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MEMORANDUM

TO: PUBLIC AGENCY CLIENTS

FROM: BARTKIEWICZ, KRONICK & SHANAHAN

DATE: DECEMBER 31, 2020

RE: SUMMARY OF NEW LEGISLATION FOR 2021

A number of new laws may impact your agency in 2021. We have prepared this memorandum to summarize laws enacted in the 2020 legislative session, and to recommend actions for complying with any new requirements. The spread of COVID-19, and the Legislature's efforts to address the risk it presents, resulted in a session focused on short-term, pandemic-related legislation. As has been a recent trend, the Legislature also focused on labor and employment matters in the 2020 session. This emphasis also resulted in less focus on issues that have typically been prevalent in recent years such as water, energy, and environmental legislation. Except as noted, the laws discussed in this memorandum will take effect on January 1, 2021.

WATER

SB 974 - California Environmental Quality Act: small disadvantaged community water system: state small water system: exemption.

SB 974 establishes an exemption from CEQA's environmental review requirements for projects that would improve drinking water quality, water supply, or water supply reliability within disadvantaged communities or state small water systems.¹ The exemption will last until January 1, 2028 and specifically applies to projects that consist solely of the installation, repair, or reconstruction of water infrastructure. The bill prescribes a number of criteria that a proposed project must meet in order to qualify for the exemption. If your agency potentially qualifies for this exemption and is interested in implementing a project pursuant to it, and would like guidance specific to whether the proposed project qualifies for the exemption, please contact your primary BKS attorney.

¹ "State small water system" is defined as "a system for the provision of piped water to a disadvantaged community for human consumption that serves at least 5, but not more than 14, service connections and does not regularly serve drinking water to more than an average of 25 individuals daily for more than 60 days out of the year."

SB 1386 - Local government: assessments, fees, and charges: water: hydrants.

SB 1386 is intended to address issues associated with the lawsuit filed in March against 81 water suppliers throughout California. The lawsuit claims that fixed costs for capacity necessary for fire protection and fire hydrants owned by the water suppliers were being subsidized by ratepayers in violation of Proposition 218, and should instead have been charged to the particular governmental entity responsible for fire protection. The bill clarifies that for purposes of assessments related to wholesale charges for water, sewage treatment, or wastewater treatment, “water” is defined to mean any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water from any source. It also expressly provides that the fees or charges for property-related water service imposed or increased on customers may include the costs to construct, maintain, repair, or replace public hydrants attached to a water system, and the cost of water dispensed through public hydrants. Although the bill specifies that it is declarative of existing law, this clarification is intended to reduce public agencies’ exposure to litigation on this issue.

COVID-19

AB 685 – COVID-19: imminent hazard to employees: exposure: notification: serious violations.

In response to reports of significant outbreaks in certain workplaces, and a lack of compliance with the recommended guidelines, applicable executive orders and public health orders, the California Legislature passed AB 685 to ensure public and private employers are providing a safe work environment to their employees. The bill imposes a number of reporting requirements on all employers based on an employee’s COVID-19-related illness. Within one business day after an employer knows or reasonably should know of an employee’s exposure to COVID-19, the employer must do all of the following:

- Provide a written notice via personal service, email, or text message, to all employees at the workplace where the exposure occurred that they may have been exposed to COVID-19;
- Provide all employees *who may have been exposed* with information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state, and local laws, including but not limited to workers’ compensation, COVID-19-related leave such as sick leave, state-mandated leave, supplemental sick leave, and antiretaliation and antidiscrimination protections of the employee; and
- Notify all employees and the employers of subcontracted employees on the disinfection and safety plan that the employer plans to implement and complete per the guidelines of the federal Centers for Disease Control.

