

2021 Employment Law Update

David A. Juhnke, Esq.

McCormick Barstow LLP

Kathryn M. Eppright, Esq.

Andre, Morris & Buttery

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A Look Back

2019



2020



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What 2020 Brought Us

- **Legislative Recap**

- Congress Acted Swiftly in the Spring, but been at Stalemate since
- California Legislature Continued to be active, but definitely less active
 - Governor Newsom imposed a 2 month break in the Spring
 - The number of bills introduced before March of 2021 were reduced by approximately 75% later in the year

- **Trends**

- New employment laws passed by the CA Legislature still reflect distrust of Employers, but the passage of Prop 22 may cause some lawmakers to consider public support for more employee-protective laws
- Possible shift at the Federal level toward more employee-protective legislation as new administration takes office and Congress majority potentially changing

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2021 – The Year of the Golden Ox



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Overview

Covid-19 Legislation/Regulation

- New Covid-19 Notice Requirements
- New OSHA Regulations
- Supplemental Paid Sick Leave
- Workers Comp Notice Requirements and Presumption

CFRA Expansion

Independent Contractors

Other New Laws

Significant Court Cases

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COVID-19 Legislation AB 685

OSHA Notice Requirements – AB 685

- Effective January 1, 2021
- Application – All Employers except health care providers
- Requires Employer to Provide Immediate Notice to Employees If:
 - Employer Receives Notice of Potential Exposure
 - To a Qualifying Individual
 - At the Worksite

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COVID-19 Legislation AB 685

- **“Qualifying individual”** is a person who:
 - Has a laboratory-confirmed case of covid-19
 - Is diagnosed positive for covid-19 by a licensed healthcare provider
 - Received a covid-19 order to isolate from a public health official
 - Died due to covid-19, as determined by the public health dept or included in county statistics

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COVID-19 Legislation AB 685

- **“Notice of Potential Exposure”** means:
 - Notification from a public health official or licensed medical provider that an employee was exposed to a qualifying individual at the worksite;
 - Notification from an employee or the employee’s emergency contact that the employee is a qualifying individual;
 - Notification through employer’s testing protocol that the employee is a qualifying individual; or
 - Notification from a subcontractor of the employer that a qualifying individual was on the worksite of the employer.

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COVID-19 Legislation AB 685

- **Required Employer Notice Must Be:**
 - In writing
 - Delivered within one business day
 - Contain certain specific information:
 - That they may have been exposed to COVID-19 (do not identify the infected person)
 - That they are entitled to COVID-19 benefits (leave, etc.)
 - Information about anti-retaliation protections
 - Information regarding Employer's CDC-compliant disinfection and safety plan

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COVID-19 Legislation AB 685

- **Employer's Notice is to go to:**
 - Its Own Employees
 - Employees of Any Subcontractors at the Worksite
 - Union Reps
- Notice Must be Sent in Same Manner Employer Normally Uses to Communicate with Employees
- Employer Prohibited From Retaliating Against Involved Employee
- Employer May Not Require Employee to Disclose Confidential Medical Information

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COVID-19 Legislation AB 685

- **Notification of an “Outbreak”**
 - “Outbreak” defined as 3 or more confirmed cases in a 14 day period at a worksite
 - Employer Must Notify the Local Public Health Agency within 48 hours including names, occupations, and worksites
- Employer Must Keep Required Notices for 3 Years
- Expands Cal-OSHA Ability to Prohibit Use of or Entry Into Workplace Which Pose Imminent Hazard to Employees
- Expands Cal-OSHA Citation Authority

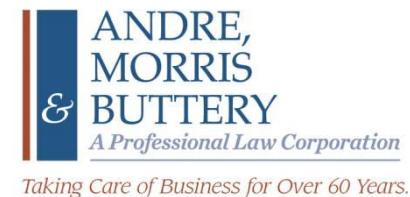
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COVID-19 Legislation AB 685

