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California Expands Employee Protections: A Dozen New Employment Laws Impacting Employers with Operations in California in 2023

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California's Legislature recently ended another busy session, sending a slew of new employee-friendly bills to Governor Gavin Newsom, who was not stingy with his pen. As a result, many California employees will wake up on January 1, 2023, with novel and enhanced rights related to pay data, protected marijuana use, and bereavement leave, among others. There are also several pre-existing laws governing pay and privacy with provisions set to kick in with the New Year.

Below we discuss the changes and laws warranting the immediate attention of any company with employees in California. Unless otherwise specified, the new laws discussed below take effect on January 1, 2023.

Laws Related to Compensation

SB 1162 (Pay Data Report and Pay Scale Disclosure)

In 2020, California enacted SB 973, requiring private employers with more than 100 employees to submit an annual pay data report to the California Civil Rights Department ("CRD") by March 31 each year.[1] SB 1162 expands and modifies these reporting obligations in three important ways, and adds a new job-posting disclosure.

First, it closes a perceived loophole used by companies that hire employees through "Labor Contractors"—i.e., "an individual or entity that supplies, either with or without contract, a client employer with workers to perform labor within the client employer's usual course of business." Any business with 100 or more employees "hired through labor contractors" within the prior calendar year will need to submit a separate pay data report to the CRD.

Second, in addition to providing the number of employees and labor contractor workers by race, ethnicity, and sex who fall within each of the pay bands used by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics Survey and 10 pre-established job categories, covered employers will need to provide the "median and mean hourly rate" by each combination of race, ethnicity, and sex within the 10 categories.

Third, the deadline to submit the requisite annual pay data reports now falls on the second Wednesday of May of each year.

Finally, SB 1162 does not just change the coverage, data, and deadline for annual pay data reports. It also requires any employer with 15 or more employees to include the applicable "pay scale"—meaning "the salary or hourly wage range that the employer reasonably expects to pay for the position"—with any job posting. Employers must also provide current employees with the pay scale for their position upon request.

For more details about SB 1162, see our client alert, here.

SB 3 (Minimum Wage)

California enacted SB 3 back in 2016, triggering a series of annual, incremental increases to the statewide minimum wage until it reached $15/hour. On January 1, 2022, employers with 26 or more employees became subject to the $15/hour minimum wage. All other employers were scheduled to join them January 1, 2023.

However, SB 3 also required that the minimum wage automatically increase by 3.5% if inflation surpassed 7% annually. The California Department of Finance projected inflation for the 2022 fiscal year to be 7.6%. As a result, on May 12, 2022, Governor Newsom announced that California's minimum wage will increase to $15.50 per hour for all employees beginning on January 1, 2023, regardless of the size of the employer.

Notably, this increase will impact most exempt employees in California, increasing the annual salary required to meet the salary basis test to $64,480 annually ($5,373.33 per month), effective January 1, 2023.

Laws Related to Discrimination

AB 2188 (Use of Cannabis)

California legalized the non-medical use of cannabis back in 2016 with the passage of Proposition 64. AB 2188 seeks to strike a balance between the realities of increasing legalization of cannabis and the interests of employers to maintain a safe, drug-free workplace.

The law amends the Fair Employment and Housing Act to make it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, based upon: (1) the person's use of cannabis off the job and away from the workplace; or (2) an employer-required drug screening test that has found the person to have *non-psychoactive* cannabis metabolites in their urine, hair, or bodily fluids.

As the latter provision makes clear, employers can continue to screen for Tetrahydrocannabinol ("THC"), the chemical compound that indicates impairment and causes psychoactive effects. They are only barred from discriminating against applicants and employees due to the presence of non-psychoactive cannabis metabolites—compounds that can stay within someone's body for weeks after using cannabis—in their system.

Additionally, there are several carve-outs to AB 2188. For instance, the new law does not:

- Apply to employees in the building and construction trades;
- Permit an employee to be impaired by, use, or possess cannabis on the job;

- Prohibit an employer from discriminating in hiring, or any term or condition of employment, or otherwise penalize a person based on *scientifically valid pre-employment drug screening* conducted through methods that do not screen for non-psychoactive cannabis metabolites;
- Affect the rights or obligations of an employer to maintain a drug-and alcohol free workplace, as specified under the Control, Regulate and Tax Adult Use of Marijuana Act;
- Supersede state or federal laws requiring applicants or employees to be tested for controlled substances, including laws and regulations requiring applicants and employees to be tested, or a specific manner of testing, as a condition of receiving federal funding, receiving federal licensing-related benefits, or entering into a federal contract; or
- Apply to applicants or employees hired for positions that require a federal government background investigation or security clearance, as specified.

