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Nevada Legislative Update 2021

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Similar to 2019, in 2021, the Nevada Legislature passed several bills implicating employment issues for both private and public employers. High level summaries of the relevant provisions of these bills and their effective dates are set forth below.

AJR 10 – Constitutional Minimum Wage Amendment

AJR 10 proposes to amend the Nevada Constitution, which currently establishes a 2-tier minimum wage system, allowing employers who provide qualifying health benefits to pay employees the lower tier minimum wage. The Nevada Constitution also presently provides for annual minimum wage adjustments based on increases in the federal minimum wage or, if greater, by the cumulative increase in the cost of living measured by the Consumer Price Index ("CPI"), subject to a 3 percent CPI adjustment cap.

If approved by the voters in 2022, AJR 10 would eliminate the two-tier minimum wage system and establish a $12/hour minimum wage for all employers (regardless of whether they provide qualifying health benefits), beginning July 1, 2024. AJR 10 would also eliminate the annual CPI increase and provide for increases in the Nevada minimum wages corresponding to any increases in the federal minimum wage above $12/hour. Finally, AJR 10 would expressly allow the Nevada Legislature to establish a minimum wage greater than $12/hour.

The resolution passed the 2019 and 2021 legislative sessions and will be placed on the 2022 ballot for voter approval.

SB 209 – Paid COVID-19 Leave

SB 209 requires private employers in Nevada that are beyond their first 2 years of operation and have 50 or more employees in Nevada to provide additional paid leave to employees for the purpose of receiving COVID-19 vaccination. If the employee is receiving a one-dose vaccine, the employer must provide two consecutive hours of paid leave. If the employee is receiving a two-dose vaccine administered on two separate occasions, the employer must provide two separate periods of leave for two consecutive hours for each occurrence, for a total of 4 hours of paid leave. Employers who provide a vaccination clinic on premises during the regular work hours of the employee are not subject to this leave requirement.

The employee must provide at least 12 hours-notice before using paid leave. Employers are required to maintain records of the receipt, accrual and use of this leave for each employee for 1 year following entry of such information and, upon request, make them available for inspection by the Nevada Labor Commissioner.

Neither the employer, nor any person acting on the employer's behalf (including agents, representatives, or supervisors), may deny an employee the right to use this paid leave, require an employee to find a replacement worker in order to exercise this leave, or retaliate against an employee for using the leave. Prohibited adverse actions against an employee for exercising their leave rights include, without limitation: (i) terminating the employee; (ii) penalizing the employee in any way; and/or (iii) making deductions from the employee's wages to cover the paid leave provided to the employee. SB 209 does not affect any contract or other agreement that provides a more generous paid time off entitlement to employees.

Notably, SB 209 also amended existing Nevada paid leave law (NRS 608.0197)—which already states that employees need not provide a reason for using leave—to clarify that paid leave may also be used for:

1. treatment of a mental or physical illness, injury, or health condition;
2. receiving a medical diagnosis or medical care;
3. receiving or participating in preventative care;
4. participating in caregiving; or
5. addressing other personal health needs.

Paid leave under SB 209 is not considered hours worked for purposes of calculating overtime.

The Nevada Labor Commissioner is to prepare a bulletin setting forth SB 209's leave requirements, and employers will be required to post the bulletin in a conspicuous location in each workplace maintained by the employer.

SB 209 is effective immediately, but the COVID-related paid leave requirement expires on December 31, 2023.

SB 293 – Wage and Salary History Inquiries

SB 293, applicable to private and public employers, as well as employment agencies, makes it unlawful to seek the wage or salary history of an applicant, rely on past wage or salary history in determining whether to make an employment offer or in determining the rate of pay, or discriminate or retaliate against an applicant for not providing their wage or salary history. Notably, “wage or salary history” also includes “any compensation and benefits” received by the applicant from their current or former employer. SB 293 also makes it unlawful to retaliate against an employee or an applicant for opposing any practice that SB 293 prohibits or because the applicant or employee has made a charge, testified, assisted, or participated in an investigation or proceeding related to the bill's provisions.

The definition of “employer” under SB 293 includes, without limitation, the State of Nevada, an agency or a political subdivision of the State of Nevada, a county, incorporated city, and an unincorporated town. For purposes of the bill, an “employment agency” means a person who undertakes to procure employees for an employer or to procure for employees opportunities to work for an employer. SB 293 does not apply

to an employer with respect to employment outside Nevada, religious organizations (in certain respects), and certain tax-exempt organizations.

