

## 2020 Midyear Employment Law Update

by James W. Ward, J.D.; Employment Law Subject Matter Expert/  
Legal Writer and Editor, CalChamber

In California, there's never a shortage of new employment laws, regulations, local ordinances and court cases to keep employers on their toes — and 2020 has been a particularly challenging year due to the COVID-19 pandemic. Along with the numerous other challenges that came with largely shutting down the state, employers have to decipher and comply with a host of new pandemic-related [federal, state and local laws and orders](#).

Even though COVID-19 continues to drive substantial legal changes this year, employers also should be aware of some other *non-COVID* developments, including new discrimination and safety regulations, privacy enforcement, local minimum wage updates, and recent court decisions.

Following is a summary of some of the new laws and cases, largely unrelated to COVID-19, that employers should keep an eye on this summer.

**Online applications that screen out applicants based on their schedule are unlawful unless job related and consistent with business necessity.**

### Fair Employment and Housing Act Regulations

New [Fair Employment and Housing Act \(FEHA\) regulations](#), effective on July 1, 2020, clarify what pre-employment practices (like job applications, pre-employment inquiries and job advertisements) constitute age- and religious creed-based employment discrimination.

Given concerns that certain pre-employment inquiries and job applications may be used to screen out applicants based on protected characteristics, the new regulations reiterate that employers can't request scheduling information to ascertain an applicant's religious creed, disability or medical condition. Any scheduling inquiry, either in an interview or on a job application, must clearly communicate that the applicant doesn't need to disclose any scheduling restrictions based on legally protected grounds; for example, employers must say something like, "Other than time off for reasons related to your religion, a disability or a medical condition, are there any days or times when you are unavailable to work?"

The regulations state that online applications that screen out applicants based on their schedule may have a disparate impact on applicants based on religious creed, disability or medical condition. Such a practice is unlawful unless job related and consistent with business necessity. An employer's online application technology must include a mechanism for the applicant to request an accommodation.

Regarding age discrimination, the new regulations clarify that employers cannot ask an applicant when they graduated or their date of birth. They also specifically prohibit online applications that:

- Require applicants to enter their age in order to access or complete an application;
- Use drop-down menus that contain age-based cut-off dates; or
- Utilize automated section criteria or algorithms that effectively screen out applicants age 40 and older.

The new FEHA regulations also substantially limit the language that can be used in recruiting and advertising, prohibiting anything that a "reasonable person would interpret as deterring or limiting employment of people age 40 and over" unless age is a bona fide occupational qualification for the position. For example, employers can't include maximum experience limitations and may not use terms like "young," "recent college graduate" or "digital native," which implies the person grew up using technology.

## Employers cannot ask applicants when they graduated or their date of birth.

Finally, the revised regulations create a presumption of age discrimination for practices that have an adverse impact on applicants and employees age 40 or over, even if the practice or policy looks neutral and doesn't specifically or expressly target older workers. To overcome this, employers must show that the practice is "job related and consistent with business necessity." This burden shifting makes it particularly important for employers to examine their practices and policies that might have a disparate impact on workers age 40 and older, and to ensure their practices are compliant with FEHA regulations.

As California continues to reopen from the COVID-19 shutdown and recruiting and hiring activities increase, employers should review their pre-employment practices, advertisements and applications, including the use of any online applications, to ensure they comply with the new regulations.

## Lighting Regulation for Outdoor Agriculture

On July 1, 2020, a [new lighting regulation](#) from the California Division of Occupational Safety and Health (Cal/OSHA) goes into effect. Pursuant to the new regulation, when outdoor agricultural work takes place between sunset and sunrise, employers must provide specified lighting in different work areas. The new regulation contains a table of different lighting intensity and height requirements for different areas and tasks.

Many employers are already providing sufficient lighting, but some may need to secure additional lighting, generators, etc. Agricultural employers operating between sunset and sunrise, which includes a large number of crops (such as wine grapes, tomatoes, onions, garlic, melons, etc.) should review the [new regulation](#) on Cal/OSHA's website to ensure compliance.

## Wildfire Smoke Regulation

Cal/OSHA's emergency [wildfire smoke regulation](#) has been extended and will remain in effect until September 22, 2020. The Occupational Safety and Health Standards Board is working toward a permanent regulation, which will likely have very similar language and requirements. Depending on when the permanent regulation is approved, it could go into effect this fall. Employers can review the full proposed text of the [permanent regulation](#) on Cal/OSHA's website.

As a reminder, the regulation requires employers to take certain actions to protect employees from wildfire smoke when the Air Quality Index reaches certain levels, including providing respirators such as N95s under certain circumstances. This will be challenging as N95s are in high demand for [pandemic-related reasons](#). As we get further into wildfire season, employers should review the regulation's requirements, which are detailed in this CalChamber [white paper](#).