AB 2188 will become effective January 1, 2024.

Laws Related to Leave

AB 1041 (Leave for "Designated Person")

Census records show that less than a fifth of American households still have the traditional structure of a "nuclear family"—a married couple and their biological children. According to AB 1041's author, "California's family leave laws" nevertheless "continue to reflect" that "outdated" model by only permitting "workers time off to care for certain narrowly defined family members."

AB 1041 thus allows workers to take leave under California's Family Rights Act ("CFRA") and Healthy Workplaces, Healthy Families Act ("HWHFA")[2] to care for a "designated person." The CFRA defines "designated person" as "any individual related by blood or whose association with the employee is the equivalent of a family relationship." The HWHFA defines them as any person "identified by the employee at the time the employee requests paid sick days." While employees do not have to identify their "designated person" until they request leave, companies are allowed to limit workers to one designated person per 12-month period.

AB 1949 (Bereavement Leave)

California's Legislature has repeatedly tried to create a statutory right to bereavement leave. It finally succeeded with AB 1949, in part due to its reliance on a perceived need to protect workers who are grieving for loved ones lost to the COVID-19 pandemic.

AB 1949 amended the CFRA to provide California employees with up to five days of job-protected bereavement leave in the event of the death of a close family member. The new provision covers any employer with five or more workers,[3] though an employee must have worked for at least 30 days prior to commencing leave, and not already be covered by a collective bargaining agreement providing for bereavement leave at a level equivalent to what is required by the new law (along with other specified working conditions). For now, though, the only "family members" for whom a worker may take leave to grieve are spouses, children, parents, siblings, grandparents, grandchildren, domestic partners, and parents-in-law—a worker's "designated person" is not covered.

Employees do not have to take all five days of bereavement consecutively, though they must take all five of the days within three months of their family member's death. Bereavement leave is also unpaid,

unless there is an existing bereavement leave policy that provides otherwise. If such a policy offers fewer than five days of paid leave however—for example, two days of paid bereavement—the company must still provide an additional three days of protected leave, though those are unpaid.

AB 1949 also authorizes employees to use accrued and available paid time off (including vacation, personal leave, accrued and available sick leave, and compensatory time off) to provide pay during bereavement leave.

Employers cannot retaliate or discriminate against any worker for exercising their right to bereavement leave, or otherwise interfere with, restrain, or deny the exercise of such rights. However, the employer may request proof of the family member's death (e.g., a death certificate, a published obituary, written verification from a mortuary), which the employee must provide within 30 days of the first day of the leave. Employers must treat that proof, and the reasons for an employee's leave, as confidential.

Laws Related to Health and Safety

SB 1044 (Emergency Conditions)

SB 1044 arose from a concern of inadequate protections for workers who need to leave the workplace, or access their phones, during emergencies like natural disasters and active shooter situations. The new law provides that in the event of an "emergency condition"—defined as either (1) conditions of disaster or extreme peril to the safety of persons or property at the workplace or worksite; or (2) an order to evacuate a workplace, a worksite, a worker's home, or the school of a worker's child, caused by natural forces or a criminal act—an employer cannot:

- Take or threaten adverse action against any employee for refusing to report to, or leaving, a workplace or worksite within the affected area because the employee has a "reasonable belief that the workplace or worksite is unsafe"; *or*
- Prevent any employee, from both the private and public sectors, from accessing the employee's mobile device or other communications device for seeking emergency assistance, assessing the safety of the situation, or communicating with a person to verify their safety.

There are various exemptions. For instance, the prohibition on "adverse action" does not apply to specific emergency responders, health care workers, or employees who work on certain public utilities, among others. The cellphone-use restriction is inapplicable to specified employees of depository institutions like banks, correctional facilities, and those who are actively operating certain types of equipment.

Under the bill, employees must first notify their employer (when feasible) of the condition giving rise to their belief that the workplace is unsafe and justifying them in leaving, or not reporting to work. If it is not feasible to provide notice before leaving or the start of the employee's workday, then the employee must provide notice as soon as possible.

