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2020 YEAR-END CALIFORNIA LABOR AND EMPLOYMENT UPDATE

To Our Clients and Friends:

This past year saw the enactment of a variety of new employment laws in California, including new disclosure requirements for employers and changes to the independent contractor landscape. In addition, the COVID-19 pandemic has touched nearly every sector of society, in nearly every corner of the world, and employment law in California is certainly no exception. The pandemic has ushered in a new legal landscape marked by heightened requirements for employers stretching from 2020 into 2023.

Below, we outline four new laws that require attention from California employers in the new year: (1) the new requirements for California employers in reporting wage and hour data; (2) the continuing evolution of the worker classification standard and the recent passage of Proposition 22; (3) the new COVID-19 notice requirements that will require employers to notify employees of possible exposure; and (4) the new Workers' Compensation Disputable Presumption under SB 1159. We also highlight California's current plan for rolling out the recently approved COVID-19 vaccines, a strategy that will no doubt develop more in the next few months as essential workers become eligible to receive the vaccine.

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I. California Employers Required to File Equal Pay Report to California DFEH (SB 973)

On September 30, 2020, California Governor Gavin Newsom signed Senate Bill 973 ("SB 973") into law, which requires employers to submit pay and hours data for various categories of employees to

California's Department of Fair Employment and Housing ("DFEH"). The stated goals of SB 973 are to decrease gender and racial pay disparities in California and fill the gap of the currently suspended federal effort to collect data for these purposes.

A. Background on SB 973 – From President Obama to Governor Newsom

Since the 1960s, employers with 100 or more employees have been required to report certain demographic data to the Equal Employment Opportunity Commission ("EEOC"). The Obama Administration expanded the reporting requirements in 2016, adding hours and pay data to the report, which would be broken down by job category, race, ethnicity and gender. The EEOC collected this data until September 2019, when it announced that it would no longer collect the information. SB 973 was enacted in an effort to continue the Obama Administration's equal pay policies by imposing largely the same requirements that existed under those policies.

B. When Does the Law Take Effect?

The law took effect on January 1, 2021, and the first report is due on March 31, 2021, with subsequent reports due each year thereafter. Employers should begin compiling the relevant data as soon as possible to ensure compliance. The DFEH has stated that it intends to issue standard forms that employers will be able to use to prepare the reports.

C. Who Does the Law Apply To?

The law applies to private employers with 100 or more employees, or employers who are required to file a federal Employer Information Report EEO-1 form. According to current DFEH guidelines, employees both inside and outside of California are counted when determining whether an employer has 100 or more employees. Temporary workers will also count toward the determination of whether an employer meets 100 employees, if the employer is required to include the temporary workers in an EEO-1 report, and if the employer is required to withhold federal social security taxes from their wages.

D. What Information Does the Report Require?

Employers will need to create a "snapshot," counting all employees (part and full-time) in a given category during a single pay period of the employer's choice between October 1 and December 31 of the prior calendar year (the "Reporting Year"). To prepare the report, employers should first count and record the number of employees by race, ethnicity, and gender organized by job categories (which are the same categories used by the federal government in the EEO-1 report).[1]

Second, employers will need to further break down the data by separating employees in each category by pay band.[2] To determine what pay band an employee falls into, the employer should look at the employee's W-2 earnings for the entire Reporting Year, regardless of whether that employee worked for the full calendar year.

Third, using the same general format, the employer must include the total number of hours worked by each employee counted in each pay band during the Reporting Year.

The employer will be permitted, but not required, to provide clarifying remarks. The report must be in searchable and sortable format. If the employer has multiple establishments, it will need to submit a separate report for each establishment, as well as a consolidated report. Each report should include the employer's North American Industry Classification System (NAICS) code.

If an employer fails to submit a report, the DFEH may seek an order requiring the employer to comply with the requirements and will be entitled to recover the costs associated with seeking the order for compliance.

E. What Does the Law Mean For Employers, Besides Additional Reporting?

While the intent is for the DFEH to use the reported data to "more efficiently identify wage patterns and allow for targeted enforcement of equal pay or discrimination laws," in reality, these goals are more likely to be impeded than helped by the data collected. This is because W-2 data is not a precise—or even remotely reliable—measure of wages paid.

