(4):

> (1) the information is deidentified in accordance with the deidentification requirements in the Privacy Rule promulgated under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), as set forth in 45 C.F.R. § 164.514; and
>
> (2) the information is "derived from patient information that was originally collected, created, transmitted, or maintained by an entity regulated by" HIPAA, California's Confidentiality of Medical Information Act ("CMIA"), or the Federal Policy for the Protection of Human Subjects, often referred to as the Common Rule.

This new deidentification exemption is in addition to, and separate from, the CCPA's current language which also excludes from its scope certain deidentified information, though the definition for deidentification is different in the CCPA than it is in the HIPPA. Thus, AB 713 now provides an alternative basis to argue that patient information that has been deidentified for HIPAA purposes is also exempt from the CCPA.

The new deidentification exemption is subject to conditions. For example, AB 713 prohibits reidentification, except for specific purposes such as treatment or billing purposes. The bill also requires that contracts for the sale or license of deidentified patient information include specific provisions prohibiting the purchaser or recipient from reidentifying the information and limiting redisclosure of the information to third parties.

AB 713 also highlights that private schools need to keep an eye on developments in privacy laws, as this is a continually changing area of law. For example, AB 713 was passed as urgency legislation (which allowed it to go into effect immediately upon the Governor's signature) in response to concerns about Proposition 24, an initiative on this November's ballot. If passed, Proposition 24 will create the California Privacy Rights and Enforcement Act ("CPREA") to replace the CCPA. Supporters of the proposition say that the CPREA will give consumers even more control over their personal data and make it harder for the Legislature to change privacy laws. Accordingly, AB 713 was preemptively passed in an attempt to preserve exemptions for medical information, just in case Proposition 24 impacts the CCPA's pre-existing exemptions for deidentified information.

All of this potential change highlights that private schools need to be on high alert for amendments, changes and modifications to the CCPA and other California privacy laws, to ensure that they or their vendors are in compliance with this continually evolving area of the law.

(AB 713 amends section 1793.130 of the Civil Code and adds sections 1798.146 and 1798.148 to the Civil Code.)

AB 1281 – Extends Exemption, From January 1, 2021 To January 1, 2022, For Certain Information Relating To Employees And Business-To-Business Communications From Provisions Of The California Consumer Privacy Act.

In 2018, California lawmakers passed the California Consumer Privacy Act ("CCPA"), giving California residents a number of consumer privacy rights, including the right to find out what personally identifying information for-profit companies are collecting about them, to opt out of having such information collected, and to have that information deleted.

The CCPA only applies to for-profit companies doing business in California, that: (a) have annual gross revenues in excess of $25 million; or (b) receive or disclose the personal information of 50,000 or more Californians; or (c) derive 50 percent or more of their annual revenues from selling California residents' personal information.

Although not covered by the law, nonprofit private schools that contract with a for-profit company who will be collecting information relating to their operations, should make sure to include contract provisions that require for-profit companies to comply with all applicable privacy laws, including the CCPA. We also recommend tracking changes in this area of law, to help in understanding what may be expected of vendors and what expectations employees, families, and other community members may have with respect to their privacy, as this is a rapidly and constantly changing area of law.

For example, the CCPA includes an exemption from its provisions for information collected by a business about a natural person in the course of the person acting as a job applicant, employee, owner, director, officer, medical staff member, or contractor of a business. Also exempted is personal information reflecting a written or verbal communication or a transaction between the business and a natural person who is acting as an employee, owner, director, officer, or contractor of a company, partnership, sole proprietorship, nonprofit, or government agency, and whose communications or transaction with the business occur solely within the context of the business conducting due diligence regarding, or providing or receiving a product or service to or from that company, partnership, sole proprietorship, nonprofit, or government agency.

These exemptions were set to sunset on January 1, 2021. However, in November, the voters will vote on Proposition 24, which, if enacted, would amend the CCPA by, among other things, extending these sunsets by two years, to give stakeholders additional time to assess whether certain business transactions should be exempted and how to protect employee privacy. Contingent on that Proposition not passing in November, AB 1281 extends the exemptions by an additional year to January 1, 2022, to give stakeholders more time to assess these issues, regardless of the outcome of Proposition 24.

(AB 1281 amends section 1798.145 of the Civil Code.)

AB 1929 – Authorizes Counties Statewide To Implement Systems For Internet-Based Mandated Reporting Of Non-Emergency Suspicions Of Child Abuse And Neglect.

