

EMPLOYER BEWARE

BY MARK E. TERMAN

NEW CALIFORNIA EMPLOYMENT LAWS FOR 2021



Among the lasting 2020 impacts of fires, politics and COVID-19, is increased regulation of California employers. More than 563 bills introduced in the last California legislative session mention “employer,” compared to about 300 bills in 2019. While most bills stalled in the Legislature, many were signed into law by Gov. Gavin Newsom, bringing more rules and risks for employers in our state, dealing with workplace safety; sick leave; workers’ compensation; diversity and discrimination; worker classification and wages; privacy; employee leaves; and settlements.

The following are elements of key state Assembly Bills (AB) and Senate Bills (SB) that became law Jan. 1 (unless otherwise noted) and affect private employers.

COVID-19, Workplace Safety & Sick Leave

Employers Must Notice COVID-19 Exposures



AB 685 requires employers who receive “notice of potential exposure” to COVID-19 to provide notice within one business day:

- In writing to all employees, and the employers of subcontracted employees, who were on the premises at the same worksite (i.e., specific portion of the workplace) as the “qualifying individual” within the “infectious period” that they may have been exposed

to COVID-19, and to the exclusive representative (i.e., union), if any, of the employees;

- To all employees who may have been exposed and their exclusive representative, if any, with information regarding COVID-19-related benefits to which they may be entitled, including but not limited to worker’s compensation, COVID-19-related leave and paid sick leave, as well as the employer’s anti-discrimination and anti-retaliation policies; and
- To all employees, the employers of subcontracted employees and the exclusive representative, if any, of the disinfection and safety plan that the employer plans to implement and complete, per federal CDC guidelines.



The written notice will be given in the same manner the employer normally communicates employment-related information. That may include, among other means, personal service, email or text message if it can reasonably be anticipated that the employee will receive it within one business day of sending. The notice must be in both English and the language understood by the majority of the employees.

“Notice of potential exposure” means notification to the employer from or through:

- A public health official or licensed medical provider that an employee was exposed to a “qualifying individual” at the worksite;
- An employee, or their emergency contact, that the employee is a qualifying individual;
- The testing protocol of the employer that the employee is a qualifying individual; or
- A subcontracted employer that a qualifying individual was on the worksite of the employer receiving notification.

“Qualifying individual” means a person who has:

- A laboratory-confirmed case of COVID-19;
- A positive COVID-19 diagnosis from a licensed health care provider;
- Been ordered, due to COVID-19, to isolate provided by a public health official; or
- Died due to COVID-19.

“Infectious period” means the time a COVID-19-positive individual is infectious, as defined by the state Department of Public Health.

AB 685 also mandates that, within 48 hours of learning of a COVID-19 “outbreak” (as defined by the state Dept. of Public Health), employers notify the local public health agency of the names, number, occupation and worksite of qualifying individuals, as well as the employer’s business address and NAICS code of the worksite where the qualifying individuals worked. The employer must then continue to give notice to the local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite.

Finally, AB 685 authorizes Cal/OSHA to shut down operations at a worksite upon its determination that a worksite or operation “exposes workers to the risk of infection” of COVID-19 constituting an “imminent hazard.” AB 685 also permits Cal/OSHA to issue a “serious violation” citation for COVID-19 related hazards without first issuing a notice of intent giving 15 days to respond to the notice with evidence in defense before a citation may issue.

This bill amends sections 6325 and 6432 of, and adds section 6409.6 to, the Labor Code.

Supplemental Paid Sick Leave



Effective Sept. 9, 2020, AB 1867 requires employers of 500 or more employees nationwide, and certain employers of health care providers and emergency responders, to provide COVID-19 Supplemental Paid Sick Leave (SPSL) for California employees who leave their place of residence to perform work. To be eligible, the employee must be unable to work because: the employee is subject to a federal, state or local quarantine or isolation order related to COVID-19; the employee is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or the employee is prohibited from working by the employer due to health concerns related to the potential transmission of COVID-19.

The California Labor Commissioner issued FAQs to assist employers in SPSL administration. Topics include how much leave is available and clarity that the state’s “general stay-at-home order” is not a qualifying quarantine or isolation order. See dir.ca.gov/dlse/FAQ-for-PSL.html.