Employers are required to retain any notices provided pursuant to the above for a period of at least three years. In the event an employer knows or reasonably should know of an “outbreak” at the workplace, it will be subject to additional requirements. Specifically, such employers are required to notify the local public health agency in the jurisdiction of the worksite of the names, number, occupation, and worksite of employees that have either

(1) tested positive for or been diagnosed with COVID-19; (2) been ordered to isolate by a public health official; or (3) died due to COVID-19. The California Department of Public Health is required to publish to its website this workplace industry information received from the local public health departments (without any personally identifiable employee information).

This bill implements many specific notice requirements for an employer when learning about a workplace exposure to COVID-19. If you have any questions about the information and notice required to be given in the event of any workplace exposure to COVID-19 or assistance with preparing any required notices, please contact your primary BKS attorney.

AB 1867 – Small employer family leave mediation: handwashing: supplemental paid sick leave.

AB 1867—passed as an urgency measure and effective since September 9, 2020—complements the federal coronavirus-related paid sick leave requirements provided by the Families First Coronavirus Response Act (FFCRA). The bill added section 248.1 to the Labor Code, which requires qualified “hiring entities” to provide COVID-19 supplemental paid sick leave to certain “covered workers,” including emergency responders, who were potentially ineligible for FFCRA paid sick leave. The definition of emergency responders is vague, and although it could potentially apply on an individual client and employee basis, its applicability to your agency is a fact-specific determination. AB 1867 also provides a mechanism for employees to bring actions against their employers for any alleged or perceived violation of these requirements.

Notably, the AB 1867 supplemental paid leave requirements are set to expire on December 31, 2020 or upon expiration of any extension of the paid sick leave requirements of the FFCRA. The recent federal extension of certain portions of the FFCRA did not include an extension of the federal paid sick leave requirements beyond December 31, 2020. To date, the California Legislature has yet to take action to extend the supplemental leave provided by AB 1867. However, given California’s rapidly increasing number of COVID-19 cases, we anticipate that the Legislature may act soon after it reconvenes on January 11, 2021 to extend supplemental paid leave benefits and other COVID-19-related requirements into 2021. BKS will continue to monitor the developing state and federal legislative enactments related to COVID-19 paid leave and keep you informed of any applicable changes and requirements. If you have any questions about your agency’s FFCRA or supplemental sick leave compliance thus far, please contact your primary BKS attorney.

Separately, AB 1867 also establishes a small employer family leave mediation pilot program administered by the California Department of Fair Employment and Housing. The pilot program applies to all employers with between 5 and 19 employees. Under it, either an employer or an employee may, within 30 days of receipt of a right-to-sue notice alleging a violation of the employee’s right to family care and medical leave, request all parties to participate in the department’s dispute resolution program, during which the employee is barred from pursuing civil action. The pilot program is currently set to expire on January 1, 2021. It is unclear whether the California Legislature will extend the program.

SB 1159 - Workers' compensation: COVID-19: critical workers.

SB 1159 imposes many new requirements on public agency and other employers to address workers' compensation issues for COVID-19-related injuries or illnesses, and essentially codified Governor Newsom's Executive Order N-62-20 regarding COVID-19. As an urgency statute, SB 1159 has been effective since September 17, 2020, when it was approved and signed by Governor Newsom. Prior to this bill, the law created a disputable presumption that specified injuries sustained in the course of employment of a specified member of law enforcement or a specified first responder arose out of and in the course of the employment. By passing this bill, the California Legislature expanded the definition of a compensable "injury" to an employee to include illness or death that results from exposure to COVID-19 if: (1) the injury is confirmed by a positive COVID-19 test or diagnosis; (2) within 14 days after a day that the employee performed labor or services; (3) at the employee's place of employment;² and (4) at the employer's direction.

