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New Year, Same Pandemic

A Primer on COVID-19 Issues in 2021

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Agenda

- CA: Emergency Temporary Standard – Maria Brunel
- AB 685 – Maria Brunel
- OSHA/NM: Department of Labor and Environment Department – Larry Vigil
- Employment Issues and COVID-19 Vaccinations – Steven Meilleur

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Cal/OSHA Emergency Temp Standard – What Employers Need to Know

- Cal/OSHA GISO 3205 COVID-19 Prevention
- Went into effect on 11-30-20
- Applies to most California employers except:
  - one (1) employee that does not have contact with other people;
  - employees working from home; and
  - those covered by California's Aerosol Transmissible Disease (ATD) standards including employees of various health facilities, emergency responders, and other care organizations

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Cal/OSHA Emergency Temp Standard – What Employers Need to Know

- Requirements for employers covered by the COVID-19 Prevention Standard
  - Establish, implement, and maintain an effective written COVID-19 Prevention Program that includes:
    - Identifying and evaluating employee exposures to COVID-19 health hazards.
    - Implementing effective policies and procedures to correct unsafe and unhealthy conditions (such as safe physical distancing, modifying the workplace and staggering work schedules).
    - Providing and ensuring workers wear face coverings to prevent exposure in the workplace.
    - Provide effective training and instruction to employees on how COVID-19 is spread, infection prevention techniques, and information regarding COVID-19-related benefits that affected employees may be entitled to under applicable federal, state, or local laws.

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Cal/OSHA Emergency Temp Standard – What Employers Need to Know

When there are multiple COVID-19 infections and COVID-19 outbreaks

- Employers must follow the requirements for testing and notifying public health departments of workplace outbreaks (three or more cases in a workplace in a 14-day period) and major outbreaks (20 or more cases within a 30-day period).
- COVID-19 testing for employees who might have been exposed
  - Requires employers to offer COVID-19 testing at no cost to their employees during their working hours who had potential COVID-19 exposure in the workplace and provide them with the information on benefits.
- Notification requirements to the local health department
  - A new requirement that obligates employers to contact the local health department immediately but no longer than 48 hours after learning of three or more COVID-19 cases to obtain guidance on preventing the further spread of COVID-19 within their workplace.

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Cal/OSHA Emergency Temp Standard – What Employers Need to Know

Recordkeeping and reporting COVID-19 cases

- Employers must maintain a record of and track all COVID-19 cases, while ensuring medical information remains confidential.
- These records must be made available to employees, authorized employee representatives, or as otherwise required by law, with personal identifying information removed.
- When a COVID-19-related serious illness (e.g., COVID-19 illness requiring inpatient hospitalization) or death occurs, the employer must report this immediately to the nearest Cal/OSHA enforcement district office.

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COVID-19 Prevention Program (CPP)

- The written elements of the COVID-19 prevention program include:
  - Authority and Responsibility
  - Identification and Evaluation
  - Correction of COVID-19 Hazards
  - Control of COVID-19 Hazards
  - Investigating and Responding to COVID-19 Cases
  - System for Communicating
  - Training and Instruction
  - Exclusion of COVID-19 Cases
  - Reporting, Recordkeeping, and Access
  - Return to Work Criteria

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Cal/OSHA COVID-19 Guidance and Resources

- Cal/OSHA COVID-19 Guidance and Resources (necessary information on all Cal/OSHA guidelines, education materials, model programs, etc.)
  - https://www.dir.ca.gov/dosh/coronavirus/
- COVID-19 Emergency Temporary Standards (ETS, Fact Sheets, Model Written Programs, etc.)
  - https://www.dir.ca.gov/dosh/coronavirus/ETS.html
- Guidance by Industry (Statewide industry guidance on COVID-19)
  - https://www.dir.ca.gov/dosh/coronavirus/Guidance-by-Industry.html
- Frequently Asked Questions (FAQ's on reporting and recording COVID-19 illness, new laws and more)
  - https://www.dir.ca.gov/dosh/coronavirus/FAQs.html
- Education Materials and Other Resources (videos and fillable written safety plans)
  - https://www.dir.ca.gov/dosh/coronavirus/EducationMaterials.html
- Webinars on COVID-19 (Free and hosted by Cal/OSHA Consultation services)
  - https://www.dir.ca.gov/dosh/coronavirus/Webinars.html
- Cal/OSHA Training Academy
  - https://trainingacademy.dir.ca.gov/page/on-demand-training-covid19

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AB 685

Effective January 1, 2021 through December 31, 2023

- Employers are required to notify all employees at a worksite of potential exposures, COVID-19-related benefits and protections, and disinfection and safety measures that will be taken at the worksite in response to the potential exposure – Same as ETS
- Notify employers to notify all employees who were at a worksite of all potential exposures to COVID-19 and notify the local public health agency of outbreaks – Same as ETS
- Cal/OSHA can issue an Order Prohibiting Use (OPU) to shut down an entire worksite or a specific worksite area that exposes employees to an imminent hazard related to COVID-19
- Cal/OSHA can issue citations for serious violations related to COVID-19 without giving employers 15-day notice before issuance
- Additional Information:
  - https://www.dir.ca.gov/dosh/coronavirus/AB6852020FAQs.html

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AB 685 – What Employers Need to Do

