# 2021 CALIFORNIA UPDATE

## LEGISLATIVE UPDATES

### Wage Changes in California

**State minimum wage increases right on schedule.**

For employers with 25 employees or less, the state minimum wage increases from $13 to $14 per hour, effective January 1, 2022.

For employers with 26 employees or more, the state minimum wage increases from $14 to $15 per hour, effective January 1, 2022. This is the last set increase under the California Minimum Wage Order MW-2021. California employers can expect more legislation coming soon.

In addition, certain cities and counties have recently adopted ordinances that establish a higher minimum wage rate for employees working within their local jurisdiction. Employers must pay the local wage where it is higher than the state or federal minimum wage rates.

**Salary thresholds increase for exempt employee positions.**

Effective January 1, 2022, as a result of the minimum wage increase, California's salary thresholds for exempt employees will be as follows:

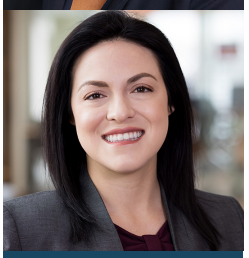
For employers with 25 employees or less, the minimum salary threshold is $58,240.

For employers with 26 employees or more, the minimum salary threshold is $62,400.

Even though an employee may fully satisfy the "duties" test to satisfy the overtime exemption, the exemption will not apply unless the employee is paid the minimum salary required for the exemption.

**Overtime hours for agricultural workers shifts again.**

For employers with 25 or fewer employees, overtime (1.5 times regular rate of pay) is required after 9.5 hours per day/55 hours per workweek, effective January 1, 2022.



**WRITTEN BY:**
Amy Robinson
Rebecca Schach

For employers with 26 or more employees, overtime (1.5 times regular rate of pay) is required after 8 hours per day/40 hours per workweek, effective January 1, 2022.

Agricultural employers are reminded to watch out for overtime requirements on the 7th day of work in a workweek, particularly the threshold for double-time pay.

**Criminal liability can now attach to intentional unpaid wages.**

Effective January 1, 2022, the crime of grand theft is to include the intentional theft of wages, including gratuities, of more than $950 from one employee, or more than $2,350 from two or more employees. Unlike other wage statutes, this criminal statute defines "employee" to include an independent contractor. Cal. Penal Code § 487m.

## California Goes "Rogue One"

**Nondisclosure provisions in settlement agreements are further narrowed under the "Silenced No More Act".**

Governor Newsom signed SB 331—known as the "Silenced No More Act"—that will take effect on January 1, 2022. Existing law prohibits nondisclosure provisions regarding sexual assault, sexual harassment, discrimination based on sex, or retaliation for reporting such harassment or discrimination. Under the new law, the Code of Civil Procedure is expanded to include a prohibition on nondisclosure provisions for acts of workplace discrimination, harassment, or retaliation based on any protected characteristic—not just sex. Protected characteristics include: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, gender, gender identity, gender expression, age, sexual orientation, and veteran or military status of any person.

The new law also prohibits nondisparagement agreements or similar agreements required as a condition of employment or continued employment that deny an employee's right to disclose information about unlawful acts in the workplace, unless the agreement includes a specific carve-out providing for the employee's right to discuss workplace conduct, such as harassment, discrimination, or conduct the employee has "reason to believe" is unlawful.

Under the new law, employers are provided a small protection to preclude disclosure of the amount paid in a settlement claim. Cal. Civ. Proc. § 1001.

## California Family Rights Act (CFRA)

**Key changes to CFRA are already in effect:**

1. Employers of five or more employees covered by CFRA: Until December 31, 2020, CFRA applied only to private employers of 50 or more employees. Starting January 1, 2021, CFRA applied to private employers of five or more employees. CFRA also applies to the California state and local governments as employers.

2. Worksite limitation eliminated: To be eligible for CFRA leave, an employee generally has to meet three requirements—has worked for the employer for more than 12 months, has worked at least 1,250 hours in the 12 months prior to their leave, and the employer has at least 50 employees within 75 miles of the employee's worksite. Starting January 1, 2021, the worksite mileage requirement was eliminated.

3. Circumstances for CFRA leave expanded: Eligible employees can take up to 12 weeks of CFRA leave to care for their own serious health condition; care for certain family members' serious health condition; or to bond with a new child (by birth, adoption, or foster placement). SB 1383 did not change these three categories, but it did expand the types of family members for whom CFRA leave can be taken (see #4 below).

   In addition, beginning January 1, 2021, CFRA leave could be taken for 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.

4. Types of family members expanded: Previously, CFRA leave could be taken to care for the serious health condition of a spouse, domestic partner, parent, minor child, or dependent adult child. Starting on January 1, 2021, employees could take leave to care for additional family members, including an adult child, the child of a domestic partner, a grandparent, a grandchild, or a sibling.

5. Limitation on parents working for the same employer eliminated: Starting January 1, 2021, if both parents of a new child work for the same employer, each parent is entitled to up to 12 weeks of leave.

The current mandatory California Department of Fair Employment and Housing poster can be found here.

## Workplace Health & Safety

**COVID-19 exposure notification and reporting received an abrupt amendment this year.**

As a follow-up to AB 685 passed in 2020, the California legislature attempted a cleanup act in AB 654 by amending and revising the notification and reporting requirements on COVID-19 exposure.

Clarifications under AB 654:

- The term "worksite" does not apply to locations where the worker worked by themselves without exposure to other employees, or to a worker's personal residence or alternative work location chosen by the worker when working remotely. Lab. Code § 6409.6(d)(7).