Notably, this presumption only applies to injuries that occurred on or after March 19, 2020, and on or before July 5, 2020, unless the employee is a first responder or health care worker as defined,³ in which case, the presumption extends to January 1, 2023. For all other employees working for employers that employ at least five people testing positive for COVID-19 on or after July 6, 2020, the disputable presumption only applies in the event of an "outbreak" at the employee's place of employment where at least five employees are employed.⁴

SB 1159 also imposes a duty on employers to report positive COVID-19 results to their claims administrator within three business days when the employer knows or reasonably should know that an employee has tested positive, regardless of whether the employee has filed an associated workers' compensation claim. The report must specify:

- That an employee tested positive for COVID-19 (without any personally identifiable information, unless the employee claims the infection is work-related or has filed a claim);
- The date the employee's test was taken;
- The address(es) of the place of employment during the preceding 14 days; and
- The highest number of employees who reported to work at that location in the 45-day period prior to the last day the employee worked at that location.

² The bill explicitly excludes the employee's home or residence from the definition of the "employee's place of employment."

³ Critical workers are defined to include firefighters, peace officers primarily engaged in law enforcement activities, fire and rescue services coordinators, an employee who provides direct patient care, authorized registered nurses or other health professionals as provided, among others. The list does not include operators or other employees of public water or wastewater providers (See Labor Code Section 3212.87(a) for a complete list of critical workers.

⁴ For these purposes, the bill defines an "outbreak" for most employers as a situation where 4 employees test positive for COVID-19 within 14 calendar days of each other, or the location is otherwise ordered close by a local or state health department.

If not doing so already, we recommend that all public agency clients with five or more employees maintain detailed records of which of their employees was working, when, and where. Some of the evidence relevant to an employer disputing the presumption includes evidence of measures in place to reduce the potential transmission of COVID-19 and evidence of an employee's nonoccupational risks of a COVID-19 infection, so it is advantageous for employers to continue strictly enforcing the COVID-19 protocol established at each worksite until the presumption expires in 2023 (or any earlier time if the law is amended or repealed). Additionally, although for most of our public agency clients, the presumption of a COVID-19-related injury arising on or after July 6 only applies in the event of an "outbreak," any employee may still bring a traditional workers' compensation claim alleging such injuries, although they would have the burden of proving the claim is work-related by the normal preponderance of the evidence standard.

LABOR & EMPLOYMENT

AB 1947 - Employment violation complaints: requirements: time.

This bill extends the period of time for filing a complaint with the Division of Labor Standards Enforcement alleging an employer's unlawful discharge or discrimination from six months to one year⁵ after the occurrence of the alleged violation. AB 1947 also provides reasonable attorney's fees for plaintiffs who bring a successful claim for an employer's violation of whistleblower protections.

AB 2257 — Worker classification: employees and independent contractors: occupations: professional services.

Last year, the California Legislature passed AB 5, which codified the *Dynamex* decision and its presumption that any worker providing labor or services for payments is an employee and entitled to receive the benefits and protections the law provides employees. An employer may rebut the presumption and treat the worker as an independent contractor if the employer can prove the three "ABC Test" factors.⁶ Under AB 5, certain categories of workers and business relationships were exempted from this presumption, including certain business-to-business contracting relationships. Effective as of September 4, 2020, AB 2257 adds public agencies and quasi-public corporations to these business-to-business exemptions, allowing public agencies to apply the *Borello* test⁷ when contracting with another business if they can demonstrate the following criteria are satisfied:

⁵ Like the previous 6-month statute of limitations, the new text also allows for an extension of this one-year statute of limitations for "good cause."

⁶ Those factors are:

- (1) The person is free from the direction and control of the hiring entity when performing the work;
- (2) The person performs work that is outside the usual course of the hiring entity's business; and
- (3) The person is customarily engaged in an independently established trade, occupation, or business in the same nature as the work performed.

⁷ The *Borello* test primarily addresses whether the hiring entity has the "right to control" the manner and means in which the worker completes his or her work.