In 2015, Governor Jerry Brown signed SB 478 which established a five-year pilot program authorizing up to ten county welfare agencies to develop programs for internet-based reporting of child abuse and neglect. The systems could only be used by certain mandated reporters, such as peace officers and teachers, and only for certain non-emergency reports. The pilot program is scheduled to sunset as of January 1, 2021. This bill, AB 1929, expands the pilot project created by SB 478 statewide, removes the sunset date, and removes the pilot project's limitations on which mandated reporters may use an internet-based reporting system, instead, allowing any mandated reporter to use it, while continuing restrictions relating to emergency reporting.

Specifically, AB 1929 allows any county welfare agency to develop a program for internet based reporting of child abuse and neglect, so long as the system does all of the following:

- Restricts the reports of suspected child abuse or neglect to reports indicating that the child is not subject to an immediate risk of abuse, neglect or exploitation and that the child is not in imminent danger of severe harm or death;
- Includes standardized safety assessment qualifying questions in order to obtain necessary information required to assess the need for child welfare services and a response, and, if appropriate, redirect the mandated reporter to perform a telephone report;
- Requires a mandated reporter to complete all required fields, including the identity and contact information of the mandated reporter, in order to submit the report; and
- Has appropriate security protocols to preserve the confidentiality of the reports and any documents or photographs submitted through the system.

In a county where an internet-based system is active, a mandated reporter may use that system instead of the initial telephone report and the mandated reporter does not have to submit the written follow-up report. However, if they use the internet-based system, they are required to cooperate, as soon as possible, with the agency on any requests for additional information if needed to investigate the report.

AB 1929 also requires the California Department of Social Services to oversee internet-based reporting through the issuance of written directives and requires each county that implements an internet-based system to hire an evaluator to monitor the implementation of the program and submit evaluations to CDSS during the first two years of implementation

(AB 1929 amends section 11166.02 of the Penal Code and section 10612.5 of the Welfare and Institutions Code.)

SB 934 – Eliminates $25 Filing Fee For Nonprofit Organizations, Including Private Schools, Seeking A Tax-Exemption From The Franchise Tax Board.

To obtain a federal income tax-exemption, nonprofit organizations, including private schools, must file an application under Internal Revenue Code section 501(c)(3) with the Internal Revenue Service. They must also obtain a corresponding state income tax-exemption under corresponding state law by filing an application with the California Franchise Tax Board (FTB).

Under current state law, there is a $25 filing fee that an organization must pay when it submits a long-form application (Form 3500) for a state income tax exemption. The organization also must pay this filing fee when it re-applies for a state exemption, after having the state exemption automatically revoked for failing to file state informational tax returns three years in a row.

SB 934 eliminates the $25 filing fee for Form 3500 on January 1, 2021. Accordingly, private schools seeking a state income tax exemption will no longer have to pay a filing fee of $25 for using Form 3500 to apply for a state income-tax exemption.

(SB 934 amends section 50650.5 of the Health and Safety Code, sections 23701, 23701r, 23772, and 23778 of the Revenue and Tax Code, and 5168 of the Vehicle Code.)

LCW LIEBERT CASSIDY WHITMORE

On-Demand Mandated Reporting Training for Private and Independent Schools!

Employees whose duties require contact with and/or supervision of children are considered "mandated reporters." LCW's Mandated Reporting for Private and Independent Schools workshop provides mandated reporters with the training that is suggested and encouraged by the California Penal Code to help them understand their obligations. It is essential that mandated reporters understand their legal duties not only to help ensure the safety and welfare of children, but because the duty to report is imposed on individual employees, not their schools.

On-Demand Training Course:
LCW has created an engaging, interactive, and informative on-demand training course. Training is one-hour and participants will receive an acknowledgement of completion at the end of the course, which can be forwarded to a school administrator.

Compatible with LMS Systems:
Does your school already use a Learning Management System for other training? Simply add LCW's Mandated Reporting training to the required training list and let your staff complete it when and where they want.

Train your whole school at a discounted price:
We are pleased to offer discounted pricing for schools that purchase multiple training sessions. In addition to pricing discounts, schools that purchase multiple training sessions will receive robust tracking analytics, dedicated account support, and branding opportunities.

Questions?
We are here to help! Contact us at on-demand@lcwlegal.com with questions on discounted school-wide pricing.

Register Today!

LCW Liebert Cassidy Whitmore
6033 West Century Blvd., 5th Floor | Los Angeles, CA 90045
www.lcwlegal.com | @lcwlegal

Private Education Legislative Roundup is published monthly for the benefit of the clients of Liebert Cassidy Whitmore. The information in ***Private Education Legislative Roundup*** should not be acted on without professional advice. To contact us, please call 310.981.2000, 415.512.3000, 559.256.7800, 619.481.5900, or 916.584.7000 or e-mail info@lcwlegal.com.