Employers also must comply with the notice and paystub requirement of the California Healthy Workplaces, Healthy Families Act of 2014 to state the amount of paid sick leave available for use on either the employee’s itemized wage statement, or in a separate writing provided along with the employee’s

payment of wages.

COVID-19 SPSL must be provided until Dec. 31, 2020, the same date that the federal Families First Coronavirus Response Act (FFCRA) is set to expire. The FFCRA applies to employers with fewer than 500 employees. If the FFCRA is extended, odds are good that COVID-19 SPSL will be extended to match that of the FFCRA. Employees on SPSL while the law expires must be allowed to finish taking the amount of leave.

Separate from COVID-19, AB 1867 requires the California Department of Fair Employment and Housing (DFEH) to create a family leave mediation pilot program for employers with between five and 19 employees. The DFEH is the state agency with power to investigate, mediate and prosecute complaints by employees or former employees under the state Fair Employment and Housing Act (FEHA). If such small employer or its employee requests mediation through the DFEH dispute resolution division, no lawsuit can be filed until the mediation is complete, and the statute of limitations would be tolled for the employee to bring a civil claim. This program expires Jan. 1, 2024.

This bill rewrites of the Government Code Sec. 12945.21, adds Health and Safety Code Sec. 113963 and amends Sec. 248.5 of, and adds secs. 248 and 248.1 to, the Labor Code.

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Workers' Compensation & COVID-19



Effective Sept. 17, 2020, SB 1159 frames presumptions governing workers' compensation eligibility for illness related to COVID-19 from and after March 19, 2020, the date originally established by Gov. Newsom's Executive Order N-62-20. These presumptions can be disputed with evidence that, for example, such illness did not arise at work. There are three key elements of the bill.

First, the bill codifies (and supersedes) that Executive Order, which created presumptions that an employee's illness related to COVID-19 is an occupational injury and therefore eligible for workers' compensation benefits if specified criteria are met, covering all California employees who worked at a jobsite outside their home at the direction of their employer between March 19 and July 5, 2020.

Second, for cases arising on or after July 6, 2020, SB 1159 creates a presumption that any COVID-19 related illness of an employee arose out of and in the course of employment for purposes of awarding workers' compensation benefits if criteria are met for two types of employees: certain first responder and health care employees listed in the new law; and all other employees, but only if COVID-19 exposure occurred during an "outbreak" at the specific place of employment.

A "specific place of employment" (SPOE) means, "the building, store, facility or agricultural field where an employee performs work at the employer's direction." SPOE "does not include the employee's home or residence, unless the employee provides home health care services to another individual at the employee's home or residence."

An "outbreak" under SB 1159 is defined as any of the following occurring at a SPOE within 14 calendar days:

- If the employer has 100 employees or fewer, four employees test positive for COVID-19;
- If the employer has more than 100 employees, 4 percent of the number of employees who reported to the SPOE test positive for COVID-19; or
- The SPOE is ordered closed by public authorities due to a risk of infection with COVID-19.

This definition is different from the one that applies for AB 685 reporting purposes.

Third, employers with five or more employees, who know or reasonably should know that an employee has tested positive for COVID-19, must report to their workers' compensation carrier in writing via electronic mail or facsimile within three business days all of the following:

- "An employee has tested positive." That employee's personally identifiable information must not be provided unless the employee asserts the infection

is work-related or has filed a workers' compensation claim form disclosing the infection;

- The date that the employee tests positive, which is the date the specimen was collected for testing;
- The addresses of each of the employee's SPOE during the 14-day period preceding the date of the employee's positive test; and
 - The highest number of employees who reported to work at the employee's SPOE in the 45-day period preceding the last day the employee worked at each SPOE.

The reporting mandate applies regardless of whether the employer believes the employee contracted COVID-19 at work.

The bill also places a retroactive reporting requirement on employers.

By Oct. 17, 2020, employers were to have provided a similar written report to their workers' compensation carrier for any positive test that occurred between July 6, 2020, and Sept. 16, 2020.