- The business service provider is free from the control and direction of the agency, both under the contract and in fact;
- The business service provider is providing services directly to the agency, rather than the agency's customers;
- There is a written contract specifying the payment amount, rate of pay, etc.;
- The business service provider has any required license applicable to the work;
- The business service provider maintains a business location separate from the agency;
- The business service provider is customarily engaged in an independently established business of the same nature of the work performed;
- The business service provider can contract with other businesses or agencies to provide the same or similar service and maintain a clientele without restrictions by the agency;
- The business service provider holds itself out to the public as available to provide the same or similar services;
- The business service provider provides its own tools, vehicles, and equipment to perform the services, as required by the nature of the work;
- The business service provider can negotiate its own rates;
- The business service provider is not performing the type of work for which a license from the Contractors' State License Board is required, pursuant to Chapter 9 of Division 3 of the Business and Professions Code.

Although in practice, AB 2257 probably will not affect your agency's currently-existing classifications of particular service providers as independent contractors, this bill provides greater flexibility for public agencies when contracting for certain services, such as information technology and landscaping services. If you have questions regarding how this bill may affect any current or upcoming contracts, please contact your primary BKS attorney.

AB 2992 – Employment practices: leave time.

Currently, employers are prohibited from discharging, discriminating, or retaliating against employees who are a victim of domestic violence, sexual assault or stalking, for taking time off from work to obtain or attempt to obtain relief to help ensure the health, safety or welfare of the victim or victim’s child. AB 2992 broadens the scope of these protections by expanding the definition of a victim protected under the statute, allowing for the victims of a crime or abuse⁸ to take time off from work to obtain or attempt to obtain relief, including a restraining order or other type of injunctive relief to help ensure the health, safety, or welfare of the victim or their child. This bill also provides that employers are prohibited from taking action against employees when an unscheduled absence occurs if employees provide certification that they were receiving services for certain injuries. For employers with 25 or more employees, AB 2992 provides additional protections to a victim, prohibiting the employer’s discharge of, discrimination or retaliation against them for taking time off to seek medical attention or obtain services for physical or mental injuries caused by crime or abuse.

SB 1383 – Unlawful employment practice: California Family Rights Act

SB 1383 repeals the California New Parent Leave Act (NPLA) and California Family Rights Act (CFRA), and instead implements a new CFRA. SB 1383 expands the protections previously afforded by these acts by applying the provisions to most private employers, adding the ability to care for a serious health condition of more family members, and eliminating other previous restrictions on the use of CFRA leave. As with the previous leave laws, the new CFRA continues to apply to all government agencies. Affected employers will be required to grant employees up to 12 workweeks of unpaid protected leave during any 12-month period to bond with a new child of the employee or to care for themselves or a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner, or due to 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.

GENERAL LOCAL GOVERNMENT

AB 992 - Open meetings: local agencies: social media.

AB 992 details how local elected officials may use social media to engage with their constituents while complying with the Brown Act. AB 992 sets a similar standard for social media as is currently in place under the community meetings exception to the Brown Act. The members of a legislative body may use internet-based public social media platforms to answer questions (e.g., Facebook, Twitter), provide information to the public, or solicit information from the public regarding a matter that is within the subject matter jurisdiction of the legislative body.

⁸ Including a victim of stalking, domestic violence, or sexual assault; a victim of a crime that caused physical injury or that caused mental injury and a threat of physical injury; or a person whose immediate family member is deceased as the direct result of a crime.

The part of this bill that deviates from existing Brown Act requirements is that it prohibits even one additional member of the legislative body from communicating with the member that originally posted to social media. In this context, any type of response by a legislative body member to another member’s social media post, share, or comment, *regardless* of whether less than a quorum of the legislative body is involved, is prohibited. What constitutes a comment to a social media post is broad, and can include simple affirmative or negative responses, or even an emoji, “like” or other symbol. Given this prohibition, we recommend that client managers advise their legislative body members about this new Brown Act prohibition. Clients also should consider amending any existing relevant board policy or implementing a new social media policy to govern legislative body members’ use of social media concerning agency business. If your agency would like assistance with preparing such a policy or advising your governing board on this new law, please contact your primary BKS attorney.

AB 2107 – Local government: securitized limited obligation notes.