- Develop a "COVID-19 Exposure Notice Letter" to be sent to employees, employee's representative, employers of subcontracted employees, and independent contractors *(must be sent within one business day of being informed of potential exposure)*
  - For Employees include:
    - Exposure notice
    - Information regarding COVID-19-related benefits and leave options
    - Disinfection plan and CPP
      - May be sent in a manner normally used to communicate employment related information
  - For Employers of subcontracted employees and independent contractors
    - Exposure notice
    - Notification of disinfection plan in CPP
- Notify the public health department if you have a potential or confirmed COVID-19 exposure *(within 48 hours)*

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OSHA Coronavirus Update

- OSHA Inspections
  - $3,849,222 in Coronavirus Violation Penalties
  - Violations Include Failures to:
    - Implement Written Respiratory Protection Program
    - Provide Medical Evaluation, Fit Test, Training
    - Report an Injury, Illness or Fatality
    - Record an Injury, Illness on OSHA Recordkeeping Forms
    - Comply with the General Duty Clause
  - Santa Fe, NM auto parts store recently agreed to pay fines in the amount of $79,200

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NM OSHA Coronavirus Update

- NM Environment Dept (NM OSHA) Rapid Response
  - Emergency Amendment Refiled 12/3/20
  - Must report positive cases within 4 hours
  - State Agencies initiate “Rapid Response” to provide guidance/support to prevent spread beyond infected employee
- Surveillance Testing and Contact Tracing Plan Exemption
  - All Employees Tested Every 2 Weeks
  - Contact Tracing Requirements
  - Additional Terms And Conditions Apply

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NM OSHA Coronavirus Update

- Notify NMED- NM OSHA
  - Online https://nmgov.force.com/rapidresponse/s/
  - Email NMENV-OSHA@state.nm.us
  - Phone 505-476-8700
  - Fax 505-476-8734
- Initial Notification Must Include:
  - Establishment name, address
  - Employer representative name and contact information (phone,email)
  - Number of people employed at location
  - Number of employees who tested positive
  - Date each employee was tested
  - Last date each positive employee was in the establishment
  - Date each positive employee began self-quarantine
  - Employee names and other personally identifiable information **should not** be provided

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Mandatory COVID-19 Vaccination in Employment

- The employer's **critical considerations** will include:
  1. unless legally prohibited, will the employer require mandatory vaccines for all employees;
  2. with a mandatory vaccine policy, is the employer's internal HR Department prepared for the roll-out; and
  3. what will be the consequence for employees who refuse the offered vaccine.
- At present, no law, regulation, or other guidance directly addresses whether employers may require their employees to get a COVID-19 vaccination.
- However, the **EEOC and OSHA** have interpreted mandatory flu vaccinations previously as a permissible mandate by employers – with certain conditions and restrictions:
  - Under the **Americans with Disabilities Act** (the "ADA"), an employer may require medical testing and other invasive procedures **if job related and consistent with business necessity.**
  - The **EEOC** will likely require that employers comply with other legal requirements with respect to any mandated vaccine, including the ADA and Title VII of the Civil Rights Act of 1964 ("Title VII").

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Mandatory COVID-19 Vaccination in Employment

- **OSHA guidance allows employers to mandate vaccinations for employees**, but provides an exception for employees who refuse a flu vaccine because of a "reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine) . . . ."
- The **EEOC** has confirmed that under the ADA an employee with **underlying medical conditions** should be entitled to an exemption from mandatory vaccination for valid and supported medical reasons.
- **Title VII** also provides employees with an exception to a mandatory vaccination based upon **sincerely held religious beliefs**.
  - When these objections are raised, the employer should engage in a discussion (the "Interactive Process") with the employee
- Employee may express a concern that a vaccine may not have met all appropriate medical testing standards or raise a general objection to vaccinations (an "anti-vaxxer").
  - Provided that a vaccine has met the approval of the FDA, the employer should have a reasonable basis to rely on the medically determined safety of an approved vaccine.

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Mandatory COVID-19 Vaccination in Employment

- Until there is additional guidance, it appears that employers may require employees to receive vaccinations when available, subject to the restrictions identified by the EEOC and OSHA.
- If an employer intends to make COVID-19 vaccination of employees a requirement, **update policies** to include the recognized EEOC protective provisions in its policy for those who have medical or religious objections to the vaccination. Amended language should:
  - Confirm the obligation of each employee to use all reasonable steps to keep other employees safe. This may currently include Center for Disease Control (the "CDC") protocols for hand washing and certain safe distancing requirements.
  - Continue protocols, even with a fully inoculated workforce, until medical experts provide otherwise, these protocols should be maintained.
  - State that the employer requires vaccinations to further the safety of its employees.
  - Do not guarantee vaccine effectiveness, but only confirm the medically provided information regarding the vaccine.

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Disclaimer

This briefing has been prepared by Poms & Associates Insurance Brokers, LLC to provide information on recent developments of interest to our clients. It is not intended to offer legal or regulatory advice for a particular situation. Events are rapidly developing during this national state of emergency, and best practices are constantly changing. We recommend that individuals and entities carefully monitor and follow health directives of the WHO and CDC, along with federal, state and local authorities.

Please visit our website at www.pomsassoc.com or call us at 818-449-9300

California Legislative Update: New Employment-Related Laws for 2020-2021

October 6, 2020

This is a brief summary of some of the more significant developments applicable to employers operating in California. These new laws will take effect on the date indicated, leaving employers with little time to prepare. Links to the legislation are included to get more details.