For instance, W-2 compensation reflects an employee's reported income for a calendar year, which is not necessarily tied to the number of hours worked or the employee's earnings in that year. Identically compensated employees may have a wide variance in W-2 data in any given year for reasons other than differences in wage rates. For example, if an employee's compensation package includes equity grants, such compensation will not be reflected on a W-2 until the stock option is exercised or the rights vest, which may be years later (and potentially after unforeseen or unpredictable events that may significantly increase or decrease the value of the equity). Other non-wage compensation, such as reimbursement of relocation expenses or payment of recruitment bonuses, will also be reflected in the W-2, but do not have any meaningful tie to compensation level.

W-2 data also does not report hours worked, or account for employees who worked only part of the year (for example, employees who took a leave of absence, or were hired or quit in the middle of the year). SB 973 tries to account for these potential gaps by requiring employers to report the hours worked by the employee. But many employers do not track hours of exempt employees, and will be forced to either leave that portion blank or estimate hours, which may skew the analysis.

Additionally, the pay data report asks employers to categorize employees based on the federal EEO-1 job categories. But those categories do not account for different skills required between jobs in the same category for which the market dictates different compensation. The job categories also do not account for differences in an employee's education, training or experience within the same job category, all variables that greatly affect compensation and which the law acknowledges should be considered in evaluating wage rates under the Equal Pay Act.[3]

As a result of these many deficiencies of the reported W-2 data, many employers who are actively and conscientiously working to ensure equitable compensation may nevertheless face allegations of pay discrimination. To reduce this risk, employers should consider providing clarifying remarks, as is permitted by the statute, but should work closely with experienced counsel to determine how much and what kind of clarifying data they should provide.

II. Amendment to ABC Test Under Assembly Bill 2257 and Proposition 22

In 2018, the California Supreme Court in the *Dynamex* case articulated a new test for classification of independent contractors, which the legislature codified in Assembly Bill 5 ("AB 5") a year later—albeit with numerous exemptions of varying complexity. The Legislature this year passed Assembly Bill 2257 ("AB 2257"), which provides still more exemptions than already existed under AB 5, and revises many of the exemptions that AB 5 had put in place the previous year. And just recently, California voters passed Proposition 22, which further narrowed the reach of AB 5. Thus, while 2020 has brought some clarity concerning classification of independent contractors, many questions remain that will need to be addressed in 2021 and thereafter.

A. History of the Worker Classification Test and the Adoption of the ABC Test

In 2018, the California Supreme Court imported a new legal standard for determining worker classification for purposes of California wage orders: the "ABC test." In contrast to the flexible, multi-factor analysis that had been in place for nearly three decades, the Court in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), held that companies seeking to classify workers as independent contractors must prove three elements:

1. The worker remains free from the hiring entity's control and direction in connection with the performance of the work, both under the contract and in fact;
2. The worker performs work that is outside the usual course of the hiring entity's business; <u>and</u>
3. The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity.

On September 18, 2019, Governor Newsom signed AB 5 into law, declaring it "landmark legislation" for "workers and our economy." AB 5 not only codified the ABC test, but also clarified that this test applies broadly to claims arising under the Labor Code and Unemployment Insurance Code, and not just the narrower wage orders to which *Dynamex* is limited. But AB 5 also exempted many industries from its otherwise broad reach and permitted those industries to continue using the more employer-friendly test in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989)—the standard before *Dynamex*.[4] Notably, truck drivers, journalists, and on-demand app-based workers, such as ride-share workers, were not expressly exempted.

B. AB 2257—Providing More Exemptions to AB 5

On September 4, 2020, AB 2257 was signed into law. Among other things, AB 2257 widened the business-to-business and referral agency exemptions, and introduced <u>109 additional</u> categories of workers exempted from AB 5. The business-to-business exemption involves business entities such as corporations and partnerships contracting with other businesses to provide services, while the referral agency exemption applies to business entities that perform services through a referral agency. These business entities prefer to be labeled as an independent contractor, and not employee, of the referral

agencies. Yet, even though these exemptions were broadened, once again, gig economy workers were not among the many expressly exempted industries.