**Resource for More Info: CA Dept of Public Health
*Employer Questions About AB 685***

[https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/
COVID-19/Employer-Questions-about-AB-685.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Employer-Questions-about-AB-685.aspx)

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COVID-19 Regulations GISO 3205

OSHA EMERGENCY REGULATIONS GISO 3205

- Effective November 30, 2020
- Applicability – Virtually All Employers
 - Does Not Cover Employees Working at Home
- Requires Employer to Establish and Implement Written COVID-19 Prevention Program
 - Similar to IIPP Requirements
 - May be Integrated with IIPP
- Contains Notice Requirements for Reporting Outbreaks
- Creates Paid Leave Program for Employees

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COVID-19 Regulations GISO 3205

- Written COVID-19 Prevention Program Including:
 - System for Communicating with Employees re COVID issues
 - Identification and Response to COVID hazards in workplace
 - Investigating and Response to COVID events in workplace
 - Training and Instruction for Employees
 - Engineering Controls including PPE, scheduling, site controls
 - Reporting, Recordkeeping and Access
 - Removal of Exposed Workers from Workplace
 - Infection control in employer-sponsored housing and transportation
- Model Plan on Cal-OSHA website

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COVID-19 Regulations GISO 3205

- Detailed Requirements for Reporting “Outbreaks” to Public Health Authorities
 - Similar to AB 685 but some differences
 - Make sure to comply with both sets of requirements
- Employer Required to Remove From Workplace
 - Employee who tests positive for COVID
 - Employee who has COVID symptoms
 - Employee “exposed” to confirmed case (within 6 feet for 15 mins. over 24 hr. period) during “high risk exposure period”

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COVID-19 Regulations GISO 3205

- During Exclusion Period Employer must “continue and maintain employee’s earnings, seniority, and all other right and benefits”
- Exceptions:
 - Employee unable to work for non-COVID reasons
 - Employer can show that employee exposure not work-related (can this be done without employee admission?)
- Employer may consider other benefits received by Employee (sick pay, disability, worker’s compensation)

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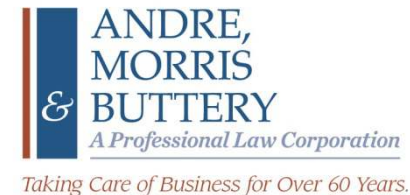
COVID-19 Regulations GISO 3205

More Information -- OSHA GISO 3205 Regulations, FAQs

<https://www.dir.ca.gov/oshsb/documents/COVID-19-Prevention-Emergency-txtbrdconsider.pdf>

<https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html>

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COVID-19 Legislation AB 1867

Supplemental Paid Sick Leave (“SPSL”)

- Already in effect, but may expire on 12-31-20 if the FFCRA expires
- Requires 2 weeks paid sick leave for covid-related absences
- Applies to Employers with 500 or more employees
- Imposes paid sick leave requirement on employers not covered by the federal covid19 relief law passed last Spring

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COVID-19 Legislation AB 1867

Supplemental Paid Sick Leave (“SPSL”)

- If over 500 employees, need to provide SPSL if:
- The employee must quarantine or isolate per a Federal, State, or local order
- The employee has been advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19
- The employee is prohibited from working by the Employer to health concerns related to the potential transmission of COVID-19

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COVID-19 Legislation SB1159

Workers Compensation Notice and Presumption

- Effective September 17, 2020
- Codifies Governor's Executive Order issued 3/15/20
- Application – Employer with 5 or more Employees
- Provides New Reporting Requirement for Employers
- Creates Rebuttable Presumption for Worker's Comp Claims

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COVID-19 Legislation SB1159

- **Notice Requirement** -- Employer Must Report to Worker's Comp Carrier if it "knows or reasonably should have known" that employee tested positive for COVID-19 within 14 days after performing work at jobsite
 - Retroactive to Date of Executive Order (3/15/20)
- **Deadline to Report**
 - Positive tests prior to 9/17/20 must be reported by 10/17/20
 - Positive tests after 9/17/ 20 must be reported within 3 days
- **Report must include**
 - date of test
 - address where employee worked for 14 days prior to test
 - number of employees at that jobsite

