

**FENWICK**

# **2021 Employment Law Year in Review**

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# Employment Practices Group



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# Agenda

- Introduction
- Wage and Hour
- COVID Update
- EEO
- Paid Time Off/Leaves of Absence
- Unfair Competition/Arb/NLRB
- Remote Work/Distributed Workforce Considerations
- Q&A/Closing

# WAGE AND HOUR/INDEPENDENT CONTRACTOR

# Wage and Hour — Minimum Wage Increases

- CA minimum wage increase
  - \$14/hour (25 or fewer employees)
  - \$15/hour (26 or more employees)
  - *Watch out for local minimum wage increases*
- CA minimum exempt salary increase
  - \$58,240/year (25 or fewer employees)
  - \$62,400/year (26 or more employees)
  - *Computer software employees = \$104,149.81/year*

# Wage and Hour — Minimum Wage Increases

- NY Minimum wage increase
  - \$15/hour (NY, LI and Westchester Counties)
  - \$13.20/hour (remainder of state)
  - <https://www.ny.gov/new-york-states-minimum-wage/new-york-states-minimum-wage>

# Wage and Hour — Contractor Misclassification

- Bad News:
  - *Dynamex* ABC test applies retroactively
  - CA (SB 727) — Prime contractors jointly liable with subs, on contracts after 1/1/22, for Labor Code penalties and interest owed by the sub for wage violations and failure to fund unemployment and workers' comp
    - Primes should re-examine contractual indemnity clauses
    - Similar law enacted in NY (SB 266C/AB 3350A)
- Good News:
  - CA (AB 1561) — Expansion of ABC exemptions, including:
    - Construction industry subcontractors
    - Research subjects in connection with data aggregation

# Wage and Hour — Non-Compliance Penalties

- California:
  - AB 1003 — Enhanced criminal liability (grand theft felony) for intentional wage theft (\$950+ for 1 worker; \$2350+ for 2 or more) over 12-month period
    - Applies to contractors as well as employees
- Washington:
  - SB 5355 — Employees (except 5%+ owners or highly compensated) can place liens on employer's real/personal property to satisfy wage claims
- These developments remind us that wage violations, even unintentional, have severe consequences



## Wage and Hour

- CA (AB 701) — Warehouse Performance/Production Quotas for Hourly Employees:
  - Must be in writing and provided upon hire or by Jan 31, 2022
  - Writing must describe quantity, time period for completion and consequences of failure to meet quota
  - Quotas cannot interfere with meal/rest or workplace safety laws
  - Applies to businesses with 100+ employees at single warehouse, or 1000+ at multiple warehouses in CA

# COVID UPDATE

## Federal Vaccination/Testing Mandates

- Supreme Court struck down OSHA ETS (“Shot or Test Rule”)
  - Would have required employers with 100 or more employees to either (1) require full vaccination; or (2) allow employees to choose between full vaccination or weekly negative COVID test + masking
  - Federal law does not authorize overbroad mandate
  - COVID-19 not a “work-related danger” or “occupational hazard”
  - Left open possibility of targeted regulations to address special workplace dangers
  - Allowed enforcement of CMS vaccine mandate for healthcare providers
  - Did not rule on federal contractor vaccine mandate, which is currently stayed
- All employers have discretion (not duty) to impose vaccine mandate and/or testing, subject to state and local law

# State Regulation of Vaccination Mandates

- Alabama — AL Senate Bill 9
- Arizona — AZ Atty Gen'l Opinion No. 121-007 (R21-006)
- Arkansas — AR Senate Bill 739/House Bill1977
- Florida — FL HB 1B/SB 2B & FL Private Employer Vaccine Mandate Program FAQs
- Iowa — House File 902
- Kansas — 2021 Kansas HB 2001
- Montana — HB 702/HB 702 FAQs
- North Dakota — North Dakota HB 1511
- Tennessee — TN HB 9077/SB 9014 (as amended)
- Texas — Executive Order GA-40
- Utah — Utah SB 2004
- West Virginia — WV HB 335

## Health & Safety (Federal & CA)

- Reimbursement of at-home COVID tests
  - Starting 1/15/22, insurers must cover the cost of 8 over-the-counter COVID tests per month
- CAL/OSHA Revised Emergency Temporary Standards
  - Tests cannot be self-administered at home; must be processed by lab, or administered and observed by medical professionals or employer
  - Exposed vaccinated/asymptomatic employees (1) must be provided with COVID tests; (2) must wear a mask and maintain a 6 ft distance for two weeks if they do not test
  - Fabric masks should pass the “light test”
- CA Dept of Health Mask Order — effective 12/15/21 – 02/15/22
  - All employees must wear masks indoors regardless of vaccination status, unless working alone in an enclosed room