C. Prop 22—Creating a Safe Harbor for App-Based Workers and Companies

In November, California voters passed the Protect App-Based Drivers and Services Act (Prop 22) to ameliorate the threat of AB 5 for on-demand, app-based rideshare and delivery companies in California. Prop 22 ensures AB 5 cannot be applied to "app-based workers," enabling "network compan[ies]" to continue classifying app-based workers as independent contractors.

Companies can classify workers as independent contractors and take advantage of Prop 22's safe harbor as long as they qualify as a Delivery Network Company or Transportation Network Company and meet the requirements of Prop 22's four-element independent contractor standard:

1. The network company does not unilaterally prescribe specific dates, times of day, or minimum number of hours during which the app-based driver must be logged into the network company's online enabled platform;

2. The network company does not require the app-based driver to accept any specific rideshare service or delivery service request as a condition of maintaining access to the network company's online-enabled application or platform;

3. The network company does not restrict the app-based driver from performing rideshare services or delivery services through other network companies except during engaged time; <u>and</u>

4. The network company does not restrict the app-based driver from working in any other lawful occupation or business.

Prop 22 also requires network companies to provide workers with certain levels of compensation and specific benefits to ensure the "economic security" of app-based rideshare and delivery drivers. These benefits include hourly compensation of at least 120% of the local minimum wage plus $0.30 per mile; a healthcare subsidy consistent with contributions required under the Affordable Care Act for certain qualifying workers; occupational accident insurance; and protection against discrimination and sexual harassment.

D. What Questions Remain Regarding Worker Classification After AB 2257 and Prop 22?

While AB 2257 and Prop 22 have provided more clarity regarding the classification of independent contractors in California, many questions remain. Thus, over the next year, we expect to see courts addressing the reaches of both the ABC Test and Prop 22. For example, we expect decisions regarding:

- **Retroactive Application of *Dynamex*'s ABC Test:** On November 3, 2020, the California Supreme Court heard oral arguments in *Vazquez v. Jan-Pro Franchising International, Inc.*, No. S258191 (filed Sept. 26, 2019), where it is poised to determine whether *Dynamex* applies retroactively.

- **Federal Preemption of the ABC Test Under the FAAAA:** Parties have challenged the ABC Test, both under *Dynamex* and AB 5, as preempted by federal law. In particular, trucking groups and companies have challenged AB 5 as preempted by the FAAAA, which regulates motor carriers. *See California Trucking Association, et al. v. Xavier Becerra, et al.*, 433 F. Supp. 3d 1154 (S.D. Cal. 2020) (issuing preliminary injunction of AB 5 as applied to motor carriers in California because of FAAAA preemption); *see also People v. Superior Court of Los Angeles County (Cal Cartage Transportation Express, LLC)*, 57 Cal.App.5th 619 (Cal. Ct. App. 2020), petition for review pending (finding that the ABC test is not preempted by the FAAAA).

- **Reach of Prop 22:** Parties have already begun filing cases concerning whether Prop 22 can apply retroactively and whether it is a partial repeal of AB 5, among other questions.

The focus on worker classification issues is not likely to fade in 2021. Companies with independent contractor workforces should review their practices and contracts to make sure that they can comply with the applicable legal standard, and should stay apprised of the many developments we expect to see in this area over the coming year.

III. COVID-19 Notice Requirements Under Assembly Bill 685

On September 17, 2020, Assembly Bill 685 ("AB 685") was signed into law by Governor Newsom in order to strengthen access to information regarding the spread of COVID-19. AB 685 imposes two new notice requirements on employers regarding COVID-19, effective January 1, 2021. First, employers are required to notify certain employees and representatives concerning a possible exposure to COVID-19. Second, should the number of cases reach an "outbreak" as defined by the State Department of Public Health, the employer must notify the local public health agency.