Changes under AB 654:

- Employers are now required to give notice to the local public health agency of a COVID-19 outbreak, within 48 hours or one business day, whichever is later. Lab. Code § 6409.6(b).
- The types of employers that are exempt from the COVID-19 outbreak reporting requirement has expanded to include additional licensed entities, including but not limited to community clinics, adult day health centers, community care facilities, and child daycare facilities. Lab. Code § 6409.6(h).

Through urgency legislation, AB 654 took effect on October 5, 2021, and remains in effect until January 1, 2023. Cal. Lab. Code §§ 6325, 6409.6.

**Cal/OSHA gains expanded enforcement powers starting January 1, 2022.**

Backed by organized labor advocates, SB 606 expands the enforcement powers of Cal/OSHA with three tools:

1. Rebuttable presumption of enterprise-wide violations. A rebuttable presumption exists that a workplace safety violation is enterprise-wide if the employer has multiple worksites and either:
   - The employer has a written policy or procedure that violates the Health and Safety Code Section 25910, or any standard, rule, order, or regulation set related to that Code, or
   - The Division of Occupational Safety and Health has evidence of a pattern or practice of the same violation committed by that multisite employer involving more than one of the employer's worksites. Cal. Lab. Code § 6317(b).
2. Mandatory "egregious" violation for certain conduct. The Division must issue an "egregious violation" if any one of the following is true:
   - The employer, intentionally, through conscious, voluntary action or inaction, made no reasonable effort to eliminate the known violation.
   - The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses. For purposes of this paragraph, "catastrophe" means the inpatient hospitalization, regardless of duration, of three or more employees resulting from an injury, illness, or exposure caused by a workplace hazard or condition.
   - The violations resulted in persistently high rates of worker injuries or illnesses.

- The employer has an extensive history of prior violations of this part.
- The employer has intentionally disregarded its health and safety responsibilities.
- The employer's conduct, taken as a whole, amounts to clear bad faith in the performance of its duties under this part.
- The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that may be in place. Lab. Code § 6317.8(b).

3. Subpoena power. The Division now has power to issue a subpoena if the employer or the related employer entity fails to promptly provide the requested information, and may enforce the subpoena if the employer or the related employer entity fails to provide the requested information within a reasonable period. Cal. Lab. Code § 6317.9.

**Wildfires fanned the flames for expanded PPE stockpiles and trainings.**

Current law requires that the California Department of Public Health and related state agencies create a PPE stockpile for all health care workers and essential workers in the state during a 90-day pandemic or other health emergency. In the most recent amendment, "health emergency" includes wildfire smoke events. As a further expansion, agricultural workers (i.e., workers subject to IWC Wage Orders 8, 13, and 14) are included as essential workers. Cal. Health & Safety Code § 131021(b)(4); Cal. Lab. Code § 9110(a). With these expansions in mind, the Division has updated the content of required training, and employers must provide that required training in a language and manner readily understandable by employees—***taking into account their ethnic and cultural backgrounds and education levels***. Lab. Code § 9110(c). You can access the Division's regulation on worker protection from wildfire smoke here.

## NOTABLE CASES

***Donohue v. AMN Services, LLC*, 481 P.3d 661 (2021). The practice of rounding time punches is not consistent with the objective to provide a duty-free 30-minute meal period and therefore violates the Wage Order and Labor Code.**

The California Supreme Court considered a class-action lawsuit by nurses who alleged that the employer's practice to round time punches for meal periods violated the Wage Order and Labor Code. Specifically, the employer's electronic timekeeping system rounded the time punches to the nearest 10 minute increment. For example, if an employee clocked out for lunch at 11:02 a.m. and clocked in after lunch at 11:25 a.m., Team Time would have recorded the time punches as 11:00 a.m. and 11:30 a.m. Although the actual meal period was 23 minutes, Team Time would have recorded the meal period as 30 minutes. While the California Supreme Court agreed that the rounding practice resulted in an overpayment to nurses, the practice violated the Wage Order and Labor Code that both required precision of timekeeping.

## KEY TAKEAWAYS

1. California employers cannot engage in the practice of rounding time punches—specifically, adjusting the hours that an employee has actually worked to the nearest preset time increment—in the meal period context.
2. Time records showing noncompliant meal periods raise a rebuttable presumption of meal-period violations.

***Ferra v. Loews Hollywood Hotel, LLC*, 489 P.3d 1166 (2021). Premium pay must be calculated at the "regular rate of pay," including nondiscretionary bonuses.**

The California Supreme Court provided much-needed clarity on how to compensate for failure to provide mandatory meal, rest, or recovery periods at the "regular rate of compensation" (i.e., premium pay). Previously, California employers struggled with the inconsistent statutory language that referenced "regular rate of compensation" in the Labor Code and Wage Order as it relates to premium pay while the overtime statute referenced "regular rate of pay." Interestingly enough, this was not a case in which the parties argued about the facts. The parties agreed and stipulated that Plaintiff worked as a bartender, and the employer paid (and continued to pay) meal- and rest-period premiums at Plaintiff's base rate of compensation (her hourly wage), without including an additional amount for incentive compensation, such as nondiscretionary bonuses.

The California Supreme Court ruled that "an employee's 'regular rate of pay' for purposes of Labor Code section 510 and the IWC wage orders is not the same as the employee's straight time rate (i.e., his or her normal hourly wage rate)." Employers must pay premium payments to employees for missed meal, rest, and recovery breaks at the "regular rate of compensation," which includes not only the base hourly rate, but also any nondiscretionary or performance-based incentive payments like bonuses or commissions received by the employee.

## KEY TAKEAWAY

Premium pay must be paid at "regular rate of compensation" that includes nondiscretionary payments like bonuses and commissions.