## Health & Safety (CA)

- New CA Dept. of Health Isolation & Quarantine Recommendations
  - Aligns with new CDC recommendations; considers boosted status
  - If employee tests positive or is exposed (unvaccinated)
    - Isolate/quarantine for 5 days; return if asymptomatic + negative test; or
    - Isolate/quarantine for 10 days if asymptomatic and no test; and
    - Wear mask for 10 days after positive test/exposure
  - If employee is exposed (unboosted if booster eligible)
    - No quarantine required if asymptomatic, but must obtain negative test 3-5 days after exposure
    - Must quarantine if symptoms develop
    - Wear mask for 10 days after exposure
  - If employee is exposed (boosted or not booster eligible)
    - No quarantine required unless symptoms develop
    - Test on day 5
    - Wear mask for 10 days after exposure

# Health & Safety (CA)

- New Categories of Cal/OSHA violations (SB 606, effective 1/1/22)
  - Enterprise Wide: Rebuttable presumption for employers operating multiple worksites if (1) noncompliant policy or procedure, or (2) pattern/practice of same violations involving more than one worksite
    - Can't be based on emergency regulation adopted/amended in last 30 days
  - Egregious: OSHA can issue fines/penalties for each employee exposed to violation as a separate violation if one or more are true of employer:
    - Intentionally made no reasonable effort to eliminate known violation
    - Violations resulted in fatalities, catastrophe, or large number of injuries/illnesses
    - Violations resulted in persistently high rates of worker injuries
    - Extensive history of OSHA violations
    - Intentional disregard for health and safety responsibilities
    - Bad faith in performance of safety duties
    - Large number of violations

## Health & Safety (NY)

- NY Heroes Act — requires all private NY employers to implement and post COVID safety plan (model or own, if meets or exceeds model) that address:
  - Employee health screenings
  - Face coverings and PPE that must be provided by the employer
  - Hand hygiene and cleaning/disinfecting of shared equipment and high-touch surfaces
  - Social distancing
  - Appropriate compliance with mandatory or precautionary isolation/quarantine orders
  - Engineering controls for ventilation and air flow
  - Assignment of employer representative responsible for enforcement of the protocols
  - Employee notice requirements
  - Review of standards, policies and employee rights
- Employers with 10+ employees must establish Workplace Safety Committees



# Health & Safety (NY)

- NY Indoor Vaccine Mandate
  - Applies to all employers (regardless of size) that maintain a workplace in NYC
  - All employees, interns, volunteers and independent contractors who perform in-person work or interact with the public must show proof of at least one dose of a COVID-19 vaccine (and show proof of second dose within 45 days)
  - Does not apply to employees who:
    - (1) work from home or do not interact with co-workers or the public;
    - (2) enter a workplace briefly for a limited purpose; or
    - (3) are non-NYC residents and performing artists or college or professional athletes (as well as those who are accompanying such individuals)
  - Employers must verify and record vaccination
  - For non-employee workers, it is sufficient to request and record confirmation of vaccination

EEO

## EEO — CA

- SB 331: “Silenced No More” Non-Disclosure Restrictions
  - Expanded existing law that prohibits settlement agreements from barring the disclosure of certain factual information (i.e., sex-based harassment and discrimination), to include acts of workplace harassment or discrimination *not* based on sex
- SB 807: Personnel Record Preservation
  - Employers must now preserve personnel records for employees and applicants for four years from the date they were created, after an employee is terminated and when an applicant is not hired
- SB 657: Electronic Posting of Workplace Notices
  - Permits the electronic distribution of workplace notices that employers are required to physically post
- AB 51: Ninth Circuit Update
  - Employer attempts to impose mandatory arbitration agreements on applicants or employees can be criminally and civilly penalized in California

## EEO — Other States

- AB A430 (NY): Notice Requirements for Employee Electronic Monitoring
- NYC Human Rights Law “NYCHRL” (Amended)
  - Employment protections afforded by the NYCHRL will now apply to all domestic workers who perform work in NYC, regardless of the total number of workers employed by the employer
- NYC Salary Transparency Law
  - Unlawful discriminatory practice under the NYCHRL, to not state the minimum and maximum salary for any position located within the City

## EEO — Other States

- CO Equal Pay Transparency Rules
  - Employers now required to disclose in each job posting: (1) the hourly or salary compensation, or the range of compensation, and (2) a general description of all the benefits and other compensation available for the position
- HB 2935 (OR): Oregon CROWN Act
  - Amends the definition of race under the OR Fair Employment Practices Law to include physical characteristics which are historically associated with race, including natural hair/texture, and protective hairstyles
- SB 45 & HB 21 (TX): Expanded Definition of Employer and Impact on Sexual Harassment Claims
  - As of 9/1/21, “employer” is defined as “a person who: (A) employs one or more employees; or (B) acts directly in the interests of an employer in relation to an employee”