The report requirements are the same, except that the highest number of employees per relevant SPOE is for the period between July 6 and Sept. 17, 2020.

An employer—or other person acting on its behalf—who intentionally submits false or misleading information or fails to submit information when reporting can be fined up to \$10,000 by the Labor Commissioner.

This bill adds Sec. 77.8 to, and repeals secs. 3212.86, 3212.87, and 3212.88 of, the Labor Code.

SB1159 bill also places a retroactive reporting requirement on employers.

Diversity & Discrimination

Added Corporate Board Diversity



Passed in 2018, SB 826 was the nation's first law mandating female membership on boards of directors. By Dec. 31, 2019, it required publicly held corporations (listed on a major U.S. stock exchange) whose executive offices are located in California (according to the corporation's SEC 10-K form) to have at least one female director. No later than Dec. 31, 2021, the minimum number of required female directors increases to two if the corporation has five directors or to three if the corporation has six or more directors. "Female" under this bill means, "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth."

Effective Sept. 30, 2020, AB 979 expands board diversity requirements of publicly held corporations whose principal executive office is located in California. By Dec. 31, such boards must have at least one director from an under-represented community. No later than Dec. 31, 2022, the minimum number of required



directors from under-represented communities increases to two if the corporation has more than four, but fewer than nine directors, and to three directors for such boards with nine or more directors. “Director from an under-represented community” means, “an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual or transgender.”

AB 979 expands the California Secretary of State’s (SOS) obligation to publish each March 1 a corporate compliance report regarding female directors, to include directors from an underrepresented community starting March 1, 2022.

Finally, SB 979 further authorizes the SOS to impose fines for violations as follows: \$100,000 for failure to timely file board member information with the Secretary of State, \$100,000 for a first violation and \$300,000 for a second or subsequent violation.

The bill amends Sec. 301.3 of, and adds secs. 301.4 and 2115.6 to, the Corporations Code.

AB 979 requires publicly held corporations to have directors from an under-represented community in numbers based on board size.

Pay Data & Reporting



SB 973 requires employers with 100 or more employees to submit a pay data report to the Department of Fair Employment and Housing (DFEH) by March 31, 2021, and annually thereafter. Modeled after the federal EEO-1 Component 2 collection form, the state pay data report requires employers to collect aggregate W-2 earnings and report the number of employees in each of the 12 pay bands (spanning from \$19,239

and under to \$208,000 and over) for 10 broad job categories (executive or senior-level officials and managers, first or mid-level officials and managers, professionals, technicians, sales workers, administrative support workers, craft workers, operatives, laborers and helpers, and service workers) classified by race, sex and ethnicity.

Employers also must report total hours worked by each employee within a given pay band during the reporting year. Employers with multiple establishments must submit a report for each establishment as well as a consolidated report that includes all employees.





The bill authorizes the DFEH to oversee the collection of pay data and to share information of alleged pay discrimination with the agency responsible for enforcing the California Equal Pay Act, the Division of Labor Standards Enforcement, to coordinate enforcement.

The bill also requires the Employment Development Department to provide the DFEH, upon its request, as specified, with the names and addresses of all businesses with 100 or more employees and authorizes the DFEH to seek an order requiring non-reporting employers to comply with SB 973.

This bill amends Sec. 12930 of, and adds Chapter 10 (commencing with Section 12999) to, the Government Code.

Worker Classification & Wages

Independent Contractor Classification Labyrinth



Now infamous AB 5 (effective Jan. 1, 2020) codified and expanded applicability of the “ABC test,” established in 2018 by the California Supreme Court in the *Dynamex* case.

The ABC test presumptively considers all workers to be employees and forces a hiring business to bear the burden of proving each of the following criteria for proper independent contractor classification:

AB 5 also established seven groupings, covering about 50 industry-specific professions, trades and relationships, exempt from the ABC test that instead would be subject to factors articulated in 1989 by the California Supreme Court.





- The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under contract for the performance of the work and in fact.
- The worker performs work outside the usual course of the hiring entity's business.
- The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

AB 5 also established seven groupings, covering about 50 industry-specific professions, trades and relationships, exempt from the ABC test that instead would be subject to factors articulated in 1989 by the California Supreme Court in the *Borello* case and in classification criteria in the statute.