AB 2107 reauthorizes, until December 31, 2024, a previously-existing statute that expired on December 31, 2019, which allowed a special district to issue securitized limited obligation notes (SLONs) for the acquisition or improvement of land, facilities, or equipment. These notes must mature within 10 years and can be issued to a cumulative \$2 million dollars outstanding at one time.

AB 2151- Political Reform Act of 1974: online filing and disclosure system.

This bill requires a local agency to post on its website, within 72 hours of the applicable filing deadline, a copy of any campaign finance disclosure documents filed with that agency in paper format. The agency must redact the street name and building number of the persons or entity representatives listed on any document before posting. Agencies also must make the filings available for four years from the date of the election associated with the filing. This bill does not change any requirements related to the filing and retention of Forms 700 and other conflict of interest filings.

AB 2231 - Public works.

The law currently exempts from classification as a public works project, and thus from payment of prevailing wage, otherwise private development projects if a state or local agency directly or indirectly funds that project with a public subsidy that is “de minimis” in the context of the project. AB 2231 clarifies that the “de minimis” exception is limited to a direct or indirect monetary or in-kind subsidy by a public entity of less than \$600,000, and only if that is less than 2% of the total project cost. The bill explicitly provides that it does not apply to any project that was advertised for bid, or a contract that was awarded pursuant to that bid, before July 1, 2021.

Redistricting

In response to numerous California Voting Rights Act (CVRA) challenges against local agencies since the enactment of the CVRA in 2001, in which many agencies have switched to district-based from at-large elections, either voluntarily or as a result of actual or threatened litigation, the California Legislature enacted AB 849 in the 2019 legislative

session to clarify the process by which cities and counties must switch from at-large to district-based elections and to redistrict existing voting divisions after each decennial census. Although AB 849 does not apply to our special district clients, it and the increased focus on voting practices, and election integrity generally, underscores the importance of ensuring that your agency is complying with all of its voting system obligations.

Special district clients that have by-division voting systems in place, and if required by their authorizing act, will be required by Elections Code section 22000 to redistrict based on the 2020 census data. The 2020 census data is anticipated to be released on March 31, 2021. This decennial redistricting must be conducted in compliance with the requirements of Elections Code sections 22000 and 22001 and federal voting rights requirements.⁹ The decennial redistricting must be completed no later than 180 days preceding the next district election, which, based on the November 8, 2022 election date, means the required public hearing and any necessary changes must occur prior to May 12, 2022. Given the recent focus on voting rights issues, we recommend that clients promptly review the relevant 2020 census data upon receiving it to evaluate your agency's redistricting obligations, if any. If adjustments to your agency's electoral division boundaries or other adjustments are required, your agency should prepare a schedule to ensure that all steps related to redistricting are completed prior to May 12, 2022, and to communicate with the public as required and appropriate to publicize any redistricting activities undertaken. In light of the recent focus on voting rights, clients that still vote at-large may wish to analyze whether they might have potential liability for a claimed voting rights violation. If you have any questions regarding your agency's obligations for redistricting after release of the final 2020 census data or related elections matters, please contact your primary BKS attorney for an individualized assessment of the steps your agency will need to undertake and when.

ENERGY & ENVIRONMENT

AB 2386 - Office of Emergency Services: disaster council plans.

Currently, cities and counties are authorized to create disaster councils to develop plans for meeting any condition constituting a local emergency or state of emergency, including, earthquakes or natural or manmade disasters specific to that jurisdiction. Under AB 2386, the Office of Emergency Services is now required to annually review a minimum of 10 emergency plans described above to determine if the plans substantially conform to the best practices published by the Federal Emergency Management Agency, prioritizing in its review a plan submitted from a county determined to be at a "high risk" of wildfire disaster. These measures are intended to address deficiencies identified by the California State Auditor's Office last year of certain state and local emergency and natural disaster preparedness plans.

If you have any questions regarding the new laws discussed in this memorandum, or if you need assistance reviewing or revising any of your agency's related policies, documents, or forms, or preparing new policies, please contact your primary BKS attorney.

⁹ See 52 U.S.C., § 10301.