PAID TIME OFF/LEAVES OF ABSENCE

# California – Updates to CFRA

- AB 1033
  - Amends CFRA by including leave to care for a “parent-in-law”
  - Makes procedural changes to small employer mediation program
    - Applies to employers with 5-19 employees
    - In effect until Jan 1, 2024
- Action item:
  - Update CFRA policy and train personnel on enforcement

# California – COVID-19 Supplemental Paid Sick Leave

- SB 95
  - Applied to employers with 25+ employees
  - Provided 80 hours of paid leave for various COVID-19 reasons
  - Expired Sept 30, 2021
- **Though SB 95 has expired, local ordinances still remain** (e.g., counties of Los Angeles, Sonoma, cities of Oakland and Long Beach)



# New York – Paid Family Leave Updates

- As of January 1, 2021:
  - 12 weeks of job-protected, paid time-off for various family and medical leave (and COVID-19) reasons
  - Increase in wage replacement benefit
    - 67% average weekly wage
- As of January 1, 2022:
  - Cap on intermittent PFL eliminated
- Action item:
  - Update written policies regarding PFL benefits

# Washington — Updates to WA Paid Family & Medical Leave

- Legislative changes in 2021:
  - Expansion of “family member”
  - Pandemic leave assistance grants for employees and employers
  - Clarification that prior paid leave claims continue
- Action item:
  - Update PFML policy and train personnel on enforcement

UNFAIR COMPETITION/ARBITRATION/NLRB

## Non-Competition

- Continuing state-level trend to restrict enforceability of post-employment non-competes for low(er) wage earners (incl. WA, OR, NV, MA, IL, VA)
- DC law that imposed complete ban on non-competes both during and post-employment delayed until April 2022, with possible narrowing of law to allow for enforcement of conflict-of-interest policies
- Especially with distributed workforces, increasingly important for employers to evaluate these issues on a state-by-state basis

# Arbitration

- CA – AB 51:
  - Prohibits forced arbitration of Labor Code and FEHA claims
  - Sept 2021: 9<sup>th</sup> Cir (3 judge panel) upheld the substance of the law, but struck down civil and criminal sanctions as preempted by the FAA
  - Further appellate activity; in the meantime, AB 51 is the law of the land in CA

# Labor Relations Update

- Renewed Union Organizing Efforts
  - Starbucks – Buffalo and beyond (1<sup>st</sup> union for company-owned stores)
  - Amazon
- NLRB reconsidering business-friendly “employee” vs. “independent contractor” test
  - Could materially impact gig worker unionizing efforts

# REMOTE WORK/DISTRIBUTED WORKFORCE CONSIDERATIONS

## Hiring — Multistate

- Flexible in beginning of pandemic
- Become more permanent and expected
- Requirements vary by state
  - Register as an employer
    - Often 1 employee
    - UI account or different WC insurance
  - Set up state-specific payroll
  - Register as a business or foreign corporation
  - Comply with state and local employment laws (e.g., sick time and leaves)
- Need state-specific offer letter and PIIA (e.g., arbitration, non-competes, exceptions to assignment)
- Watch out for non-competes and other restrictive covenants



# Hiring — International

- Main motivators
  - U.S. employees want to live abroad
  - U.S. employers want to tap into foreign talent pool
- Additional risk and administration
  - Employment law compliance
    - Foreign employment laws (e.g., termination and severance)
    - Payroll/withholding and benefits
  - Taxes
    - Permanent establishment risk = being taxed on operations in a foreign country
  - IP assignment
    - Ensuring proper assignment of inventions
    - Safeguarding IP under foreign law

## Hiring — Recommendations

- Establish remote work/relocation policy
  - Outline the process for requesting relocation
  - Make advance approval mandatory
- Revise employee handbooks and other policies given various locations
- Outline WFH expense policy
- Research state/foreign requirements before approving relocation
  - Consider allowing employees to move to only certain states or countries
  - Set up the proper infrastructure in those jurisdictions
- Consider using EORs or PEOs (what about a contractor?)

# Performance Management

- Proactively address performance management
- Communicate expectations regarding work hours, availability, and productivity metrics
- Conduct trainings for managers on how to effectively manage remote employees
- Seeing trend of formerly great performer struggling during the pandemic

# Termination

- Comply with state and/or foreign requirements for termination (e.g., final paycheck, separation agreement, state termination notices)
- Institute and follow protocols for managing return of company property and protection of confidential information

Q&A