Effective Sept. 4, 2020, AB 2257 retains the ABC test and modifies and adds exemptions to the ABC test. Some elements are summarized here; but, more than most bills, the devil is in the details.

AB 2257 expands the scope of exempted professionals and industries such as recording artists, songwriters, lyricists, performance artists, licensed landscape architects, real estate appraisers, home inspectors, persons who provide underwriting inspections and other services for the insurance industry, still photographers, photojournalists, videographers, photo editors, fine artists, freelance writers, translators, editors, content contributors, advisors, narrators, cartographers, producers, copy editors, illustrators and newspaper cartoonists.

“Bona fide business to business” exemption changes, include that:

- A “contracting business” can be a public agency or quasi-public corporation;
- Services can be provided directly to customers of contracting business by employees of the “business services provider” if the services are provided solely in the name of the business services provider;
- The written contract must include payment amount, any applicable rate of pay, and due date of payment;
- The business service provider's business location may include the business service provider's residence; and



**Effective Sept. 4, 2020,
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- The business service provider can contract with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity.

AB 2257 clarifies that a service provider that provides services through a referral agency may be properly classified as an independent contractor if the service provider satisfies 11 criteria

which include:

- The service provider is free from the control and direction of the referral agency both as a matter of contract and in fact;
- If the work for the client is performed in a jurisdiction that requires the service provider to have a business license or business tax registration—or a professional license, permit, certification registration—the service provider must certify to the referral agency that they have the required documents;
- The service provider provides its own tools and supplies to perform the services and the service provider sets their own hours and terms of work or negotiates their hours and terms of work directly with the client;
- Without deduction by the referral agency, the service provider sets their own rates, negotiates their rates with the client through the referral agency, negotiates rates directly with the client or is free to accept or reject rates set by the client;
- The service provider is customarily engaged, or was previously engaged, in an independently established business or trade of the same nature as, or related to, the work performed for the client and the service provider is free to accept or reject clients and contracts; and
- The referral agency does not restrict the service provider from maintaining a clientele and the service provider is free to seek work elsewhere, including through a competing referral agency.

The bill adds Sec. 2775 and repeals Sec. 2750.3 of the Labor Code, and amends secs. 17020.12 and 23045.6—and adds secs. 18406, 21003.5 and 61001 to—the Revenue and Taxation Code (RTC).



Successor Liability for Unpaid Wages



AB 3075 seeks to aid enforcement of liability for wage and hour law violations where multiple, changing and successor business entities may make enforcement more difficult.

It mandates that required statements of information filings with the California Secretary of State include whether any officer or director of the corporation, or member or manager of the limited liability company, “has an outstanding final judgment issued by the Division of Labor Standards Enforcement or a court of law, for which no appeal therefrom is pending, for the violation or provision of the Labor Code.”

The bill also makes a successor employer liable for any wages, damages and penalties owed to any of the

predecessor employer’s former workforce pursuant to a final judgment, after the time to appeal has expired or appeal affirms the judgment. Successorship can be established by any of the following:

- Substantially the same facilities or substantially the same workforce to offer substantially the same services as the predecessor employer. This factor does not apply to employers who maintain the same workforce pursuant to the Displaces Janitor Opportunity Act (Labor Code Sec. 1060 et. seq.);
- Substantially the same owners or managers that control the labor relations as the predecessor employer;
 - Employs as a managing agent any person who directly controlled the wages, hours or working conditions of the affected workforce of the predecessor employer; or

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- Operates a business in the same industry and the business has an owner, partner, officer or director who is an immediate family member of any owner, partner, officer or director of the predecessor employer.

This bill amends Sec. 1205 of, and adds Sec. 200.3 to, the Labor Code and amends secs. 1502, 2217 and 17702.09 of the Corporations Code.

Learned or Artistic Professional Exemption and Adjunct Professors

AB 736 Classification as “exempt” (from overtime and certain other wage and hour law rigors) most always requires satisfaction of both the duties test and the salary basis test. Professors typically satisfy the former. Payment of a salary equal to twice the state minimum wage for a full-time worker (\$58,240 annually in 2021 for employers with more than 25 employees) is the common way to meet the salary basis test.