SB 293 mandates that employers and employment agencies provide interviewed applicants the wage or salary rate for the position. If a current employee has applied for a promotion or transfer and has completed an interview or has been offered the promotion or transfer, employers and employment agencies must provide the employee the wage or salary range or rate for the desired position, if the employee requests it. Employers and employment agencies may ask the applicant for their wage or salary expectation for the position sought.

These limitations and requirements also apply to boards of county commissioners, county officers, and any other persons acting on behalf of a county, as well as appointing authorities, governing bodies of incorporated cities or unincorporated towns, their officers, and their agents.

SB 293 provides rights to aggrieved individuals to file complaints with the Nevada Labor Commissioner, and the Labor Commissioner may issue, upon request of the person, a right-to-sue notice after 180 days have passed from the complaint filing. The person may bring action against the employer or employment agency no later than 90 days after receipt of the notice. If a court finds a violation of SB 293, the court may award the employee the same legal or equitable remedies that may be awarded to a person under Title VII of the Civil Rights Act of 1964 (“Title VII”), if the employee is protected by Title VII or NRS 613.330.

In addition, the Labor Commissioner may impose penalties of no more than $5,000 for each violation, in addition to any other remedy or penalty. If the penalty is imposed, the Labor Commissioner may also recover costs of the proceeding, including investigative costs and attorney's fees.

SB 293 is effective October 1, 2021.

SB 327 – Protection for Natural Hairstyles

Existing Nevada law already prohibits race discrimination. SB 327 clarifies that “race” includes traits associated with race, such as hair texture and protective hairstyles (including, without limitation, natural hairstyles, afros, bantu knots, curls, locks and twists). Employers may still enforce health and safety requirements under federal and state law.

In addition, SB 327 mandates that where an employee files a charge with the Nevada Equal Rights Commission (“NERC”) and NERC does not determine that an unfair employment practice has occurred, NERC must: (i) issue the employee a right-to-sue notice and a letter explaining that the employee may bring a civil action in district court no later than 90 days after receiving the right-to-sue letter; and (ii) provide the employee basic information related to filing a charge with the U.S. Equal Employment Opportunity Commission (“EEOC”) and the process by which the EEOC conducts their review of NERC's conclusion.

SB 327 also includes provisions related to testing for vertical employee promotions by certain counties, incorporated cities, and school districts, as

well as provisions addressing aspects of collective bargaining for local government employers.

In relevant part, SB 327 is already in effect.

SB 386 – Right to Recall in Certain Industries

Also known as the “Nevada Hospitality and Travel Workers Right to Return Act,” SB 386 gives certain categories of employees who had worked for covered employers for at least 6 months during the 12 months preceding March 12, 2020 and were laid off for economic reasons after March 12, 2020 the right to return to their jobs starting July 1, 2021 through August 21, 2022.

Covered employers are business entities which directly or indirectly own or operate an airport service provider, an airport hospitality business, a casino, an event center, or a hotel that is located in a Nevada county with a population of at least 100,000 people. These terms are specifically and broadly defined in the Act. In addition, to be covered, employers must employ or exercise control over the wages, hours, and working conditions of 30 or more employees or must have done so as of March 12, 2020. Successor employers are also encompassed by the Act if, on or after January 31, 2020, they bought or otherwise acquired the ownership, or all or substantially all of the assets, of another employer which owns or operates a covered enterprise, and continued to conduct the same or similar business as the predecessor employer. A covered employer's obligations are not excused because of an organizational form change or operational relocation within Nevada.

While the term “employee” is broadly defined, it excludes employees who serve in managerial or executive capacity and employees who are exempt from the Fair Labor Standards Act's minimum wage and overtime requirements. Persons who are engaged as theatrical or stage performers are also outside the Act's scope. Further, the Act does not apply to laid-off employees who are parties to valid severance agreements.

