

California Legislation And Regulation To Watch In 2021

By **Dorothy Atkins**

Law360 (January 3, 2021, 12:02 PM EST) -- As Golden State lawmakers roll out tougher worker protection rules in response to the COVID-19 pandemic, 2021 will also see businesses scrambling to comply with a new layer of data collection restrictions and new corporate diversity rules, legal experts say.

After the pandemic sparked nationwide shutdowns early last year, California Gov. Gavin Newsom signed a host of state laws aimed at protecting workers. Many of those new laws took effect Jan. 1, offering a boon to workers while potentially catching some small businesses off guard, legal experts say.

Meanwhile, 2021 will also see the Golden State expanding on efforts to implement its unique consumer data protection regime. And the state will continue leading efforts to require businesses to diversify their corporate boards and to implement new pay data reporting requirements to combat systemic pay disparities.

These are among the major legislative and regulatory developments that California attorneys will be watching in 2021.

The Golden State Takes On COVID-19 at the Workplace

Passed in September, A.B. 685 sets out tougher COVID-19 reporting standards for employers than the current reporting guidelines outlined by the federal government, requiring them to notify potentially infected workers within one business day of their workplace exposure.

The bill, which took effect Jan. 1, also requires employers to have a disinfection safety plan on hand in case of a workplace outbreak. If three or more employees are infected, the new law requires businesses to report the outbreak to local health authorities, and it also gives the California Division of Occupational Safety and Health more authority to enforce compliance.

Meanwhile, A.B. 1867, which was also signed into law in September, requires employers with 500 or more California employees to provide supplemental paid sick leave to a worker who contracts COVID-19 if the employee can't work remotely. Another new law, S.B. 1159, creates a presumption that an employee's COVID-19 illness is an occupational injury, qualifying the employee for workers' compensation benefits.

Morrison & Foerster LLP of counsel Oswald B. Cousins noted that those presumptions are rebuttable since, historically, illnesses have not been subject to workers' compensation.

"In some ways that's good for both employers and employees," Cousins said. "The employers generally limit workers' compensation because you can't have a runaway damages award."

A.B. 1885, another law that took effect Jan. 1, will likely have broad implications for small businesses pushed into bankruptcy due to the pandemic, according to Michael T. Krueger of Newmeyer & Dillion LLP. That law increases the California homestead exemption, which protects the value of debtor homes from creditors, from its previous \$175,000 cap to \$600,000, depending on the county's median sale price of a single-family home.

Krueger said the new homestead exemption allows bankrupt individuals in certain counties to keep their homes and protect up to \$600,000 of equity in their primary residence, while still wiping out their debts in Chapter 7 proceedings.

"That's going to change the game completely in 2021," he said. "If I am a business owner and I've personally guaranteed a lease or loans and I have \$500,000 equity in my house, I would be much more inclined to [file for bankruptcy] if I knew that now I can file and keep [that equity]."

Krueger noted that updates to California's homestead exemption caps were long overdue, but the change in the law comes at a time when many small businesses are on the brink of bankruptcy due to coronavirus-related closures. Without the change, he notes, those business owners would likely face losing their homes.

"I think that [the new law] has specifically allowed small-business owners to recover more quickly," he said.

Californians Vote for New Privacy Protections

Cybersecurity and privacy legal experts are busy preparing clients for how the enforcement of the existing California Consumer Privacy Act will play out in the new year in light of a new layer of privacy regulations that will be implemented under the California Privacy Rights Act, which voters approved in November.

The CPRA builds on the CCPA, which itself is a relatively young statute. It does that by creating a new agency dedicated to data privacy and providing consumers with substantial new data control mechanisms that companies must implement before Jan. 1, 2023.

Although the new CPRA's compliance deadline is two years away, within the first few months of 2021, a board will be appointed to the new agency and a budget will be assigned to it, with the majority of CCPA enforcement falling under its purview.

Jeff Dennis, head of Newmeyer & Dillion's privacy and data security group, pointed out that the CPRA also has a 12-month "look-back" period, which could expose businesses if they're found in violation of the new data privacy rules, which Dennis noted are "extensive and very complex."

"I think the key is if you have not yet complied with the CCPA and are required to, you should start immediately, because the CPRA is not 'instead of' it's 'in addition to,'" Dennis said. "It's another layer."

Since the CCPA took effect at the start of 2020, businesses have been hit by a wave of civil suits over alleged violations. Legal experts expect that trend to continue in 2021. There are also still unanswered questions regarding whether and how the CPRA will apply to employee data collected by employers, according to Ryan Derry of Paul Hastings LLP.

Behnam Dayanim, the head of Paul Hastings' privacy and cybersecurity practice, said he suspects CCPA litigation will likely focus on the precise meaning of certain provisions, rather than general challenges to the new law's constitutional validity.

"It's around for good unless Congress passes a [preemptive] federal law," he said.