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COVID-19 Legislation SB1159

- Penalties for Failure to Report
 - \$10,000 if employer “intentionally submits false or misleading information or fails to submit information”
 - Civil citation also possible
- Worker’s Comp Carrier will use report to determine whether there is an “outbreak” at the jobsite, defined as:
 - 4 employees test positive if less than 100 employees at jobsite
 - 4% of employees test positive if more than 100 employees at jobsite or
 - Jobsite is ordered to close by a Public Health Agency

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COVID-19 Legislation SB1159

- “Disputable Presumption” that Employee who Suffers Illness or Death from COVID-19 Contracted the Virus at Work for Worker’s Compensation Purposes If:
 - Illness was reported 3/15/20-7/5/20 and occurred within 14 days after working at jobsite
 - Illness was reported after 7/6/20 and occurred within 14 days after working at a jobsite where there is an “outbreak”
 - Illness was reported at any time by an employee working in healthcare or public safety

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COVID-19 Legislation SB1159

- Employer can Challenge Presumption by Showing:
 - Measures in place at jobsite to reduce transmission
 - Employee's risk of exposure outside the workplace
 - Employee's statements concerning exposure and diagnosis
 - Other factors used in non-COVID worker's comp claims
 - As a practical matter, it will be difficult to refute presumption
- Employer is not required to provide worker's comp form to employee who reports COVID-19 infection unless employee states that infection occurred at work
 - However, it is good policy to provide the form in all cases

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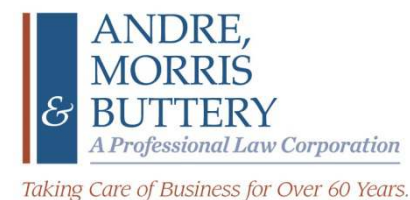
COVID-19 Legislation SB 1159

Workers Comp Presumption

Resource for More Info: CA DIR *FAQs re: SB1159*

<https://www.dir.ca.gov/dwc/Covid-19/FAQ-SB-1159.html>

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New CFRA Legislation – SB1383

CA Family Rights Act Expansion

- Expands the CFRA leave rights so they apply now to small employers (5 or more)
- Becomes effective January 1, 2021
- Allows eligible employees to take up to 12 weeks of unpaid leave in a 12-month period

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New CFRA Legislation – SB1383

Eligibility:

- 12 months of service (not req'd to be consecutive so long as gaps in employment do not exceed 7 years (note: 7 years limit does not apply if gap is due to military service))
- 1250 hours worked in preceding 12 months

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New CFRA Legislation – SB1383

What Leave Qualifies?

- Employee's own serious illness
- Employee's need to care for family member who is seriously ill
- Baby Bonding
- Qualifying military exigency

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New CFRA Legislation – SB1383

Important Things to Know/Do:

1. Post notice and update handbook to include CFRA
2. Define the 12 months (rolling, calendar, anniversary)
3. Obtain or Develop checklist and forms to use so you properly classify the leave and any other leave types that might run concurrently
4. Designate it when it qualifies and give employee written notice within 5 days of receiving certification
5. Continue health benefits (including company's share of premium payments) during CFRA

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New CFRA Legislation – SB1383

Important Things to Know/Not to Do:

1. Do not contact the doctor to verify leave (can only contact doctor to authenticate the certification provided---meaning to be it came from doctor)
2. Do not ask for medical information
3. Do not treat baby bonding and pregnancy disability the same (CFRA provide for baby bonding; PDL/FMLA provides for disabilities associated with pregnancy or childbirth).
4. Do not decide that an employee is a poor performer and needs to be terminated when he/she is out on CFRA leave

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New CFRA Legislation – SB1383

Important Thing to Remember:

- CFRA protects employee's right to return to his/her job or comparable job at the end of the CFRA leave
- Expiration of statutory leave triggers obligation of employer to initiate the interactive process
- If doctor does not clear employee to return after CFRA, reach out to the employee to discuss status, need for additional leave or other accommodations and document your interactive process