COVID-19 IN THE WORKPLACE			
LAW	**MAIN TOPIC**	**SUMMARY**	**EFFECTIVE DATE**
AB 685	**New Mandated COVID-19 Reporting - Notification to Employees**	Allows the state to track COVID-19 cases in the workplace more closely. Expands Cal/OSHA's authority to issue Stop Work Orders for workplaces that pose a risk of an "imminent hazard" relating to COVID-19. Requires notice in the event of a COVID-19 exposure in the workplace, including providing written notice to "all employees" who were at the worksite within the infectious period who may have been exposed to the virus. AB 685 requires employers, within one business day of receiving notice of potential exposure to COVID-19 in the workplace, to: (1) provide written notice to all employees, the employers of subcontracted employees, and exclusive representatives who were on the premises at the same worksite, (2) provide all employees who may have been exposed and their exclusive representative with information regarding COVID-19-related benefits, including, but not limited to, workers' compensation, COVID-19-related leave, company sick leave, state-mandated leave, or supplemental sick leave, and (3) notify all employees, the employers of subcontracted employees, and the exclusive representative on the disinfection and safety plan the employer intends to implement.	January 1, 2021
AB 1867	**Supplemental COVID Sick Leave**	Requires up to 80 hours of COVID-related paid leave for workers at "hiring entities" with more than 500 workers. Applies to contractors of "food sector" businesses. Includes requirements for recordkeeping and reporting available leaves on wage statements.	September 19, 2020 through December 31, 2020 (unless extended due to FFCRA being extended)

California Legislative Update: New Employment-Related Laws for 2020-2021

COVID-19 IN THE WORKPLACE			
LAW	**MAIN TOPIC**	**SUMMARY**	**EFFECTIVE DATE**
AB 1867	**Food Sector Workers – Handwashing**	A food employee working in any food facility shall be permitted to wash their hands every 30 minutes and additionally as needed.	September 19, 2020
SB 1159	**Workers' Compensation – COVID-19 Presumption**	Creates a "rebuttable presumption" that an employee contracted COVID-19 at work if they have tested positive or is diagnosed with COVID-19 within 14 days after a day that the employee worked at the employee's place of employment. The bill does set forth that the "place of employment" does not include an employee's residence if they are working at home. The presumption is of workers' compensation coverage for employee illness or death resulting from COVID-19 on or after July 6, 2020 through January 1, 2023. Claims must be rejected within 30 or 45 days (not the usual 90 days) or the injury is presumed compensable. It also requires reporting to workers' compensation claims administrators and has stiff fines for non-compliance.	September 17, 2020
SB 1159	**Workers' Compensation Presumption – Covered Workers**	SB 1159 sets forth specific types of workers that the law covers (such as active firefighting members, Department of Forestry and Fire Protection, peace officers, and fire and rescue service coordinators). For other employees, the law applies if there is an "outbreak at the employee's specific place of employment." An outbreak exists when one of the following occurs within a fourteen (14) day period: • For employers with 100 or fewer employees at a specific place of employment if 4 employees test positive for COVID-19 • For employers with more than 100 employees at a specific place of employment if 4 percent of the employees who reported to the specific place of employment tested positive for COVID-19 • If the specific place of employment is ordered closed by a local health department, State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent.	

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California Legislative Update: New Employment-Related Laws for 2020-2021

COVID-19 IN THE WORKPLACE			
LAW	**MAIN TOPIC**	**SUMMARY**	**EFFECTIVE DATE**
AB 2537	**Acute Care Hospital PPE Supplies**	Acute care hospitals must supply PPE to employees who provide direct patient care and ensure that employees use PPE. Beginning April 1, 2021, acute care hospitals must maintain a three-month supply of PPE and provide an inventory of PPE to the Division of Occupational Safety and Health upon request.	January 1, 2021 and April 1, 2021
AB 2043	**OSHA: COVID-19 Awareness.**	Requires Cal-OSHA to disseminate information on best practices for COVID-19 infection prevention in English and Spanish, together with other awareness and prevention measures, targeted at and to be easily understood by agricultural employees from various ethnic and cultural backgrounds.	September 28, 2020

INDEPENDENT CONTRACTORS			
LAW	**MAIN TOPIC**	**SUMMARY**	**EFFECTIVE DATE**
AB 2257	**ABC Test, Additional Exceptions**	Maintains the ABC test for independent contractor status but adds 26 new exceptions. (including proofers and record directors, persons who provide underwriting inspection, home inspectors, and individuals who contract for the purpose of providing services at a single-engagement event [*e.g. musicians*]), and clarifies existing industry-specific exemptions Broadens the "referral agency" exception. Somewhat clarifies the "business to business" exception - exempts bona fide business-to-business contracting relationships from the law's application.	September 4, 2020
AB 323	**Newspaper Carriers – One-Year Exception**	Extends for one year the exception from the ABC test for newspaper carriers.	January 1, 2021