Dayanim added that he doubts that Capitol Hill lawmakers will pass a federal data privacy law in 2021 in light of the current political divide in Congress, but he said he's also keeping a close eye on what lawmakers in other states are doing and whether they follow California's lead.

From an international standpoint, Shannon Yavorsky, a partner in the cyber and privacy practice at Orrick Herrington & Sutcliffe LLP, said the CPRA brings California data laws even closer to the European General Data Protection Regulation and may make it easier for the Golden State to get a so-called adequacy decision from the European Commission, allowing businesses to transfer data outside of Europe to California without running afoul of the GDPR.

Yavorsky said an adequacy decision would be particularly welcome in light of the European Union top court's Schrems II decision in July, which struck down Privacy Shield, a popular legal framework for transferring data across the Atlantic.

"It's just created a giant mess for companies trying to transfer personal data outside of Europe," she said.

Still, Yavorsky said, as the European and California laws are currently written, there are many different terms and restrictions under the different legislative regimes that aren't necessarily interchangeable or complementary and as a result, indemnification provisions in data processing agreements are being debated intensely.

"That just makes it more and more complex, with companies trying to comply with laws globally," she said.

Expect Efforts to Unwind Laws Aimed at Protecting Gig Workers

Legal experts expect that in 2021 new industries eyeing Uber and Lyft's success with Proposition 22 will seek legislative and regulatory exemptions from A.B. 5, which made it more difficult to classify workers as independent contractors.

A.B. 5 tightened the independent contractors standard by establishing a three-part ABC test that the California Supreme Court adopted in its 2018 ruling in *Dynamex Operations West v. Superior Court*.

But since it was signed into law in September 2019, A.B. 5 has faced numerous legal challenges, including lawsuits lobbed by Uber and Lyft claiming the statute is unconstitutional.

The tech companies took their fight to voters and in November, Californians passed Proposition 22,

which exempts some app-based ride-hailing and delivery companies from having to reclassify their drivers as employees under A.B. 5.

Despite the recent carveouts, Derry said there still remains a "whole host" of independent contractor relationships in other industries like the trucking industry, and those relationships are still bound by A.B. 5 requirements.

Derry said in 2021, he expects much of the pending Uber and Lyft litigation will be dropped, but he also expects to see more one-off attempts at excluding certain professions from the statute. However, Derry added that A.B. 5 likely won't be scrapped outright.

Although Assemblyman Kevin Kiley, R-Rocklin, plans to introduce a bill to repeal the law this month, Derry said that with Democrats controlling the Legislature, A.B. 5 is likely here to stay in some form.

Boosting Corporate Diversity While Strengthening Worker Rights

In 2020, California lawmakers took strides toward requiring companies to diversify their top brass by enacting A.B. 979, which mandates that publicly held companies incorporated in California achieve certain diversity requirements on their boards of directors by January 2023.

The new law, which requires California-based companies to include people from underrepresented communities on their boards, was passed in the wake of a similar law requiring boards to increase the number of women board members.

Since Newsom signed A.B. 979 into law in September, a conservative activist group has sued to block it, arguing that the statute runs counter to the due process and anti-discrimination provisions of California's Constitution.

Legal experts say they are keeping a close eye on the litigation, along with how shifts in boardroom dynamics stemming from the law may impact corporate governance. A.B. 979's enactment comes alongside S.B. 973, which imposes new pay data reporting requirements for employers starting in March, part of an effort to root out discriminatory pay disparities between employees of different genders and races.

Morrison & Foerster's Cousins, however, emphasized that whether the data collected will be useful in the government's enforcement efforts remains to be seen, and the new law imposes significant burdens on administrators to keep track of and produce the data.

"A lot of concern is this is going to be a lot of work, and it's not going to amount to much use," Cousins said.

Meanwhile, the state has enacted several employee-friendly statutes, including S.B. 1383, which alters the California Family Rights Act to require employers with more than five workers to give workers up to 24 weeks of protected leave in a 12-month period under certain circumstances, and A.B. 1947, which doubles the period plaintiffs have to file complaints with the state Division of Labor Standards Enforcement from six months to a year and incentivizes civil litigation by allowing plaintiffs' attorneys to recover fees for certain retaliation claims.

Cousins noted that many small-business owners likely aren't aware of the changes to the CFRA under

S.B. 1383, which he emphasized has a lot of procedural payroll reporting requirements. While large companies are used to keeping tabs on employment law changes, the new statute likely isn't on the radar of many small-business owners, even though a violation of the new law could result in a wrongful termination claim and significant penalties and damages, he said.

Cousins said companies that don't comply could see themselves at the business-end of a "pretty full-blown lawsuit."

"It's really something that needs to be taken very seriously by organizations," he continued. "I think it will be a challenge, to say the least, for small employers."

--Editing by Orlando Lorenzo.

Correction: An earlier version of this story misspelled Michael T. Krueger's last name in one instance. The error has been corrected.