Effective Sept. 9, 2020, AB 736 confirmed an alternate salary basis test for part-time, or “adjunct,” faculty at private, nonprofit colleges and universities in California who are employed by the course or laboratory. To satisfy this test, the faculty member must be paid at least the following per classroom hour: \$117 in 2021, \$126 in 2021, \$135 in 2022 and a percentage increase in 2023 and each year thereafter that is equal to

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the percentage increase to the state minimum wage. This per classroom hour calculation “encompass[es] payment for all classroom or laboratory time, preparation, grading, office hours, and other course or laboratory-related work for that course or laboratory and no separate payment shall be required. ‘Classroom hour’ means the time spent in the primary forum of the course or laboratory, regardless of whether the forum is in-person or virtual.”

Employees must be compensated separately for non-course related work on behalf of the employer, which will not affect the employee’s classification as an exempt employee. Finally, when employed under a collective bargaining agreement, the faculty member must be paid pursuant to the CBA if the classification of employment in a professional capacity is expressly included in the CBA in clear and unambiguous terms.

This bill adds Labor Code Sec. 515.7.

Minimum Wage Going Up

As part of legislation signed by Gov. Brown in 2015, the state minimum wage increased on Jan. 1 to \$14 per hour for employers with 26 or more employees and to



NEW CALIFORNIA EMPLOYMENT LAWS FOR 2021

\$13 per hour for employers of 25 or fewer employees. It will continue to increase annually until \$15 per hour is reached by Jan. 1, 2022, for larger (26-plus employees) employers, and by Jan. 1, 2023, for smaller employers. State minimum wage changes impact classification

requirements to assure compliance in each municipality in which they have employees working. A good starting place is the UC Berkeley Labor Center Inventory of U.S. City and County Minimum Wage Ordinances: <https://laborcenter.berkeley.edu/minimum-wage->



of most exempt workers. In addition to “duties tests” for administrative, executive and professional exemptions, a salary of at least twice the state minimum wage must be paid to meet the “salary basis test” (assuming another salary basis test does not apply). By Jan. 1, the annualized salary rate that employers with 26 or more employees must pay to meet the exempt salary requirement will advance to \$58,240. Employers with smaller workforces must pay at least \$54,080 as salary to meet the test.

State minimum wage increases also impact retailers who rely on the inside-sales exemption, which requires that employees be paid at least 1.5 times the state minimum wage, and at least half of their other earnings be from commissions.

Municipalities continue to create and increase their own minimum wage for companies with employees working in their jurisdiction. Employers must pay the higher of the state or local minimum wage. These local rates typically change Jan. 1 or July 1. Some are already in excess of \$16 per hour. Employers should monitor the

[living-wage-resources/inventory-of-us-city-and-county-minimum-wage-ordinances/](https://laborcenter.berkeley.edu/minimum-wage-ordinances/).

Overtime Exemption for Some Computer Professionals

Labor Code Sec. 515.5 contains an overtime pay exemption for highly skilled computer professionals who spend more than half of their working time in top-level intellectual or creative work that requires the exercise of discretion and independent judgment, such as software engineers and programmers, and systems designers and analysts. To qualify for exemption, the employee

To qualify for Labor Code Sec. 515.5 exemption, the employee also must be paid at least a minimum amount per hour or, alternatively, a salary equal to that hourly rate.

also must be paid at least a minimum amount per hour or, alternatively, a salary equal to that hourly rate. Each year, the California Department of Industrial Relations sets that pay rate based on the California CPI increase. For 2021, the minimum hourly rate of pay exemption is \$47.48, the minimum monthly salary exemption is \$8,242.32 and the minimum annual salary exemption is \$98,907.70.



Employee Privacy

Human Resources Data Under California Consumer Privacy Act



Passage of both AB 1281 and Nov. 3, 2020, ballot Proposition 24 extended until Jan. 1, 2023, the exemption from employer obligations under the California Consumer Privacy Act regarding human resources personal information.

This bill amends Civil Code Sec. 1798.145.