California Legislative Update: New Employment-Related Laws for 2020-2021

LEAVES OF ABSENCE			
LAW	**MAIN TOPIC**	**SUMMARY**	**EFFECTIVE DATE**
AB 1867	**Supplemental Paid Sick Leave (COVID)**	Requires up to 80 hours of COVID-related paid leave for workers at "hiring entities" with more than 500 workers nationally (and certain health care providers and emergency responders). This bill essentially covers all workers in California who may not be entitled to supplemental paid sick leave covered by the Emergency Paid Sick Leave Act established by the federal Families First Coronavirus Response Act ("FFCRA"). Applies to contractors of "food sector" businesses. Includes requirements for recordkeeping and reporting available leaves on wage statements.	September 4, 2020
AB 1867	**Small Employer CFRA mediation**	Coinciding with expansion of California Family Rights Act (CFRA) to small employers (SB 1383), creates Department of Fair Employment & Housing (DFEH) "small employer family leave mediation pilot program" for employers with between 5 and 19 employees.	September 4, 2020
AB 2017	**Kin Care Leave**	Provides that the designation of sick leave taken for kin care shall be made at the sole discretion of the employee.	January 1, 2021
AB 2399	**Family Temporary Disability Insurance: Military Members & Care Recipients.**	Expands Family Temporary Disability Insurance (FTDI) program to include absences for "qualifying exigency" due to military service of family member. The employee's "qualifying exigency" covers active duty or call to covered active duty for members of the military.	January 1, 2021
AB 2992	**Victim of Crime Leave –**	Expands leave for victims of domestic violence, sexual assault or stalking to include leave for the victim of any crime that caused physical injury or mental injury with a threat of physical injury. Expands the prohibition on discrimination or retaliation against employees for taking time off who are victims of domestic violence, sexual assault, or stalking, to include other crimes or	January 1, 2021

California Legislative Update: New Employment-Related Laws for 2020-2021

LEAVES OF ABSENCE			
LAW	**MAIN TOPIC**	**SUMMARY**	**EFFECTIVE DATE**
	Protected Time Off	abuses "that caused physical injury or that caused mental injury and a threat of physical injury" and "a person whose immediate family member is deceased as the direct result of the crime …" "and regardless of whether any person is arrested for, prosecuted for, or convicted of, committing the crime."	
SB 1383	**CFRA expansion**	Expands categories of family members covered by CFRA leaves. SB 1383 expands the California Family Rights Act (CFRA) to require businesses with as few as five employees (eliminating the geographical restrictions) to provide 12 weeks of mandatory family leave per year. The bill also expands family care and medical leave to include leave (1) to care for grandparents, grandchildren, siblings, domestic partners with a serious health condition (in addition to existing leave to care for a parent or spouse), and (2) because of a qualifying exigency related to covered active duty or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the US Armed forces. SB 1383 also expands the definition of child to include the child of a domestic partner. Finally, SB 1383 eliminates the previous carve out that existed for certain highly paid or key employees.	January 1, 2021

WAGE AND HOUR			
LAW	**MAIN TOPIC**	**SUMMARY**	**EFFECTIVE DATE**
AB 1512	**Security Guards – Rest Breaks**	Allows employer to require that security guards covered by collective bargaining agreements, paid at least one dollar more than minimum wage, remain on premises and on call during rest breaks, to remain on call, and to carry and monitor a communication device. The security officer must be permitted to restart a rest period anew as soon as practicable if the rest period is interrupted.	January 1, 2021

WAGE AND HOUR			
LAW	**MAIN TOPIC**	**SUMMARY**	**EFFECTIVE DATE**
AB 2479	**Certain Petroleum Workers: Rest Periods.**	Extends, past January 1, 2021 and until January 1, 2026, the exemption in Labor Code section 226.75 that applies to rest periods for specified employees who hold safety-sensitive positions at petroleum facilities, to the extent they must carry and monitor communication devices and respond to emergencies, or remain on the employer's premises to monitor the premises and respond to emergencies.	January 1, 2021 *(Extension of current rule)*
AB 1947	**Statute of Limitations for Wage/Hour Discharge – Discrimination Complaints**	Lengthens from six months to one year the statute of limitations for bringing a claim of discharge of discrimination in violation of any law under the jurisdiction of the Labor Commissioner.	January 1, 2021
AB 2231	**Public Works**	Lowers threshold for qualifying as a public works project for purposes of minimum wage.	January 1, 2021
AB 2588	**Health Care Worker Training**	Requires acute care hospital to reimburse certain training expenses of employees and job applicants providing direct patient care.	January 1, 2021
AB 3075	**Wages: Report of Wage and Hour Violations**	Requires that corporations register and file with the state information regarding violations of the wage orders or Labor Code. AB 3075 makes a successor to any judgment debtor liable for any wages, damages, and penalties owed to any of the judgment debtor's former workforce pursuant to a final judgment and sets forth certain criteria to establish successorship. AB 3075 also authorizes local jurisdictions to enforce state labor standards requirements with respect to imposition of minimum penalties for failure to comply with wage-related statutes, as set forth in Labor Code Section 1206.	January 1, 2021

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California Legislative Update: New Employment-Related Laws for 2020-2021

WAGE AND HOUR			
LAW	**MAIN TOPIC**	**SUMMARY**	**EFFECTIVE DATE**
SB 1384	**Representation of Financially Disabled Persons in Arbitration**	Labor Commissioner will represent financially disabled persons when wage claims are referred to arbitration.	January 1, 2021

UNEMPLOYMENT INSURANCE – WORK SHARING			
LAW	**MAIN TOPIC**	**SUMMARY**	**EFFECTIVE DATE**
AB 1731	**Unemployment – Work Sharing plans**	Automates parts of California's work sharing program to create an alternative process for the submission and approval of employer work sharing plan applications.	January 1, 2021

EQUAL EMPLOYMENT OPPORTUNITY			
LAW	**MAIN TOPIC**	**SUMMARY**	**EFFECTIVE DATE**
AB 979	**Corporate Boards of Directors – Diversity**	Requires publicly held corporations headquartered in California to include at least one person from an "underrepresented community" on their boards by the end of 2021, and two to three, depending on the size of the board, by the end of 2022. The bill defines a director from an "underrepresented community" as an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.	January 1, 2021

