

January 2021

As always, the New Year brings a new batch of revisions to California labor and employment laws. Chiefly, the California Supreme Court has offered some clarity on the applicability of the changes to California independent contractor classification, California medical leave laws have undergone a much-needed remodel and the minimum wage has been increased. Below are some of the key considerations.

## I. "ABC" Test Now Retroactive

On January 14, 2021, the California Supreme Court issued a ruling in *Vazquez v. Jan-Pro Franchising Int'l*, which raised the question of whether the "ABC" test for delineating employees from independent contractors should be applied retroactively.

The "ABC test" was expressed in the 2018 California Supreme Court decision *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*. The test was later codified by Assembly Bill 5, which became law in 2020. Under the test, workers can be considered independent contractors only if they control their work; if their duties fall outside the scope of a company's normal business; and if they have an independent business doing that work.

As a practical matter this means any California employer that has used independent contractors in the last four years should review their contracts and practices to assess their potential exposure.

## 2. Employee Leave Law Revision

One of the major changes in California's employment laws in 2021 is a full scale renovation of the California Family Rights Act. The renovation is intended to (mercifully) streamline and harmonize the battery of leave laws that apply to California workers, including the elimination of the New Parent Leave Act. Some of the key highlights:

### A. Expanded Coverage to Small Employers

Effective January 1, 2021, The CFRA applies to private employers with **five or more employees**, and the requirement that employees work within 75 miles of the worksite will be eliminated. As a result, the CFRA will apply to almost all California employers, including those who never had to comply with family and medical leave laws.

### B. Expanded Definition of "Family Member"

Effective January 1, 2021: The definition of "family members" will be expanded to include siblings, grandparents, grandchildren, domestic partners and adult children (as each is defined under the Act). Thus, employees have more qualifying reasons to take CFRA leave. Employers who employ both parents of a child must grant separate CFRA leave to each qualifying parent, either at the same time or back to back, depending on the employees' requests.

### C. New Leave Entitlement for Active Military Duty

CFRA leave is now available to provide care to family members while a service-member spouse is away from the household on duty.

### D. Exemption Eliminated

Until January 1, 2021, CFRA allowed employers to exempt the highest 10% earners where the employer's refusal to grant CFRA leave would be necessary to prevent substantial and grievous economic injury to the employer. Under the revised CFRA, there is no longer be a 10% exemption option for employers.

### E. Pregnancy Disability Leave

Previously, time taken for pregnancy disability qualifies for leave under the FMLA but not under the CFRA. Now, Pregnancy disability leave for up to four months will be a right separate from the CFRA. This means a California employee with pregnancy disability could be entitled to pregnancy disability leave under the FMLA, separately under California law, and then entitled to additional leave under the CFRA for a different qualifying reason.

### 3. Odds & Ends

In addition, there are a handful of smaller statutes that took effect on January 1, 2021 that apply to all California employers. The following is non-comprehensive sample of some of the major points:

#### A. California Minimum Wage Increase January 1, 2021

The Statewide minimum wage will increase to **\$13.00 for employers with twenty-five or less employees and \$14.00 for employers with at least 26 employees**, in addition to additional increases set by local ordinance.

#### B. Notification of COVID-19 Exposure

Expands Cal/OSHA's authority to issue Stop Work Orders and obligates employers to provide written notice to all potentially exposed employees.

In addition, when an employee is absent from work due to Covid-19, a California employer may not **require an employee to provide a negative Covid test to return to work.**

#### C. Settlement Agreements / No-Rehire Clauses

Settlement/Severance agreements frequently include language barring the employee from seeking employment with the company in the future. Now, an employer who includes this language in a settlement or severance agreement must retain written documentation of that agreement.

#### D. Statute of Limitations for DLSE Claims of Discrimination

The statute of limitations for discrimination claims before the DLSE is expanded to one year from six months.

#### E. Rest Breaks / Security Guards

Employers can now require security guards enter into collective bargaining agreements requiring employees to remain on premises and on call during rest breaks, so long as they are paid at least one dollar more than the applicable minimum wage.

As always: the ways in which California employment laws apply to a particular business are unique to your business, personnel and practices—there is no one size fits all solution.

### Contacts



**Arthur S. Gaus**

Associate

Tel: +1 510.835.6811

E-mail: [agaus@burnhambrown.com](mailto:agaus@burnhambrown.com)



**Raymond A. Greene**

Partner

Tel: +1 510.835.6706

E-mail: [rgreene@burnhambrown.com](mailto:rgreene@burnhambrown.com)