**As of July 1, 2020, the ABC Test applies for workers' compensation purposes.**

## Workers' Compensation

Last year, the biggest development in employment law was [Assembly Bill 5](#) (AB 5), the independent contractor bill that codified the "ABC Test" outlined by the California Supreme Court's 2018 *Dynamex* decision and extended it to the Labor and Unemployment Insurance codes. While the bulk of the law went into effect January 1, 2020, one provision was delayed until July 1, 2020; on this date, the ABC Test will apply for purposes of workers' compensation.

There are additional workers' compensation developments for employers to keep an eye on, including bills similar to Governor Gavin Newsom's [Executive Order](#) that temporarily expanded workers' compensation benefits by creating a rebuttable presumption that workers who test positive or are diagnosed with COVID-19 contracted the infection in the scope of employment.

While the order expired on July 5, 2020, the California Legislature has taken up the issue and introduced AB 664 and AB 196, both of which are currently on [CalChamber's Job Killer list](#). These bills would establish conclusive (not rebuttable) presumptions that certain workers who contract COVID-19 did so in the scope of employment, automatically making them eligible for workers' compensation benefits. In the case of AB 664, eligible employees would also be entitled to non-workers' compensation benefits, including reimbursement for emergency equipment or personal protective equipment (PPE), reasonable living expenses and temporary housing costs.

Both bills would substantially increase workers' compensation costs, the burden of which will ultimately fall on California employers should the bills become law.

## CCPA Enforcement Begins July 1

The [California Consumer Privacy Act](#) (CCPA) went into effect on January 1, 2020, but with delayed enforcement until July 1, 2020.

The CCPA significantly changed California's consumer data collection rules to give consumers more control over how businesses use their personal information. Though employers are exempt from much of the law as it pertains to their employees' personal information (employment information), employers still must comply with the requirement to disclose, at or before the time of collection, the categories of personal information collected about an applicant or employee, as well as the purposes for which the information will be used.

Many employers are doing their best to comply with the new law, but a big problem they face is uncertainty about *how* to comply. The Attorney General has been working on CCPA [regulations](#) since October 2019 and they have yet to be finalized. The Attorney General sent the latest draft regulations to the Office of Administrative Law for review on June 1, which means, if approved, the new regulations could take effect on October 1, 2020. Despite the lack of final regulations, the Attorney General indicated enforcement would not be delayed and is still set to begin on July 1, 2020.

Employers should continue compliance efforts and remember that "personal information" as defined by the CCPA is extremely broad and may have implications for certain information [collected during the COVID-19 pandemic](#).

**On July 1, 2020, the maximum duration of Paid Family Leave benefits an individual can receive increased from six to eight weeks.**

## Expansion of Paid Family Leave

Also beginning July 1, 2020, the maximum duration of Paid Family Leave (PFL) benefits an individual can receive from California's State Disability Insurance program will be increased from six to eight weeks, per SB 83. The PFL program provides partial wage replacement benefits to employees who are absent from work to care for a seriously ill family member or to bond with a minor child within one year of birth or placement of the child via foster care or adoption. To align with the state, San Francisco also expanded its Paid Parental Leave Ordinance to require up to eight weeks of supplemental compensation.

## Minimum Wage Updates

Along with statewide laws and regulations, July also brings several *local* minimum wage increases. Here's a list of localities with minimum wage increases effective July 1, 2020.

- **Alameda:** \$15/hour.
- **Berkeley:** \$16.07/hour.

- **Emeryville:** \$16.84/hour;
- **Fremont:** \$15/hour for employers with 26 or more employees; \$13.50/hour for employers with 25 or fewer employees.
- **Los Angeles City:** \$15/hour for employers with 26 or more employees; \$14.25/hour for employers with 25 or fewer employees.
- **Los Angeles County (unincorporated areas):** \$15/hour for employers with 26 or more employees; \$14.25/hour for employers with 25 or fewer employees.
- **Malibu:** \$15/hour for employers with 26 or more employees; \$14.25/hour for employers with 25 or fewer employees.
- **Milpitas:** \$15.40/hour.
- **Novato:** \$15/hour for employers with 100 or more employees; \$14/hour for employers with 26-99 employees; \$13/hour for employers with 25 or fewer employees.
- **Pasadena:** \$15/hour for employers with 26 or more employees; \$14.25/hour for employers with 25 or fewer employees.
- **San Francisco:** \$16.07/hour.
- **San Leandro:** \$15/hour.
- **Santa Monica:** \$15/hour for employers with 26 or more employees; \$14.25/hour for employers with 25 or fewer employees.
- **(NEW) Santa Rosa:** \$15/hour for employers with 26 or more employees; \$14/hour for employers with 25 or fewer employees.