California Legislative Update: New Employment-Related Laws for 2020-2021

EQUAL EMPLOYMENT OPPORTUNITY			
LAW	**MAIN TOPIC**	**SUMMARY**	**EFFECTIVE DATE**
SB 973	**Pay Data Reporting**	Requires private employers with 100 or more employees that must file the federal annual Employer Information Report (EEO-1) to also submit—on or before March 31, 2021, and each year after—a pay data report to the DFEH that states the number of employees by race, ethnicity, and sex in the following categories: all levels of officials and managers, professionals, technicians, sales workers, administrative support workers, craft workers, operatives, laborers and helpers, and service workers.	January 1, 2021

PRIVACY			
LAW	**MAIN TOPIC**	**SUMMARY**	**EFFECTIVE DATE**
AB 1281	**One-Year Exclusion of HR Data from CCPA**	Grants another one-year extension of the exclusion of certain Human Resources data from coverage under the California Consumer Privacy Act.	January 1, 2021

HUMAN RESOURCES			
LAW	**MAIN TOPIC**	**SUMMARY**	**EFFECTIVE DATE**
AB 1963	**Human Resources and Certain Front-Line Supervisors & Other Adults – Mandated**	Human Resources professionals who work for businesses that employ minors, and employ five (5) or more employees, are mandated child abuse reporters, and are designated to accept complaints. Mandated reporters of sexual abuse now also include front-line supervisors and adults working for businesses with five or more employees, whose duties require direct contact with, and supervision of, minors in the performance of the minors' duties in the workplace.	January 1, 2021

California Legislative Update: New Employment-Related Laws for 2020-2021

HUMAN RESOURCES			
LAW	**MAIN TOPIC**	**SUMMARY**	**EFFECTIVE DATE**
	Child Abuse Reporting	AB 1963 requires those employers to provide mandated reporters with training on identification and reporting of child abuse and neglect.	
AB 3175	**Entertainment Industry: Minors Sexual Harassment Training.**	Requires that a parent or legal guardian accompany age-eligible minors during employer-provided sexual harassment training made available online by the DFEH and certify to the Labor Commissioner that the training has been completed.	September 25, 2020
AB 2143	**Settlement Agreements: No-hire Provisions**	Existing law prohibits no-hire provisions in settlement agreements unless the employer has determined in good faith that the aggrieved person engaged in sexual harassment or sexual assault. AB 2143 revises that law to require that the employee has filed the claim in good faith for the prohibition to apply, and that the employer has documented the determination of sexual assault or sexual harassment before the aggrieved person filed the claim. AB 2143 also expands the exceptions to the no-hire provision prohibition to include a determination that the aggrieved person engaged in any criminal conduct, in addition to the existing sexual harassment and sexual assault exceptions.	January 1, 2021
AB 2855	**Direct Patient Care Employees: Educational Programs and Training Costs**	Requires employers to reimburse employees providing direct patient care or an applicant for direct patient care employment for the costs of any employer-provided or employer-required educational program or training.	January 1, 2021

CA Legislative Update
California Family Rights Act

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On September 17, 2020, Governor Newsom signed legislation that will greatly expand the California Family Rights Act in a manner that will impact both small and large California employers. The CFRA requires covered employers to provide up to 12 weeks of unpaid leave during each 12-month period for purposes of family and medical leave. Senate Bill 1383 (SB 1383) also expands the covered reasons for protected leave and the family members whom employees may take leave to care for under the law.

SB 1383 will go into effect on January 1, 2021 – giving you a short window of time to take action and develop compliance plans. The first of the year will be here before you know it, so the time to take action is now.

Summary of SB 1383 CFRA Expansion

Senate Bill 1383 expands CFRA to do two main things:

1. It expands CFRA coverage to all employers (public and private sector) with five or more employees, down from 50; and
2. It allows CFRA leave to be used to provide care for grandparents, grandchildren, siblings, parents-in-law, domestic partners, adult children, and children of domestic partners.

Therefore, Therefore, any private employers or public agencies with 5 to 49 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.

California employers with as few as five employees must provide family and medical leave rights to their employees under a new law signed by Governor Gavin Newsom The new law significantly expands the state's existing family and medical leave entitlements and goes into effect on January 1, 2021.

Expanded Eligibility to Small Employers

Under the current CFRA (modeled largely after the federal Family and Medical Leave Act), employers were not required to provide family care and medical leave under the California Family Rights Act (CFRA) (Cal. Gov. Code section 12945.2), if the employee seeking leave worked at a worksite with fewer than 50 employees within a 75-mile radius.

Similarly, employers were not required to provide "baby bonding" leave under the New Parent Leave Act (NPLA) (Cal. Gov. Code section 12945.6), if the employee seeking leave worked at a worksite with fewer than 20 employees within a 75-mile radius.

SB 1383 repeals and replaces both the current CFRA and the current NPLA, and expands the leave requirements to employers with five or more employees. As of January 1, 2021, such employers must provide eligible employees with up to 12 workweeks of unpaid protected leave during any 12-month period. In addition to lowering the threshold to five employees, SB 1383 eliminates the "50 employees within 75 miles of the worksite where the employee is employed" qualification. Employees still must have at least 1,250 hours of service with the employer during the previous 12-month period to be eligible for the leave.

Therefore, CFRA will now apply to much smaller employers. Many smaller employers have likely never had to comply with a family and medical leave law such as CFRA, so there may be a steep learning curve between now and January 1.

The new law requires employers with at least five employees to provide an otherwise eligible employee with up to 12 workweeks of unpaid job-protected leave during any 12-month period for certain covered reasons. The employer must maintain and pay for the employee's coverage under a group health plan for the duration of the leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of the leave.