Laws Related to COVID-19

AB 152 (Supplemental Paid Sick Leave)

On February 9, 2022, Governor Newsom signed SB 114, creating new Labor Code section 248.6, providing up to 80 hours of COVID-19 supplemental sick leave for full-time employees divisible into two banks:

- A covered employee is entitled to up to 40 hours of COVID-19 supplemental sick leave if the covered employee is unable to work or telework due to certain reasons related to COVID-19, including that the employee is attending a COVID-19 vaccine or vaccine booster appointment for themselves or a family member, or is experiencing symptoms, or caring for a family member experiencing symptoms, related to a COVID-19 vaccine or vaccine booster; and

- A covered employee is entitled to up to 40 additional hours of COVID-19 supplemental paid sick leave, if the covered employee, or a family member for whom the covered employee is providing care, tests positive for COVID-19.

For more details about SB 114, see our client alert, here.

Section 248.6 applied retroactively to January 1, 2022, and was effective through September 30, 2022. AB 152 extends the expiration date to December 31, 2022. However, it does not provide additional leave for employees who have already exhausted their COVID-19-related leave time.

AB 152 also makes an employer-friendly tweak to the law. Companies are now allowed to ask employees dipping into the second bank of 40 hours to take a second diagnostic test on or after the fifth day after the positive test that allowed the leave; and, if that test is positive, a third test within 24 hours of the second. Employers must pay for the costs of those tests, but are not obligated to provide additional COVID-19 SPSL to any employee who refuses to submit to the additional testing.

Finally, AB 152 establishes the California Small Business and Nonprofit COVID-19 Relief Grant Program within the Governor's Office of Business and Economic Development (GO-Biz) to assist small businesses and nonprofits, with 26 to 49 employees, for incurring costs for COVID-19 SPSL. Under this program, GO-Biz will provide grants to reimburse qualified small businesses or nonprofits for actual costs incurred for SPSL provided in 2022, up to a maximum of $50,000.

Because it was passed as a budget bill, AB 152 took effect immediately upon being signed by the Governor on September 29, 2022.

AB 2693 (COVID-19 Notice/Reporting Requirements)

In 2020, California responded to the COVID-19 pandemic by passing AB 685, creating various requirements around workplace COVID-19 exposure reporting. For more details about AB 685, see our client alert, here. AB 2693 extends and modifies these COVID-19-related requirements in four key ways.

First, AB 2693 extends the sunset date on the requirements to report COVID-19 in the workplace, as well as Cal/OSHA's authority to disable an operation or process at a place of employment when the risk of COVID-19 infection creates an imminent hazard, to January 1, 2024.

Second, AB 2693 provides employers with a choice as to how they wish to provide notice to workers potentially exposed to COVID-19 in the workplace. They can continue to, within one business day of learning of possible exposure, provide written notice to all employees who were at the same worksite as the infected worker during the infectious period—as well as their exclusive representative, if any—informing them (1) that they may have been exposed to COVID-19 and (2) of COVID-19-related benefits to which they may be entitled. Or within that same time frame they can post a notice, either prominently at the impacted worksite or in existing employee portals with other workplace notices, with all relevant information (i.e., dates on which an employee with a confirmed case of COVID-19 was on the worksite premises within the infectious period, location of the exposure, contact information for employees to

receive information regarding COVID-19 related benefits, and contact information for employees to receive the cleaning and disinfection plan that the employer is implementing), and then keep it up for 15 calendar days. Employers must continue to maintain a record as to how, and where, they provided notice.

Third, AB 2693 changes the event triggering an employer's obligation to provide notice—requiring it only when there is a "confirmed case of COVID-19," defined as "an individual who has been infected with COVID-19, as defined by the State Department of Public Health."

Fourth, under AB 2693, employers are no longer required to notify the local public health agency or State Department of Public Health when there is a COVID-19 outbreak. The Department of Public Health will also no longer publicly post the number and frequency of COVID-19 outbreaks and the number of COVID-19 cases and outbreaks by industry.

AB 1751 (Workers' Compensation COVID-19 Presumption)

California's legislature passed SB 1159 in 2020, establishing a set of presumptions related to COVID-19 for its workers' compensation system. Under that law, there is a rebuttable presumption that a peace officer, firefighter, specified frontline employees, and certain health care employees who contract COVID-19 were infected with the virus via a workplace exposure. For other employees, there is a presumption of occupational injury whenever they contract COVID-19 during an outbreak at a particular worksite. Employers bore the burden of rebutting these presumptions. For more details about SB 1159, see our client alert, here.