Employers should review the hourly wage rates for applicable local jurisdictions, paying particular attention to their remote workers' locations, as remote workers could be subject to local minimum wage and other ordinances that may not apply at the workers' normal worksite. Additionally, in light of COVID-19, several local governments have passed additional ordinances addressing paid sick leave and other issues.

**Any employment decision based, at least in part, on a person's sexual orientation or gender identity constitutes unlawful discrimination.**

## Court Decisions

On June 15, 2020, the U.S. Supreme Court ruled that any employment decision based, at least in part, on a person's sexual orientation or gender identity constitutes unlawful discrimination under Title VII of the Civil Rights Act (*Bostock v. Clayton County, Georgia*, No. 17-1618, (U.S., Jun. 15, 2020)).

Title VII prohibits discrimination in employment decisions based upon an individual's race, color, religion, sex and national origin. The Supreme Court took up three factually similar cases to examine whether the definition of sex in Title VII included protections against workplace

discrimination on the basis of sexual orientation and gender identity; the court focused exclusively on Title VII's actual words, choosing not to include any legislative history in its opinion, and settled on a definition of sex to mean a person's "status as either male or female [as] determined by reproductive biology." The Supreme Court also looked further at what Title VII prohibited, finding that the plain language of Title VII prohibited discriminatory employment actions based upon, or by reason of, an employee's sex. Further, even if the employer is only motivated in part by the employee's sex, it has violated Title VII because whether there also are other non-discriminatory reasons for the negative employment action is irrelevant.

After reviewing the facts of each case and the language of Title VII's prohibition on sex discrimination, the Supreme Court determined that each of these employment actions were based, at least in part, on the employee's sex.

## Time employees spend undergoing security screenings after clocking out counts as "hours worked" under California law.

In different case, the Ninth Circuit Court of Appeals held that a background report disclosure to a job applicant required by the Fair Credit Reporting Act may be provided to a job applicant at the same time as other hiring-related materials as long as the disclosure itself is "standalone," i.e., a standalone document that consists solely of the disclosure.

Just prior to the COVID-19 pandemic, the California Supreme Court issued a long-awaited opinion holding that the time employees spend undergoing [security screenings](#) after clocking out at the end of their shifts counts as "hours worked" under California law, and employees must be compensated for such time.

The California Supreme Court also delivered two companion opinions ([Ward v. United Airlines](#) and [Oman v. Delta Air Lines](#)) answering questions certified from the Ninth Circuit Court of Appeals regarding applicability of certain Labor Code provisions to pilots and flight attendants who do some work in California but also across the country. Among the major issues, the court concluded that Labor Code sections 204 and 226, respectively governing the timing of payments and the contents of wage statements, apply to employees whose principle place of work is in California, which is satisfied when either:

- The employee works a majority of time in California; or
- For interstate transportation workers whose work is not primarily performed in any one state, the employee's base of operations is in California.

The Private Attorneys Generals Act (PAGA) also continues to be a big issue for employers. The California Supreme Court recently [issued a decision](#) holding that an employee who brought both PAGA and individual claims against an employer, then settled and dismissed their individual claims, doesn't lose standing to pursue the PAGA claim. In other words, the employee could still proceed in court on the PAGA claim despite having no *individual* claim or "injury" post-settlement.

## On the Horizon

Because the California Legislature recently got back to work, employers should expect more frequent updates on pending legislation as it works its way through the legislative process. Of particular importance for employers are the workers' compensation bills described above, as well as legislation that would expand state leaves of absence laws.

For example, Assembly Bill 3216 in its current form expands the qualifying reasons to take California Family Rights Act (CFRA) leave, including those related to states of emergency, such as school and childcare closures; being subject to quarantine or isolation order; and being advised to self-quarantine. AB 3216 also provides for 56 hours or seven days of paid sick leave for public health emergencies. And SB 1383 proposes to expand CFRA to employers with five or more employees, a dramatic change from the current 50-employee threshold that CFRA shares with its federal counterpart, the Family and Medical Leave Act.

Additional proposed bills would provide other leave expansions, such as 10 days of protected bereavement leave and unlimited time off for school or daycare closures.

These clearly would be extremely burdensome to employers, especially at this time, while they're facing substantial difficulties due to the pandemic.

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## CalChamber Can Help ...

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 California City and County Labor Law Posters

 Safe Distancing Posters, Floor Decals and Face Mask Posters

 *Local Minimum Wage, Paid Sick Leave and Other General Employment Ordinances* chart

To learn more about CalChamber resources, please call our Customer Service Representatives at (800) 331-8877, Monday through Thursday from 8 a.m. to 5 p.m. PT, and on Friday from 8 a.m. to 4 p.m. PT.

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