Leaves of Absence

California Family Rights Act Now Applies to Small Employers



Under SB 1383, the rewritten California Family Rights Act (CFRA) now applies to employers of five or more employees and affords eligible employees up to 12 workweeks of unpaid protected leave during any 12-month period. CFRA leave purposes are:

- To bond with a new child of the employee;
- For themselves or a child, parent, grandparent, grandchild, sibling, spouse or domestic partner; or
- To attend to a qualifying exigency related to the covered active duty of an

employee's spouse, domestic partner, child or parent in the Armed Forces of the United States.

To be eligible for leave, an employee must have at least 1,250 hours of service with the employer during the previous 12-month period and satisfy certain notice and certification requirements. SB 1283 eliminates the

SB 1283 eliminates the prior eligibility requirement that the employer employ any number of employees within a 75-mile radius of the employee's worksite.

prior eligibility requirement that the employer employ any number of employees within a 75-mile radius of the employee's worksite. It also repeals the New Parent Leave Act as bonding leave for smaller employers is now covered by the CFRA. The bill also requires an employer who employs both parents of a child grant up to 12 weeks of leave to each employee.

Integration with other federal Family and Medical Leave (FMLA) and California Pregnancy Disability Leave (PDL) remains the same. CFRA leave runs concurrently with FMLA leave (except for leave taken under the FMLA for disability due to pregnancy or childbirth). CFRA leave and PDL run consecutively.

This bill repeals Government Code secs. 12954.6 and 12945.2, and implements a new CFRA under Sec. 12945.2.

Employee Designation of Kin Care Use



Existing "kin care" law permits an employee to use up to half of their accrued paid sick leave to attend to the illness of a family member. AB 2017 provides that when an employee uses sick leave to attend to the illness of a family member, the employee has sole discretion to designate sick leave as being for themselves or for family care.

This bill amends Labor Code Sec. 233.

Paid Family Leave Benefits in Support of Military



AB 2399 expands Paid Family Leave to include benefits paid for time off for participation in a qualifying exigency related to the active duty or call to active duty of an individual's spouse, domestic partner, child or parent in the Armed Forces of the United States.

This bill amends secs. 3302 and 3307 of the Unemployment Insurance Code.





More Leave for Crime Victims



California Labor Code Sec. 230 and 230.1 prohibit employers of 25 or more employees from discharging, discriminating or retaliating against an employee who is a victim of domestic violence, sexual assault or stalking, for taking time off from work to obtain or attempt to obtain relief to ensure the health, safety or welfare of the victim or victim’s child. “Relief” includes legal proceedings, medical attention and psychological counselling, domestic

a settlement agreement with an employee whom the employer determined in good faith has engaged in sexual harassment or sexual assault, and in severance or separation agreements unrelated to employment disputes. AB 2143 expands the exception to include good faith determination that the settling, former employee engaged in criminal conduct. The bill also requires that the good-faith determination must have been made and documented by the employer before the employee has filed a claim.

This bill amends Code of Civil Procedure Sec. 1002.5.

AB 2143 expands the exception to include good faith determination that the settling, former employee engaged in criminal conduct.

violence shelter and safety planning.

AB 2992 expands the scope to apply to all violent crimes and when the employee is an immediate family member of a homicide victim, even if there has been no arrest for, or prosecution or conviction of, the crime.

In addition to existing certification requirements, the bill prohibits employers from taking action against employees when an unscheduled absence occurs if employees provide certification that they were receiving services for certain injuries, or if the documentation is from a victim advocate (as defined).

This bill amends Labor Code secs. 230 and 230.1.



Settlements

‘No Rehire’ Prohibited in Settlement Agreements



Existing law prohibits provisions in settlement agreements resolving employment disputes that block the employee-claimant from obtaining future employment with the accused employer, except for two situations:

What’s Next?

Employers should consider how these new laws impact their business and workplace, and then review and update their personnel and document retention policies and practices with experienced attorneys or human resource professionals.

Mark E. Terman is a partner with Faegre Drinker Biddle & Reath LLP in the firm’s Labor and Employment Group. You can reach him at faegredrinker.com.