These presumptions were scheduled to sunset on January 1, 2023. AB 1751 extended them for another year to January 1, 2024, and added a handful of public sector employees to those covered by the applicable COVID-19 presumptions (i.e., the State Department of State Hospitals, the State Department of Developmental Services, the Military Department, and the Department of Veterans Affairs).

Laws Related to Privacy

CPRA (Expanded Privacy Obligations)

Voters passed the California Privacy Rights and Enforcement Act ("CPRA") by a ballot initiative in November 2020. This law requires businesses to provide legitimate and accessible means to allow consumers to obtain their personal information, delete it, correct it, or opt out of its sale. However, there was a partial exemption for data collected for employment purposes. That exemption expires on January 1, 2023, requiring covered employers to get into full compliance with the CPRA.

Covered employers must currently provide employees and applicants a notice that discloses (1) the categories of "personal information" the employer collects, and (2) the purposes for which it uses such information. Effective January 1, 2023, covered employers will need to revise their notice to also disclose: (a) whether the employer sells or shares personal information; (b) whether the employer collects, processes, or discloses "sensitive personal information," which is a new category of information created by the CPRA; and (c) the length of time the employer intends to retain each category of personal information, or, if that would not be feasible, the criteria it will use to determine that retention period.

One of the most significant obligations to which covered employers will become subject under the CPRA will be timely responding to employees' requests invoking one or more of the following rights:

- Right to request disclosure of categories of personal information collected, sources of personal information, third parties to whom the business disclosed the personal information, and what personal information was sold/shared and to whom;
- Right to request deletion of certain personal information collected from the individual, subject to exceptions such as where the information must be retained by law;
- Right to request that inaccurate personal information collected by a business be corrected;
- Right to direct a covered entity that collects sensitive personal information to limit the use of such information; and
- Right to direct a covered employer that sells or shares personal information, as defined in the CPRA, not to sell or share such information.

Covered employers must thus ensure they have adequate procedures in place for accepting CPRA requests (e.g., email address), evaluating the requests for applicability of legal exemptions, and responding to such requests in a timely manner where no exception applies.

They should also verify any agreements with "service providers"—i.e., entities that receive and use personal information in order to perform services for the business like payroll providers—are up to date. The CPRA requires that covered entities have certain terms in such agreements (e.g., prohibiting the service provider from selling or sharing the personal information).

Failure to comply with the CPRA may subject companies to legal action from the California Privacy Protection Agency, which is empowered to assess fines ranging from $2,500 to $7,500 per violation.

Laws Related to Working Conditions

AB 257 (Fast Food Sector Council)

AB 257 is a radical new law that, among other things, establishes a new bureaucratic organization—the Fast Food Council ("Council")—within the Department of Industrial Relations ("DIR"). The Council will, until January 1, 2029, establish sector-wide minimum standards on wages, working hours, and other working conditions related to the health, safety, and welfare of, and supplying the necessary cost of proper living to, "fast food restaurant" workers.

The new law covers any establishment within California that is part of a "fast food chain"—meaning a set of restaurants consisting of 100 or more establishments nationally that share a common brand, or that are characterized by standardized options for decor, marketing, packaging, products, and services—that, in its regular business operations, primarily provides food or beverages:

- For immediate consumption either on or off the premises;
- To customers who order or select items and pay before eating;
- With items prepared in advance, including items that may be prepared in bulk and kept hot, or with items prepared or heated quickly; *and*

- With limited or no table service, but table service does not include orders placed by a customer on an electronic device.

Bakeries and restaurants located and operating within grocery stores are exempt.

Interestingly, the Council cannot convene until the DIR receives a petition signed by at least 10,000 California fast food restaurant employees approving its creation. Once that hurdle is met, the Council is authorized to issue, amend, or repeal any rules and regulations as necessary to carry out its duties. It must, however, comply with the rule-making requirements of the Administrative Procedures Act; and hold public hearings no less than every six months, providing the opportunity for the public to be heard on issues of fast food sector employment. Any actions it takes are subject to approval by California's Legislature. AB 257 also limits the Council's ability to raise the industry minimum wage beyond a set amount.[4] Any standards mandated by the Council do not apply to union-represented employees if the collective bargaining agreement that applies to them meets certain minimum requirements and provides protections that are equal to or greater than the standards.