Additional Covered Family Members Expanded Reasons for Leave

CFRA currently allows employees to take unpaid leave for a number of purposes, including to care for a "family member" with a serious health condition. CFRA currently defines "family member" to include a minor child (unless the child is an adult and a dependent child), a spouse, or a parent.

SB 1383 significantly expands the definition of "family members." First, the list of family members is expanded to include siblings, grandparents, grandchildren, and domestic partners. Second, the definition of "child" is expanded to cover all adult children (regardless of whether they are dependent) and children of a domestic partner.

Therefore, even larger California employers will have to provide leave to employees who are caring for a wider swath of family members with a serious health condition.

Expanded Reasons for Leave

SB 1383 contains other significant changes. SB 1383 eliminates certain provisions of the current CFRA. First, it eliminates the current ability of employers to cap baby bonding leave to a combined total of 12 weeks in circumstances where both parents are employees. As such, it requires an employer that employs both parents of a child to grant up to 12 weeks of leave to each employee.

The new law also requires employers to provide up to 12 weeks of unpaid job-protected leave during any 12-month period due to a qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the Armed Forces of the United States.

In addition, SB 1383 deletes language from the CFRA that authorizes an employer to refuse reinstatement to salaried employees who are among the highest 10% of the employees and where the refusal is necessary to prevent substantial and grievous economic injury.

Under SB 1383, employees will still need to meet eligibility requirements, including 12 months of service and 1,250 hours worked for the employer in the previous 12-month period, to qualify for family and medical leave.

So, 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 italic 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.

New Law May Also Create A "Stacking" Problem With The Federal FMLA

SB 1383 also appears to create a unique dilemma for employers that have 50 or more employees and are therefore covered under both the CFRA and the FMLA. Generally, leave under CFRA and FMLA runs concurrently, meaning an employee is generally only eligible for a total of 12 weeks of unpaid leave under both laws. However, the amendments to CFRA leave open the possibility that in some circumstances an employee's leave will be covered by CFRA but not by the FMLA.

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 italic 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.

What California Employers Need to Do Now

Effective January 1, 2021, most employers in California will now have to provide up to 12 weeks of unpaid family and medical leave to employees for qualifying reasons. This is on top of four months of pregnancy disability leave, which employers with five or more employees must already provide to qualifying employees.

Group health benefits must be continued on the same terms as if the employee was actively reporting to work during a covered leave, and reinstatement to the same or comparable position upon timely return from leave generally must be guaranteed. Small employers will need to familiarize themselves with the new law and take steps to adopt policies and procedures to ensure compliance.

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 employees should make:

- **For smaller public and 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 agency is prepared to provide CFRA leaves to qualified employees upon the implementation of this new law.
- **For larger public and private sector 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, agencies 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.

Overall, it is important for employers to begin reviewing their existing policies and procedures now in order to make the necessary adjustments in light of SB 1383's changes to CFRA.

Changes to California Family Rights Act (Effective January 1, 2021)

Comparisons	CFRA before 1/1/21	CFRA as amended, effective 1/1/21	FMLA compared to CFRA, as amended
Covered Employers	50 employees for most reasons; 20 employees for baby bonding	Five or more employees unclear whether five or more employees in California or anywhere --guidance likely forthcoming	50 employees for each working day during at least 20 calendar weeks in the current or preceding calendar year
Eligible Employees	Employed 1 year and worked 1,250 hours during 12 months preceding leave; employee must work at location with 50 or more employees within a 75-mile radius	Employed 1 year and worked 1,250 hours worked during 12 months preceding leave (can be non-consecutive; 75-mile radius requirement is eliminated)	Employed 1 year and worked 1,250 hours during 12 months preceding leave; employee must work at location with 50 or more employees within a 75-mile radius
Exceptions to Employee Eligibility	Employee is salaried and among the highest paid 10%	None	Employee is salaried and among the highest paid 10%
Amount of Leave	12 weeks within a 12-month period; 12 weeks leave need not be consecutive, can be taken intermittently	No change	Same as CFRA
Reason for Leave – Employee's Own Health	Employee's own serious health condition	No change	Same as CFRA
Reason for Leave – Family Member's Health	Serious health condition of child (minor or dependent adult), parent, spouse, domestic partner	Serious health condition of child of any age, parent (broadly defined), grandparent, grandchild, sibling (broadly defined), spouse, domestic partner	Serious health condition of child (minor or dependent adult), parent, spouse
Reason for Leave – Bonding with Child	Born, adopted, or foster-placed within one year of event – only one parent eligible	Born, adopted, or foster-placed within one year of event – both parents eligible	Born, adopted, or foster-placed within one year of event – only one parent eligible

Changes to California Family Rights Act (Effective January 1, 2021)

Comparisons	CFRA before 1/1/21	CFRA as amended, effective 1/1/21	FMLA compared to CFRA, as amended
Reason for Leave – Military Exigency	Not covered	12 weeks of leave in 12-month period for reasons relating to deployment or military activities of employee's spouse, domestic partner, child or parent who is a member of the Armed Forces	Same as CFRA except domestic partner not covered
Military Caregiver Leave	Not covered	Not covered	Provides up to 26 weeks per 12-month period to care for ill service member with a "serious injury or illness;" first 12 weeks may run concurrently with CFRA if the family member is covered under both CFRA and FMLA
Relationship to Pregnancy Leave	Pregnancy disability leave up to 4 months per pregnancy subject to medical confirmation of disability does not count as CFRA leave because it is a separate right.	No change	Time taken for pregnancy disability counts as FMLA leave
Documentation Permitted – Employee's Own Health	Limited to date condition commenced, probable duration, statement that employee is unable to perform employee's position; 2nd and 3rd tie-breaking opinions allowed	No change	Employer can require information about diagnosis (not allowed for CA employees per CFRA)