A. Notice of Potential Exposure

When an employer is aware of potential exposure to COVID-19 at a worksite, the employer must provide written notice of the potential exposure to all employees who were on the same worksite as the qualifying individual who caused the potential exposure, as well as notice to all employers of subcontracted employees, and to any exclusive representatives (e.g. union representatives) of potentially exposed employees.

1. What counts as a potential exposure?

If an employee, or an employee of a subcontractor, has been on the premises at the same worksite as a ***qualifying individual*** within the ***infectious period*** of COVID-19, that is a potential exposure. A qualifying individual is a person who has: (1) a laboratory-confirmed positive case; (2) a diagnosis from a licensed health care provider; (3) received an isolation order from a public health official; or (4) died due to COVID-19. If the individual developed symptoms, the infectious period begins 2 days before the symptoms were first developed, and ends when 10 days have passed since the symptoms first appeared, 24 hours have passed with no fever, and other symptoms have improved. If the individual never developed symptoms, the infectious period begins 2 days before the specimen that tested positive was collected, and ends 10 days after the specimen was collected.[5]

2. What kind of notice must be provided?

The required notice must be written, and given in a manner normally used by the employer to communicate employment-related information. This could include personal service, email, or text message if it can reasonably be anticipated to be received by the employee within one business day. The notice must be in both English and the language understood by the majority of the employees.

Each notice must include the following information:

- That the employee may have been exposed to COVID-19;
- Information regarding COVID-19 related benefits and employee protections, including protections from discrimination and retaliation for disclosing a positive diagnosis; and
- Information on the disinfection and safety plan that the employer will implement and complete per CDC guidelines.

The notice must not include the name, or any other identifying information, of the qualifying individual.

3. Are there any penalties for failing to provide notice?

The statute provides that the Division of Occupational Safety and Health ("Cal OSHA") may issue a citation and civil penalties to employers who fail to provide the required notice of potential exposure, or if the notice does not include information regarding the employer's disinfection and safety plan.

B. Notice in Case of an "Outbreak"

AB 685 also requires non-healthcare employers to notify the local public health agency in the jurisdiction of the affected worksite *within 48 hours* in the case of a COVID-19 outbreak.

1. What counts as an "outbreak"?

According to the current guidelines from the California Department of Health, a "COVID-19 outbreak in a non-healthcare workplace is defined as at least three COVID-19 cases among workers at the same worksite within a 14-day period."[6] Whether a COVID-19 case exists is determined consistent with the criteria for a qualifying individual outlined above.

2. What information must be given to the local public health agency?

The employer must provide the names, total number, occupation and worksite of the employees who are qualifying individuals. In addition, the employer must report the business address of the worksite and the North American Industry Classification System (NAICS) industry code.[7] The employer must continue to notify the agency of any subsequent cases, and the employer must provide the agency with any additional information it might request as part of the investigation.

C. Takeaways

In order to meet the notice requirements in the time constraints under AB 685, employers should take immediate steps to:

1. Implement a policy requiring employees working on-site to report COVID-19 positive tests and a process to then track those reports in a manner that will meet the standards required by AB 685 while also preserving employee privacy. This process should seek to incentivize employees to report results swiftly to the employer. The tracking method used should have the capacity to quickly determine what the infectious period is for each case.

2. Draft a notice template that can be filled out and sent quickly that includes all of the required information.

3. Implement a strategy for rapidly providing notice to employees (and subcontractors and union representatives) in case of exposure that meets the requirements of AB 685. This will require the capability to determine quickly which employees were on-site with the qualifying individual during the infectious period in order to generate the contact list for the notice that must be received within one business day.

4. Implement a process to streamline communications with the local public health agency. This may include steps such as designating a point person ahead of time who will manage communications and send required notices to the agency, determining the appropriate contacts at the local health agency, and preparing templates in advance that can be quickly generated.

IV. Workers' Compensation Disputable Presumption Under Senate Bill 1159

Governor Newsom also signed Senate Bill 1159 into law on September 17, 2020. The bill creates a disputable (rebuttable) presumption that an illness or death resulting from COVID-19 is an injury that arises out of and in the course of employment, and is thus compensable under California's workers' compensation laws. The presumption only applies to certain claims from July 6, 2020 through January 1, 2023.

