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# California Rings in the New Year with New Employment Laws

## By Joann Rezzo, Esq.

The New Year normally brings with it a sense of optimism, resolutions . . . and in California an array of new laws affecting employers; 2022 is no exception.

**Rebuttable Presumption for Workplace Safety Violators.** Under Senate Bill 606 employers operating multiple jobsites who are found to have a pattern and practice of safety violations at more than one jobsite will face a rebuttable presumption that the same violation exists at all jobsites. Similarly, employers who are found to have a written policy or procedure that violates a Cal/OSHA safety regulation will face the same presumption. If an employer fails to rebut this presumption, Cal/OSHA may issue a citation requiring enterprise-wide abatements. Penalties can exceed $130,000 for repeated or willful citations.

**The "Silenced No More Act" affects not just settlement agreements.** Senate Bill 331, known as the "Silenced No More Act," places new limits on the enforceability of nondisclosure and non-disparagement provisions found in not just settlement agreements, but in offer letters, hiring documents and other employment documents as well.

Senate Bill 331 expands existing prohibitions on settlement agreements that prohibit an employee from disclosing facts relating to a claim filed in court or as an administrative complaint that alleged workplace discrimination based on sex, sexual assault or other acts related to gender, or that alleged similar acts by the owner of a housing accommodation. Under Senate Bill 331, those prohibitions are extended to allegations of misconduct based on any characteristic protected under the Fair Employment and Housing Act (FEHA). A complaining party retains the right to shield their identity in a settlement and the settling parties may still maintain confidentiality as to the amount of the settlement payment.

The Silenced No More Act also expands existing law that makes it unlawful for an employer to condition a raise, bonus or continued employment on an employee signing a statement that he or she has no claim against the employer and releases any right to file such a claim with an enforcement authority. Employers are also precluded from requiring employees to sign a non-disparagement provision that purports to "deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment."

Senate Bill 331 also makes it unlawful for an employer to include a provision in a severance agreement that purports to limit the disclosure of "information about unlawful acts in the workplace." The definition of "information about unlawful acts in the workplace" is defined to include "information pertaining to harassment or discrimination or any other conduct that the employee has reasonable cause to believe is unlawful."

In addition, any non-disclosure or non-disparagement agreement with an existing or departing employee that restricts an employee's ability to disclose "information related to conditions in the workplace" will be required to include language stating that: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful." Employers who put a non-disparagement or non-disclosure agreement into a severance document that releases FEHA claims must include language advising the employee that the employee has a right to consult with an attorney regarding the agreement and provide the employee at least 5 days to seek such consultation. (The language about the right to seek advice of counsel is not required in a negotiated settlement agreement that resolves a claim filed in court, before an administrative agency, in an ADR forum, or through an employer's internal complaint process if the employee was already notified of the right to retain an attorney or was represented by one.)

Employers may be found guilty of "Grand Theft" of wages. Under current law, an employer who is found guilty of wrongfully and intentionally withholding wages from an employee may be convicted of a misdemeanor. Assembly Bill 1003 makes it a felony for an employer to intentionally and wrongfully fail to pay wages of more than $950 to one employee, or $2,350 to two or more employees, during a 12-month period. Additionally, independent contractors are deemed "employees" for purposes of determining whether an entity is an "employer." An employer found guilty of violating this new law may face imprisonment in a county jail for up to three years.

Period of Retention of Employee Personnel Records Expanded / SOL Tolled. The current requirement for retaining employee personnel records is currently two years. Under Senate Bill 807, that period is being extended to four years. Senate Bill 807 also tolls the statute of limitations while the Department of Fair Employment and Housing investigates complaints of unlawful actions.

Expansion of the California Family Rights Act. Under the current California Family Rights Act ("CFRA"), employers with five or more employees are required to provide employees who have worked for them for at least one year with up to 12 weeks of job-protected leave in a 12-month period. Employees are entitled to this leave when their own serious health condition, or that of a family member, requires them to be absent from work. Under Assembly Bill 1033, the list of qualified family members for such leave was expanded to include a "parent-in-law" of the employee. In addition, Assembly Bill 1033 expands the availability of the DFEH's pilot mediation program for

CFRA claims brought against small employers (i.e., 5-15 employees).

**Warehouse Distribution Centers Must Disclose Production Quotas.** Assembly Bill 701 applies to employers and staffing agencies who (1) employ 100 or more employees at a single warehouse distribution center, or 1,000 or more employees at one or more such facility, in California, and (2) utilize quotas in their performance metrics. The new law requires employers to disclose any production quotas to their employees and prevents employers from setting quotas that preclude employees from taking meal and rest periods, using bathroom facilities, or that result in violations of occupational health and safety laws.

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