Covered employers must offer eligible laid-off employees any openings which become available after the Act's effective date and which are the same or similar within the same job classification to what the employee held at the time of the employee's most recent separation from active service. Reemployment offers must be made in writing, by mail to the employee's last known address and, if known, through telephone, text message, or e-mail. If more than one employee is entitled to reemployment, then the employer must make the first offer to the employee with the greatest seniority. The employer may make simultaneous offers conditioned on the order of preference. Those who receive offers must accept or decline within 24 hours and be ready to work within 5 days of receiving the offer. If they do not, the employer may recall the next available employee with the greatest seniority.

Workers may reject up to three bona fide job offers (with a minimum of 3 weeks between each offer) if the job is the same or similar to the job the employee held previous to layoff and has similar hours. After three

rejections or being unreachable for the three offers (because mail and/or e-mail are returned as undeliverable, and the employee-provided telephone number for calls and text messages is no longer in service), the employee is no longer entitled to the job. The employer may also choose to not extend additional offers if the employee states in writing that they do not wish to be considered for future positions or the employee does not want to be considered for positions with regularly scheduled hours of work that are different from those the employee worked immediately before the employee's last separation from active service with the employer.

If the employer declines to recall a laid-off employee due to lack of qualifications and hires another person instead, the employer must provide a written explanation identifying all reasons for the decision within 30 days of that decision. The notices must be made available in English, Spanish, or any language that is spoken by 10% or more of the employer's workforce.

Employers may not retaliate against any person for seeking to enforce their rights under this Act, participating in proceedings under this Act, or opposing any practice under this Act (even if the employee is mistaken but acts in good faith). The Act creates a rebuttable presumption of retaliation if a laid-off employee exercised the rights created by the Act or alleged in good faith that the employer violated the Act, and the employee took an adverse action against the employee within 60 days of the employee's protected conduct. The employer may overcome the presumption by showing that the “true and entire” motivation for the adverse action was a legitimate business reason, and the employee may rebut the employer's explanation by showing it was pretextual.

Additionally, in the event of a layoff, the employer must provide employees who are to be laid off with written notice of the layoff at the time of the layoff or, if the layoff took place before the effective date of the Act, no later than 20 days after that date. The notice must be provided in person or mailed to the employee's last known address and, if known, by telephone, text message, or e-mail. This notice is subject to the same language requirements and must include a notice of the layoff and the layoff's effective date, a summary of the employee's reemployment rights or clear instruction as to how the employee may access information about these rights, and contact information of a person authorized by the employer to receive employee grievances of alleged violations of this Act.

The employer must retain records regarding the layoffs for two years, measured from the date of the written layoff notice provided to the employee. These records must include: (a) the full name of the employee; (b) the employee's job classification and date of hire; the employee's last known address, email, and telephone number; (c) a copy of the written layoff notice; and (d) records of reemployment offers made to the employee.

The Act establishes a private right of action for employees aggrieved under this Act and entitles those who prevail to rights of hiring and reinstatement, as well as future and back pay and benefits. Violating employers, agents of the employer, and other persons who violate or cause a violation of the Act

are subject to civil penalties as well as compensatory and liquidated damages in the amount of $500, payable to the aggrieved employee, for each day the employee's rights are violated. Aggrieved employees may also file a complaint with the Nevada Labor Commissioner. Although no criminal penalties may be imposed for Act violations, both a court and the Labor Commissioner may award attorney's fees to a prevailing plaintiff. In addition, the Act does not limit a terminated employee's right to bring action for wrongful termination, and specifically authorizes courts to reform any Act provisions to preserve the Act's maximum effect.

Before bringing a court action or a filing a Labor Commissioner complaint, however, an employee must provide the employer with a written notice of the alleged violation and any facts supporting the claimed violation; the employee must also allow the employer 15 days after receipt of the notice to cure the alleged violation.

SB 386 does not affect other employment standards that are more beneficial to employees. SB 386 also does not supersede an employee's recall rights contained in a collective bargaining agreement (“CBA”), and the applicable CBA will govern in the event of a conflict with SB 386.

In relevant part, SB 386 is effective July 1, 2021 and expires by limitation on the later of the date on which the Governor terminates the emergency described in the Declaration of Emergency for COVID-19 issued on March 12, 2020 or August 31, 2022.