A. What Conditions Create a Presumption?

For most employers, the presumption only applies if the employer maintains 5 or more employees, and an employee tests positive for COVID-19 within 14 days after reporting to their specific place of employment during an "outbreak." A "specific place of employment" means the location where an employee performs work, but does not include the employee's home or residence, unless the employee provides home health care services to another individual at the employee's home or residence.

An "outbreak" exists for the purpose of the presumption if one of the following occurs:

1. For employers with 100 employees or fewer at a specific place of employment, if 4 employees test positive for COVID-19 within 14 calendar days;

2. For employers with more than 100 employees at a specific place of employment, if 4% of the number of employees who reported to the specific place of employment test positive for COVID-19 within 14 calendar days; or

3. A specific place of employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection with COVID-19.

B. How Can Employers Rebut the Presumption?

Employers can rebut the presumption that the injury or death arose out of employment by submitting evidence which tends to dispute the claims. For example, the employer can offer evidence of the measures it established to reduce potential transmission of COVID-19, or of the employee's nonoccupational risks of COVID-19 infection.

C. Are There Any Other Changes to the Workers' Compensation Process?

Under SB 1159, the claims administrator only has 45 days to deny a claim based on COVID-19 once filed, as opposed to the typical 90 day period. If the claim is not denied, the illness is presumed compensable, and only evidence discovered subsequent to the 45-day period may be used to rebut this presumption. Thus, it is vital that employers work quickly to gather the necessary information as soon as a claim is filed.

D. Additional Requirement: Report to Claims Administrator

The bill also requires an employer that knows or reasonably should know that an employee has tested positive for COVID-19 to submit a report containing the below information to its workers' compensation claims administrator within three business days:

- Notice that an employee has tested positive (the employee should not be identified unless the employee asserts the infection is work-related or has already filed a claim);
- The date the employee tested positive;
- The address of the employee's specific place of employment during the 14-day period before the date the employee tested positive; and
- The highest number of employees who reported to work at the specific place of employment of the employee who tested positive in the 45-day period preceding the last day that the employee worked.

Reporting this information to a claims administrator provides the claims administrator with information to determine whether an outbreak has occurred. If an employer intentionally submits false or misleading information or fails to submit information when reporting, the Labor Commissioner can impose a civil penalty of up to $10,000.

E. First Responders and Healthcare Workers

The bill instituted a similar set of provisions for certain first responders such as firefighters, some peace officers, paramedics and EMTs, and healthcare workers, but with a few key distinctions. Crucially, no outbreak at the workplace is required to give rise to the presumption that a positive COVID-19 test arose from the first responder or healthcare worker's employment, and the presumption is not limited to employers of a certain size. Moreover, healthcare employers may not rebut the presumption through evidence of preventative measures or the employee's nonoccupational risks, but may rebut the presumption "by other evidence." Finally, the claim administrator must deny the claim within 30 days of its being filed to avoid a presumption that the injury is compensable, instead of the 45-day period outlined above.

F. Claims that Arose Before July 6, 2020.

For COVID-19 related claims between March 19, 2020 and July 5, 2020, there is still a disputable presumption that an injury from COVID-19 is presumed to have arisen out of and in the course of employment. An employee must, within 14 days of being present at the place of employment, either test positive for COVID-19 ***or*** be diagnosed by a licensed medical doctor, with the diagnosis confirmed by a test within 30 days. The presumption is disputable and may be controverted by other evidence. Employers are not required by the law to report employees who tested positive in this time frame to claim administrators.

G. Takeaways

To best meet the requirements of SB 1159, several critical steps should be taken:

1. Review records for confirmed COVID-19 illnesses or deaths from July 6, 2020, through the present. Implement a process to reliably and quickly record and report employee COVID-19 illnesses to your workers' compensation claims administrator within three business days.

2. Determine if any "outbreaks" have occurred since July 6, 2020. If there has been no outbreak, there is no presumption (except in the limited cases noted above). Create a method to automatically flag when an outbreak has occurred or might be imminent.