Changes to California Family Rights Act (Effective January 1, 2021)

Comparisons	CFRA before 1/1/21	CFRA as amended, effective 1/1/21	FMLA compared to CFRA, as amended
Documentation Permitted – Family Member's Health	Limited to date condition commenced, probable duration, estimate of the time employee needs to provide care, confirmation that health condition warrants participation of a family member	No change	Employer can require information about diagnosis (not allowed for CA employees under CFRA)
Health Insurance During Leave	Premiums paid by employer as though employee were working	No change	Same as CFRA
Payment During Leave	Unpaid by employer except as follows. For employee's own health condition, employee must be permitted to and can be required to use sick leave and vacation. For other purposes, employee must be permitted to and can be required to use vacation; use of sick leave use is by mutual agreement. Eligible employees may apply directly through the EDD for State Disability Insurance (SDI) (up to 52 weeks) if leave is for employee's own health condition and for Paid Family Leave (PFL) insurance (up to 8 weeks) if leave is to care for a baby or a family	No change	Same as CFRA

Changes to California Family Rights Act
(Effective January 1, 2021)

Comparisons	CFRA before 1/1/21	CFRA as amended, effective 1/1/21	FMLA compared to CFRA, as amended
	member with a health condition, or for military exigency. Local ordinances, including in San Francisco, may provide additional payment from employer during leave for baby bonding.		
Reinstatement	Reinstatement to same or a comparable position	No change	Same as CFRA
Relationship to Collective Bargaining Agreement	N/A	No change required during life of existing collective bargaining agreement	N/A

Family Care and Medical Leave

Commencing January 1, 2021, the Company provides an unpaid leave of absence for family and medical leave to eligible employees. Employees who have completed at least one year of employment and have worked at least 1,250 hours in the previous 12 months may submit a written request for a family care and medical leave of absence, without pay, for up to a maximum of 12 workweeks in a 12 month period. The 12-month period considered for eligibility will be calculated backwards a year from the date the employee starts his or her leave of absence. If it occurs that both parents of a child are employed by the Company, each parent is entitled to up to 12 weeks of leave to care for their birth or adopted child.

Leave under this policy may taken for any of the following reasons:

- The birth of a child and to bond with or provide care for the child.
- The placement of a child with you for adoption or foster care and to bond with or care for the new child.
- To care for a parent, child, spouse, domestic partner, grandparent, grandchild or sibling with a serious health condition.
- For an employee's own serious health condition that renders him or her unable to perform the functions of his or her position.
- For any qualifying exigency arising out of the fact that the employee's spouse, domestic partner, child, or parent is a military member on covered active duty or call to active duty status. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings. (Leave for this reason is referred to in this policy as "qualifying exigency leave".)

If the need for a family care and medical leave of absence is foreseeable, employees must submit their request at least 30 days in advance. Requests for family care and medical leaves will normally be granted by the Company, based on the facts and circumstances surrounding each individual request. If granted, employees will be given written notice designating the leave as a family care and medical leave of absence, as well as notice of their rights and obligations during the leave.

Requests for family care and medical leaves to care for a child, parent, spouse, registered domestic partner, grandparent, grandchild or sibling with a serious illness/health condition, or an employee with a serious illness/health condition, must be accompanied by a health provider's written statement.

In the case of the employee's own serious illness/health condition, the certification must contain information as to (1) the date the serious health condition or disability will begin, or in cases of emergency, began, (2) the probable duration of the condition or disability; (3) the estimated amount of time the health care provider believes the employee will need for the medical leave; and (4) in the case of the employee's own medical leave, certification that the employee is unable to work because of the condition or disability; or (5) in the case of a family care leave, confirmation that the employee will be participating in the supervision or treatment of the family member. Any employee who submits a certification containing false information will be subject to discipline, up to termination.

Family Care and Medical Leave

If an employee requests a family care leave for the birth, adoption or foster care placement of a child, the Company reserves the right to request documentation of such birth, adoption or placement.

Employees may request medical leave on an intermittent or reduced schedule basis in certain circumstances, where the medical need for such leave can be demonstrated. An employee must provide certification from a health care provider demonstrating that such intermittent leave is medically necessary and, if applicable, setting forth the schedule of treatment and expected absences. Similarly, intermittent leave may be requested to take care of one of the family members identified if such leave is medically necessary, and the employee provides certification from a health care provider demonstrating the medical need for such intermittent leave and, if possible, setting forth the schedule for treatment. In the case of an intermittent or reduced schedule medical/family care leave, the Company reserves the right, at its sole discretion, to transfer the employee temporarily to an alternate position which better accommodates the particular leave and the Company's business needs.

A family care leave for the birth, adoption or foster care placement of a child must be completed within the 12 month period immediately following the birth, adoption or placement of the child in foster care, and must be for a minimum of two weeks duration at one time. The employee, however, will be allowed to take a shorter leave on two occasions within that period.

The Company reserves the right to request recertification of the need for the leave at 30-day intervals, consistent with state and federal law. The Company also reserves the right to request recertification at any time if circumstances regarding the need for the medical/family care leave have changed, the employee asks for an extension, or the Company receives information that casts doubt upon the continuing validity of a medical certification.