AB 47 – Non-Compete Agreements

AB 47 revised existing Nevada non-compete law (NRS 613.195) to expressly prohibit non-competition agreements with employees who are “paid solely on an hourly wage basis, exclusive of any tips or gratuities.” By way of background, under current Nevada law, non-competition agreements are enforceable if they meet the following requirements:

1. They are supported by valuable consideration;
2. They do not impose any restraint that is greater than what is required for the employer's protection;
3. They do not impose any undue hardship on the employee; and
4. They impose restrictions that are appropriate in relation to the valuable consideration supporting the non-compete.

(Limitations exist in situations involving reductions in force, layoffs, etc.). AB 47 preserved the existing language requiring a court to revise an overbroad non-compete that is otherwise supported by proper consideration but created an additional requirement that any judicial revisions must not impose undue hardship on the employee.

In addition, AB 47 clarifies that an employer may not bring action to restrict a former employee from providing services to a former client if: (1) the former employee did not solicit the former customer or client; (2) the customer or client voluntarily chose to leave and seek the former employee's services; and (3) the former employee is otherwise complying with the limitations of the employee's non-compete covenant as to time,

geographical scope, and scope of activity to be restricted—except for any limitation on providing services to a former customer/client who seeks the former employee's services without any contact instigated by the former employee.

If an action to enforce or challenge a non-compete is brought—by the employer or the employee, respectively—and a court finds that the non-competition agreement applies to an employee compensated solely on an hourly basis, or if a court determines that the employer has restricted or tried to restrict the employee from providing services to a former client as allowed by the bill (and current statute), then the court "shall award the employee reasonable attorney's fees and costs." A court may award attorney's fees to a prevailing party pursuant to NRS 18.010.

AB 47 also contains extensive provisions pertaining to healthcare transactions and proceedings under the Nevada Unfair Trade Practice Act. It becomes effective October 1, 2021.

AB 190 – Sick Leave Allocation for Family Care

Pursuant to AB 190, if an employer provides paid or unpaid sick leave to their employees, the employer must allow an employee to use accrued sick leave to assist their immediate family members who have an illness, injury, medical appointment, or other authorized medical need. "Immediate family" means the employee's child, foster child, spouse, domestic partner, sibling, parent, parents-in-law, grandchild, grandparent, stepparent, and any person for whom the employee is the legal guardian. The employer may limit the sick leave amount the employee can use to an amount equal to no less than the amount of sick leave the employee accrues during a 6-month period.

Employers may not deny employees the right to exercise this leave or retaliate against an employee for attempting to use the leave. AB 190 does not apply to the extent prohibited by federal law, or with respect to employees covered under a valid collective bargaining agreement.

Employers must post a bulletin to be prepared by the Nevada Labor Commissioner regarding AB 190 in a conspicuous location in each workplace.

AB 190 is effective October 1, 2021.

AB 222 – Deadline for Filing Discrimination Complaints

AB 222 provides that actions under Nevada's anti-discrimination laws and/or Title VII of the Civil Rights Act of 1964 must be brought no more than 180 days after the date of the claimed discriminatory act or no more than 90 days after the issuance of a right-to-sue notice issued either by the Nevada Equal Rights Commission ("NERC") or by the United States Equal Employment Opportunity Commission ("EEOC")—whichever is later.

AB 222 further clarifies that the filing of a complaint with NERC or the EEOC tolls the limitations periods to bring a lawsuit under Title VII or NRS

613.420.

AB 222 is already effective.

SB 107 – Two-Year Statute of Limitations for Wrongful Termination Claims

SB 107 requires that common law wrongful termination claims be brought within 2 years after the challenged employment termination. This 2-year period is, however, tolled from the date when an administrative complaint relating to the termination of employment is filed with a federal or state agency and the date that is 93 days after the conclusion of the administrative proceedings concerning the complaint.

SB 107 is already effective.

AB 37 – Employee Wage Garnishment for Child Support

For purposes of child support garnishments, AB 37 defines “employer” as a person or entity that employs an obligor as an employee or independent contractor. Employers who have received a notice to withhold, which includes an arrears payment component, must inform the enforcing authority before making a lump sum payment equal to or exceeding $150 to the obligor. Lump sum payments are included in the definition of “income” for garnishment purposes and mean commission payments, bonuses (discretionary or non-discretionary), productivity or performance bonuses, profit sharing, referral or sign-on bonuses, incentive payments for moving or relocation, attendance and safety awards, cash payments, termination or severance pay, and any other one-time, unscheduled or irregular payment of compensation.