3. Implement a strategy to dispute the presumption that an infection occurred in the workplace when appropriate. This should include preparing information regarding safety measures taken by the company to prevent transmission of COVID-19. Additionally, the company should employ an appropriate investigation strategy to determine if an employee was subject to any nonoccupational risks of exposure to COVID-19.

V. COVID-19 Vaccine – Who Will Get It and When?

Finally, perhaps the most pressing question for employers and employees alike is when to expect the vaccines to rollout in California, and what this process will look like. The U.S. Food and Drug Administration has issued Emergency Use Authorization for two COVID-19 vaccines, with the

possibility that more vaccines will be authorized in early 2021. California, with guidance from the CDC, has outlined a scalable, three-phased approach, starting with healthcare workers, and ending with the general population.[8]

A. Phase 1-A: Healthcare Residents and Workers

Due to the currently limited availability of the vaccine, Phase 1-A includes three different tiers in order to provide gradual distribution. The first tier of potential vaccine recipients includes residents of skilled nursing facilities, assisted living facilities, and other similar long-term care settings for medically vulnerable or older populations. Also in the first tier are healthcare workers who come into direct contact with COVID-19 patients, and generally those medical professionals who are most at risk in terms of exposure, which include workers at correctional and psychiatric hospitals, nursing homes, acute care centers, and dialysis centers, as well as paramedics and emergency medical technicians.

The second tier within Phase 1-A includes those healthcare workers who work in intermediate care facilities, primary care clinics, urgent care clinics, rural health centers, correctional facility clinics, as well as home health care workers and public health field staff.

The third tier of healthcare workers includes workers in dental offices, specialty clinics, laboratories, and pharmacy staff not included in higher tiers.

B. Phase 1-B: Frontline Essential Workers & Adults Age 65 and Older

Phase 1-B is slated to take place once the healthcare workers in Phase 1-A are mostly vaccinated. According to the CDC, this group should include "workers in essential and critical industries" such as teachers, child care workers, and first responders, among others.[9]

Similar to Phase 1-A, the Advisory Committee on Immunization Practices ("ACIP") has proposed taking a tiered approach within Phase 1-B.[10] This proposal recommends that adults 75 and older as well as non-healthcare "frontline essential workers," such as first responders, teachers, grocery store workers, food and agriculture workers, and manufacturing employees, among others, should take priority in Phase 1-B. This would then push the remaining essential non-frontline workers, such as those who work in construction, transportation, food services, IT, finance, the legal industry, and the media industry, among others, to Phase 1-C, along with adults age 65 or older (but under age 75) and adults with high-risk medical conditions. "Frontline essential workers," for purposes of this proposal, has only been defined as including workers "in sectors essential to the functioning of society and are at substantially higher risk of exposure to SARS-CoV-2."[11] So far, California seems to largely mirror the ACIP's approach (which is accepted by the CDC), as California's Community Vaccine Advisory Committee has agreed that non-healthcare frontline workers should be prioritized in Phase 1-B. Moreover, California's approach separates Phase 1-B into two tiers: the first tier includes workers in education, childcare, emergency services, and food and agriculture industries and individuals age 75 and older, while the second tier within Phase 1-B includes workers in transportation and logistics, the industrial, commercial, and residential facilities and services industry, and critical manufacturing, along with individuals 65 to 74 years of age.[12]

C. Phase 1-C: Non-Frontline Essential Workers, Adults Age 50 and Older, & High Risk Adults

This group includes adults 50 to 64 years of age, individuals with preexisting conditions that put them at high risk of getting severely ill from COVID-19, and the non-frontline essential workers excluded from Phase 1-B in industries such as water and wastewater, defense, energy, chemical and hazardous materials, financial services, communications and IT, government operations and community-based essential functions.[13]

D. Remaining Phases

Phases 2 and 3 would include the general public and nonessential workers, although these categories are not fully fleshed out yet, and depend on a substantial increase in vaccine supply.

