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PERSPECTIVE

Gazing into the employment law crystal ball for 2021

By Todd R. Wulffson

Businesses in California have a solid, triple threat coming at them right now — a new year, a new administration in Washington, D.C., and a new normal from the pandemic. All three of these bring with them challenging new laws relating to employees. Some will go into effect Jan. 1, 2021, but most will roll out over the course of the next year. Those businesses which have been diligent, creative or just plain lucky enough to have survived the pandemic thus far will need to anticipate the new employment law trends, so as to minimize liability and to focus on keeping their businesses alive.

Time Off Requests Will Be More Common

In Senate Bill 1383, California has greatly expanded the protections under the California Family Rights Act, also known as CFRA, and, starting Jan. 1, 2021, will require employers with five or more employees to provide up to 12 weeks of job-protected leave for employees because they or a family member has a serious health condition, to bond with a new child, or a qualifying emergency related to active military duty. Employees taking leave under the CFRA must (with some exceptions) be returned to their previous position.

Many of the leave laws enacted in response to the pandemic follow this trend. Both small and large employers must now provide up to 80 hours of paid sick leave for employees affected by COVID-19. This is in addition to the 12 weeks of CFRA leave noted above. While paid sick leave requirements are set to expire on Dec. 31, they likely will be extended into the new year.

As this gauntlet of a year ends, California employers must prepare for the demands of new leave obligations. Employers should update their policies, prepare contingency plans to deal with greater employee absences, budget for increased overtime hours, and possibly secure contracts with agencies for temporary employees.

Pay Equity Legal Compliance Will Be Monitored

California employers must now focus more on diversity and inclusion in the workplace, particularly with respect to pay equity. Starting on March 31, 2021 (and every year thereafter), private employers with 100 or more employees are required to submit a pay data report to the California Department of Fair Employment and Housing, also called the DFEH. That data must disclose pay band data for employees, (by race, ethnicity, and gender), who are employed in specified job categories, so that the DFEH can identify potentially discriminatory pay practices. For the next few months, especially during the year-end evaluation and bonus period, employers should proactively review and make any necessary changes to their pay policies and practices, before the DFEH reviews such data (which becomes a public record once submitted). Employers should also anticipate that future legislation will impose these same reporting requirements on smaller companies.

Heightened Focus on Workplace Safety Is Here to Stay

Safety in the workplace has been in the forefront during the pandemic and will assuredly receive even more consideration under a Biden administration. This includes attention from the Occupational Safety and Health Administration.

Employers should expect the issuance of an emergency standard to deal with the pandemic, including distribution of approved vaccines (which are receiving emergency authorization now from the FDA), increased inspection activity, and increased reporting requirements. Employers will need to perform even more detailed hazard assessments, as well as to document and train more. An increase in investigations, enforcement activities, and penalties are also highly likely. Employers should continue to pay close attention to OSHA's whistleblower protections, as "complaints" about safety procedures or shortages of supplies, staff or PPE will almost always constitute protected activity. Once an employee has en-

gaged in protected activity, it becomes especially important to avoid even the appearance of retaliation, particularly when it comes to disciplinary action toward the complaining employee.

Expect Changes to Labor Relations Laws

There has already been a wave of new litigation and organizing activity as COVID-related layoffs have affected many industries. A Democrat majority at the National Labor Relations Board (which may not be achieved until at least August 2021, due to existing member Board terms) is likely to roll back many pro-business decisions issued during the past four years. Many of these changes will affect both union and non-union workplaces. We will almost certainly see changes that will affect employee handbooks, including at-will employment, confidentiality and social media policies. The definition of "concerted activity," which provides protections to employees who engage in it, will almost certainly be expanded, after being narrowed under the current Board.

Perhaps the most important issue to watch in this area is that the U.S. House of Representatives just passed a bill that would tilt the scales of labor law unequivocally in favor of organized labor. The Protecting the Right to Organize Act, commonly referred to as the PRO Act, would bring about a radical shift in labor relations, and might even reverse the steady decline of unionization we have seen since the 1950s. The PRO Act contains a veritable "wish list" of provisions that drastically favor big labor. If it passes the Senate, President Biden will almost certainly sign it.

Employee Privacy and Data Security

On Nov. 3, California voters approved the California Privacy Rights Act, a consumer privacy ballot initiative that makes significant amendments to the landmark California Consumer Privacy Act. The CPRA will become law as written, and grants the California Attorney General, and the newly established California Privacy Protection Agency, the authority to adopt regulations on a range of issues. Although the law's

substantive provisions do not become effective until Jan. 1, 2023, California businesses should begin assessing compliance obligations in light of the CPRA's newly-introduced consumer rights, protection of employee information, and the extensive changes to existing CCPA business requirements. The CCPA will remain in force in the interim.

Conclusion

Based on the foregoing, California continues to be a state whose best quality for employers is its weather. For those businesses willing to tough it out, adaptability and patience with respect to employment laws will be key. ■

Todd R. Wulffson is the managing partner of the Orange County office of CDF Labor Law LLP, a California-based labor, employment and immigration law firm with offices throughout the state. He has focused his practice on counseling and defending businesses in labor and employment matters for over 30 years. In addition to private practice, from 2006-2010, he served as general counsel and SVP of Human Resources to Palace Entertainment.



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