The information to be provided by the employer to the enforcing authority must be on a form prescribed by the Division of Welfare and Supportive Services (“DWSS”) and must be submitted to the enforcing authority at least 10 days before the date when the employer intends to make the $150 or more lump sum payment to the obligor. Within 10 days after receiving the form from the employer, the enforcing authority is required to provide the employer with a written notice from DWSS, specifying the amount to be withheld from the lump sum payment and delivered to the enforcing authority. Employers cannot make the lump sum payment before the stated intended date of release, or the 11th day after submitting the DWSS form to the enforcing authority or the date that the written notice from the enforcing authority is received by the employer—whichever is earlier. The written notice from the enforcing authority is binding on the employer and must be sent by the enforcing authority to the obligor's last known address by first class mail and to the employer by first class mail or electronically. An obligor may contest the written notice.

The bill authorizes a court to impose penalties on an employer who declines to withhold money from a lump sum payment or refuses or intentionally fails to remit money from a lump sum payment to an enforcing authority.

AB 37 is effective October 1, 2021.

AB 385 – Compensation Received by Public Officers and Employees

With certain exceptions, AB 385 prohibits public bodies from entering into employment contracts that entitle officers or employees of the public body to receive:

1. fringe benefits, unless the public body has adopted a policy pursuant to which all employees in similar positions are to receive the benefit;
2. bonuses, unless based on merit and awarded at a public meeting;
3. upon termination for cause or resignation when an investigation related to their employment is pending:

    (i) wages in lieu of notice or administrative leave;
    (ii) salary, benefits, or equivalent compensation, including severance pay;
    (iii) bonus; or
    (iv) other forms of payment.

Terminated public body officers or employees must be paid for any accumulated annual leave, compensatory time, and unused sick leave authorized by law or policy. Terminated officers and employees are also still entitled to receive compensation for past services and their pension or retirement benefits under the Public Employees' Retirement System or other retirement or pension program of which they are members.

AB 385 does not prohibit public body officers or employees from bringing causes of action for wrongful or unlawful acts committed against them involving their employment or termination or accepting any legal or equitable relief awarded or recovered as a result of those causes of action. The bill also does not prohibit a public body from agreeing to pay the cost of purchasing service credit on behalf of an officer or an employee pursuant to NRS 286.3007 or under any other retirement or pension program, if applicable.

These provisions do not apply to any contract negotiated pursuant to a collective bargaining agreement or officers or employees of the Nevada System of Higher Education.

AB 385 is effective December 1, 2022.

SB 245 - Labor Commissioner Authority and Wage Definition

Subject to certain exception, SB 245 requires the Nevada Labor Commissioner to decline jurisdiction over a complaint filed with the Labor Commissioner if the complainant is covered by a collective bargaining agreement (“CBA”) that provides an exclusive remedy or other relief for a violation of its terms—until such time as the remedies, relief, and relevant appeals (if any) have been exhausted. The Labor Commissioner may, however, assume jurisdiction if the Labor Commissioner determines that the remedies or other relief contained in the CBA are inadequate,

unavailable, or non-binding. If the Labor Commissioner assumes jurisdiction, the Commissioner must determine the employer's compliance with all applicable Nevada laws, including those set forth in NRS Chapter 608.

SB 245 also states that, if an employer fails to pay the wages, compensation, or salary of an employee timely and fully, the employee may bring a civil action against the employer within 2 years after the employer's failure. The Commissioner is prohibited from taking jurisdiction over a claim for the same wages due while the civil action is pending.

Finally, SB 245 supplements the definition of “wages” under NRS 608.012 to include amounts owed to a discharged employee or to an employee who resigns due to untimely payment to the employee.

SB 245 is effective July 1, 2021.

AB 307 – Unemployment Services Posting

AB 307 requires the Nevada Department of Employment, Training and Rehabilitation (“DETR”) to prepare one or more notices concerning job training or employment programs offered by DETR, such as its Career Enhancement Program and Nevada JobConnect—and to provide each such notice to the Nevada Labor Commissioner. The Labor Commissioner, in turn, is required to make the notices available to Nevada private employers and to require employers to post the notices in a conspicuous location at the workplace where notices to applicants and employees are ordinarily posted and read.

AB 307 is effective October 1, 2021.