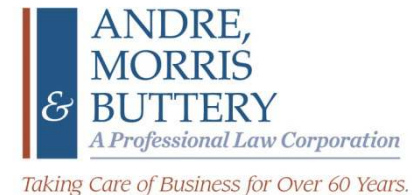
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Independent Contractor Continuing Evolution

AB 2257: Expansion of list of exemptions by CA Legislature

Prop 22: Exemption of Uber and Lyft by ballot initiative

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Independent Contractor Legislation: AB 2257

Example of “Regulatory Failure”

Eight months after AB 5 went into effect, AB 2257 was passed to expand the exceptions.

Driven by lobbying efforts from groups ranging from freelance writers to actors to truck drivers.

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Independent Contractor Legislation: AB 2257

New exemptions:

- Business to Business now extends to contractors of public agencies or quasi-public agencies
- Individual to Individual exemption if it is a stand-alone, non-recurring event at a single location, or a series of events in the same location no more than once a week.
- New professional services exemptions: hotel inspectors, appraisers, cartographers, registered professional foresters, content contributors, specialized performers hired to teach a class no more than once a week....

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Independent Contractor Legislation: AB 2257

The list of exemptions goes on:

- Freelancers without the submission cap
- Musicians, songwriters, composers, sound engineers & mixers, photographers, radio promoters, some publicists
- Performing artists, like comedians, magicians, mimes, storytellers, actors, even puppeteers
- Manufactured housing salespeople
- Competition judges and amateur referees and umpires

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Independent Contractor Legislation: AB 2257

Who did not get an exemption?

Trucking companies

Motion picture and television companies

Gig economy companies, like Uber and Lyft

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Independent Contractor Legislation: AB 2257

Resources:

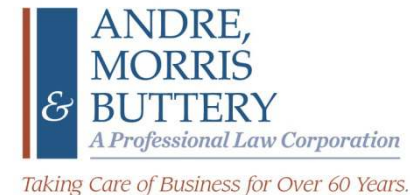
CA Labor & Workforce Development Agency

<https://www.labor.ca.gov/employmentstatus/faq/>

And CA DIR

https://www.dir.ca.gov/dlse/faq_independentcontractor.htm

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Independent Contractor Legislation: Prop 22

Uber and Lyft's Plan B

Passed by over 58.6% of the vote in CA

Classifies app-based drivers as independent contractors and not employees (Uber, Lyft, DoorDash, Instacart, etc.)

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Other New Laws Going Into Effect

- CA pay data reporting – SB 973
- Extension of exempting employers from CA Consumer Privacy Act – AB 1281
- Minimum Wage increase/correlating increasing for exempt employee minimum salary
- Kin care clarity –AB 2017
- Crime Victim Leave—AB2992
- Reporting Child Abuse—AB1963

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Significant Court Cases

Sanchez v. Martinez

- CA Court of Appeal decision
- Piece Rate issue
- Alleged failure to pay rest breaks
- Court held employees paid a piece rate are entitled to either remedy authorized by Labor Code 226.2 and 226.7:
Pay at minimum wage for the rest break time *or* premium pay (1 additional hour of straight time pay), *but not both*

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Significant Court Cases

Colucci v. T-Mobile USA

- CA Court of Appeal decision
- What Not to Do and Who Not to Hire as Manager
- Discrimination/Retaliation based on Regional Manager's skeptical response to store manager claim of disability, allegations of conflict of interest without investigation, and failure to response to employee complaints
- Jury Verdict for Punitive Damages Upheld

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Significant Court Cases

King v. U. S. Bank National Association

- CA Court of Appeal decision
- Wrongful Termination/Defamation case
- Court upheld jury award finding the claims were supported by substantial evidence, including evidence that Human Resources failed to properly investigate claims of gender discrimination and harassment made against the plaintiff proper to his termination

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QUESTIONS?

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