During the leave of absence, health insurance benefits ordinarily provided by the Company, and for which the employee is otherwise eligible, will be continued during the period of the leave for up to a maximum of 12 weeks, if the employee elects to continue to pay his or her share of the premiums for such coverage. Employees on a leave of absence are not eligible to receive paid holiday benefits or any other non-legislated benefits.

Generally, employees on family care and medical leave who return to work immediately following the end of an approved leave will be returned to the same job they held immediately prior to their leave or, if that position has been filled or is no longer available, to a comparable position if one is available, consistent with applicable law. There may be circumstances, however, where the Company will be unable to offer reinstatement, consistent with applicable law.

Employees with a serious illness/health condition must present a health provider's written release verifying that they are able to safely perform their duties before they will be allowed to return to work. Employees who fail to return to work on the date the leave expires without obtaining proper re-certification may be treated as having voluntarily terminated their employment with the Company.

Employees on approved family leaves of absence are eligible to apply for Paid Family Leave benefits through the State of California. Such State benefits can provide up to eight weeks of wage-replacement benefits to workers who take time off work to care for a seriously ill child,

spouse, parent, domestic partner, grandparents, grandchildren, siblings or parents-in-law. Employees who utilize paid time off are required to coordinate state benefits with the Company such that they receive no more compensation during a family medical leave than they would earn if they were working.

Leave time taken under this policy in California will not run concurrently with Pregnancy Disability Leave. Employees who have taken 12 weeks of parental leave under the Parental Leave policy in 2020 should consult Human Resources regarding their eligibility to take family leave in 2021 under this policy.

GUIDANCE DOCUMENT:

Mandatory COVID-19 Vaccination in Employment

Employer's Critical Considerations:

1. unless legally prohibited, will the employer require mandatory vaccines for all employees;
2. with a mandatory vaccine policy, is the employer's internal HR Department prepared for the roll-out; and
3. what will be the consequence for employees who refuse the offered vaccine?

What Does the Law Say?

At present, no law, regulation, or other guidance directly addresses whether employers may require their employees to get a COVID-19 vaccination.

However, the EEOC and OSHA have interpreted mandatory flu vaccinations previously as a permissible mandate by employers – with certain conditions and restrictions:

- Under the Americans with Disabilities Act (the "ADA"), an employer may require medical testing and other invasive procedures if job related and consistent with business necessity.
- The EEOC will likely require that employers comply with other legal requirements with respect to any mandated vaccine, including the ADA and Title VII of the Civil Rights Act of 1964 ("Title VII").
- OSHA guidance allows employers to mandate vaccinations for employees, but provides an exception for employees who refuse a flu vaccine because of a "reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine) . . ."
- The EEOC has confirmed that under the ADA an employee with underlying medical conditions should be entitled to an exemption from mandatory vaccination for valid and supported medical reasons.
- Title VII also provides employees with an exception to a mandatory vaccination based upon sincerely held religious beliefs.
    - When these objections are raised, the employer should engage in a discussion (the "Interactive Process") with the employee.
- Employee may express a concern that a vaccine may not have met all appropriate medical testing standards or raise a general objection to vaccinations (an "anti-vaxxer").
    - Provided that a vaccine has met the approval of the FDA, the employer should have a reasonable basis to rely on the medically determined safety of an approved vaccine.

Until there is additional guidance, it appears that employers may require employees to receive vaccinations when available, subject to the restrictions identified by the EEOC and OSHA.

Additional Employer Considerations

It is important for employers who are subject to a collective bargaining agreement to evaluate any limitations before requiring vaccinations as a term of employment.

GUIDANCE DOCUMENT:

Mandatory COVID-19 Vaccination in Employment

Employers should also consider the value of a mandatory vaccination policy for their businesses and whether other alternatives, such as voluntary vaccination programs, remote work, physical distancing, and facial coverings can be similarly effective in maintaining a safe work environment.

Consider the employee morale issue. A mandatory vaccination program might have significant ramifications on employee retention and recruitment.

Determine if the full workforce will have mandatory COVID-19 vaccines, or if only a portion of the employees will have this requirement.

- If only a portion, review and modify job descriptions to support the need for vaccinations (e.g., travel requirements, direct interaction with customers, etc.).

Risk may come from an employee suffering a severe side effect from the vaccine, which may result in a workers' compensation claim.

If You Do Enact a Mandatory COVID-19 Vaccination:

Update policies to include the recognized EEOC protective provisions in its policy for those who have medical or religious objections to the vaccination. Amended language should:

- Confirm the obligation of each employee to use all reasonable steps to keep other employees safe. This may currently include Center for Disease Control (the "CDC") protocols for hand washing and certain safe distancing requirements.
- Continue protocols, even with a fully inoculated workforce, until medical experts provide otherwise, these protocols should be maintained.
- State that the employer requires vaccinations to further the safety of its employees.
- Do not guarantee vaccine effectiveness, but only confirm the medically provided information regarding the vaccine.

Prepare and train human resources personnel in fielding, responding to, and documenting requests for accommodations, as well as how best to engage in the interactive process with employees who request accommodations.

- HR Department should be designated as the vaccination response team to ensure that a consistent and well-informed response is provided to all employee questions.
- Communication with the medical health insurance provider to confirm whether the vaccination will be covered and if the employee will have responsibility for any portion of the cost. The employer may consider covering cost of the vaccination.

Develop a consistent approach to deal with employees who refuse the vaccine (without a legal basis for the refusal). If such refusal will result in termination of employment, such termination action should be consistently applied.

Consider creating a specific severance policy for terminated employees (conditioned upon the employee's execution of a release and waiver of claims), but severance would not be required.