Overall, it is important to keep in mind that this is an evolving situation. On the state-wide level, there is no definitive guidance as to what exactly separates these frontline essential workers in the first tier of Phase 1-B from the other essential workers in California for purposes of the vaccine rollout. Moreover, the California Department of Public Health has not yet determined the details for allocation in Phase 1-B, as it has not yet released the allocation guidelines that tend to provide clarity to this rapidly changing process. Even if this tiered approach for Phase 1-B is carried out, essential workers will all be covered under Phase 1, whether in groups 1-A, 1-B, or 1-C, thus putting them ahead of the general population and nonessential workers in terms of eventually receiving the vaccine.[14]

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[1] The job categories required by the statute are:

1. Executive or senior level officials and managers.
2. First or mid-level officials and managers.
3. Professionals.
4. Technicians.
5. Sales workers.
6. Administrative support workers.
7. Craft workers.
8. Operatives.
9. Laborers and helpers.
10. Service workers.

[2] The pay bands are those used by the United States Bureau of Labor Statistics in the Occupational Employment Statistics survey, and include the following categories: (1) $19,239 and under; (2) $19,240 - $24,439; (3) $24,440 - $30,679; (4) $30,680 - $38,999; (5) $39,000 - $49,919; (6) $49,920 - $62,919; (7) $62,920 - $80,079; (8) $80,080 - $101,919; (9) $101,920 - $128,959; (10) $128,960 - $163,799; (11) $163,800 - $207,999; and (12) $208,000 and over.

[3] California Equal Pay Act, California Labor Code § 1197.5 (a): "An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates: … (D) A bona fide factor other than sex, such as education, training, or experience."

[4] Some of the industry workers specifically exempted by AB 5 include physicians and other medical industry professionals, lawyers, accountants, engineers, architects, securities brokers, real estate agents, as well as certain professional service providers meeting six requirements (including workers in areas such as human resources and marketing, among others), and business-to-business contracting relationships that also satisfy certain conditions.

[5] Employer Guidance on AB 685: Definitions, Cal. Dep't of Public Health (last updated Oct. 16, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Employer-Guidance-on-AB-685-Definitions.aspx.

[6] Employer Guidance on AB 685: Definitions, Cal. Dep't of Public Health (last updated Oct. 16, 2020), available at https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Employer-Guidance-on-AB-685-Definitions.aspx.

[7] Companies can find their codes here: https://www.naics.com/search/.

[8] State of California COVID-19 Vaccination Plan: Interim Draft, Cal. Dep't of Pub. Health (Oct. 16, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/COVID-19-Vaccination-Plan-California-Interim-Draft_V1.0.pdf.

[9] How CDC is Making COVID-19 Vaccine Recommendations, Ctrs. for Disease Control and Prevention (last updated Dec. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations-process.html; *see also* Advisory Memorandum On Ensuring Essential Critical Infrastructure Workers' Ability to Work During the COVID-19 Response, Cybersecurity & Infrastructure Sec. Agency (December 16, 2020), here.

[10] The Advisory Committee on Immunization Practices' Updated Interim Recommendation for Allocation of COVID-19 Vaccine – United States, December 2020, Ctrs. for Disease Control and Prevention (last updated December 22, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm695152e2.htm.

[11] ACIP COVID-19 Vaccines Work Group: Phased Allocation of COVID-19 Vaccines, Advisory Comm. on Immunization Practices (Dec. 20, 2020),

https://www.cdc.gov/vaccines/acip/meetings/downloads/slides-2020-12/slides-12-20/02-COVID-Dooling.pdf.

[12] Vaccines, Cal. ALL State Gov't Website (Jan. 8, 2021), https://covid19.ca.gov/vaccines/#Vaccine-allocation-and-administration.

[13] *Id*.

[14] *See* Employer Playbook for the COVID "Vaccine Wars," Gibson, Dunn & Crutcher LLP, https://www.gibsondunn.com/wp-content/uploads/2020/12/an-employer-playbook-for-the-covid-vaccine-wars.pdf.

http://www.gibsondunn.com/

Gibson Dunn lawyers are available to assist in addressing any questions you may have about these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or the authors:

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