AB 257 also empowers the Labor Commissioner, the Division of Occupational Safety and Health, and the Civil Rights Department to ensure compliance with the Council's standards. In any successful civil action to enforce, the court may grant injunctive relief in order to obtain compliance and can award costs and reasonable attorneys' fees.

Fast food restaurant operators are also barred from discharging or in any manner discriminating or retaliating against any employee for:

- Making a workplace safety or health complaint or disclosing information to the media, the Legislature, a watchdog or community based organization, or a governmental agency, as specified, on violations or noncompliance;
- Testifying or participating in a proceeding relating to employee or public health or safety, or any state or local Fast Food Council proceeding; *or*
- Refusing to perform work the employee had reasonable cause to believe would violate employment, public health and safety laws or would pose a substantial risk to the health or safety of the employee(s) or the public.

Employees can pursue a private cause of action for such acts, and if successful can request reinstatement, treble damages, and attorneys' fees. They also enjoy a rebuttable presumption of unlawful discrimination or retaliation whenever a company takes any adverse action taken against an employee within 90 days of learning that worker exercised their rights under the new law.

AB 1601 (Relocation of Call Centers)

California's WARN Act already requires companies to provide notice to employees whenever it intends to move a facility with 75 or more people more than 100 miles away. AB 1601 adds a new legal hurdle for covered employers that operate call centers in California. Under this new law, any covered employer (meaning a company with 75 or more employees) that intends to move a call center, or a unit within a call center that handled 30% or more of the calls received over the last year, to a foreign country must also provide employees with a notice of relocation—even if fewer than 75 workers are impacted by the relocation. Companies must also provide a copy of that notice to the Employment Development Department, which will (semiannually) publish a list of all the companies that relocated call centers from

California to a location outside the U.S. Businesses that fail to comply are barred from receiving certain grants, loans, and other tax credits.

Laws Related to Union Activity

AB 2183 (Card Check for Agricultural Employees)

California passed the Agricultural Labor Relations Act ("ALRA") in 1975, which governs the methods agricultural workers can use to organize and engage in collective bargaining. AB 2183 makes that process easier.

Previously, agricultural workers were required to participate in a secret ballot election on the question of unionization in-person, at a physical location. Labor activists, however, have argued for years that the process is rife with intimidation. AB 2183 creates two additional methods for agricultural employees to become represented by a union. The first is a "labor peace" election, or compact, under which employees vote by mail-in ballot. The employer, however, must agree to hold the election by mail. If the employer refuses, workers can also organize without any election by a majority of the employees signing a union representation authorization card, and the union submitting the signed authorization cards to the Agricultural Labor Relations Board ("ALRB"). Upon the ALRB's verification that a majority of the workers signed an authorization card, a bargaining unit is established. These new options for certification of a union as the representative of the employees will remain available until AB 2183 sunsets on January 1, 2028. The law could be extended or made permanent at that time.

AB 2183 also seeks to curtail alleged intimidation by creating a rebuttable presumption that an employer who disciplines, suspends, demotes, lays off, terminates, or otherwise takes adverse action against a worker during a labor organization's campaign did so for retaliatory reasons. The employer may rebut this by providing clear, convincing, and overwhelming evidence that the adverse action would have been taken in the absence of the campaign. Employers who commit unfair labor practices, as defined by the law, are subject to a maximum $10,000 penalty.

What Should Employers Do?

California-based employers and out-of-state-employers with employees in California should immediately review their policies, procedures, and practices to ensure compliance with the new laws.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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[1] California renamed its "Department of Fair Employment and Housing" the "Civil Rights Department" effective July 1, 2022.

[2] The HWHFA is also commonly known as California's Paid Sick Leave law.

[3] The state and any political or civil subdivision of the state, including, but not limited to, cities and counties, are also considered covered employers.

[4] Any minimum wage established by the Council between January 1 and December 31, 2023, cannot exceed $22 per hour. After that, the highest hourly minimum wage that may be established by the Council can increase by no more than the lesser of one of the following, rounded to the nearest ten cents: (1) 3.5 percent, or (2) adjusted to the U.S. Consumer Price Index, as specified.

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