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California Governor Signs Worker Recall Law

By [J. Al Latham, Jr.](#), [Cameron W. Fox](#), [Sara Kalis](#) & [Ankush Dhupar](#)

In the latest development of pandemic-related legislation, certain California employers must now contend with a slew of new worker protection laws. On April 16, Governor Gavin Newsom signed Senate Bill 93 into law, which creates California Labor Code section 2810.8 and outlines protections for workers impacted by the COVID-19 pandemic. The provisions of SB 93 went into effect on April 16, and are set to expire on December 31, 2024.

Which Businesses Are Affected?

SB 93 has limited applicability, affecting only:

- **HOTEL BUSINESSES**—Hotels with either 50 or more guest rooms or suites of room (calculated based on the room count on the opening of the hotel or on December 31, 2019, whichever is greater), and “any contracted, leased, or sublet premises connected to or operated in conjunction with the building’s purpose, or providing services at the building.”
- **PRIVATE CLUBS**—Any private, membership-based business or nonprofit organization that operates a building or complex of buildings containing at least 50 guest rooms or suites of rooms (calculated as described above) that are offered as overnight lodging to members.
- **EVENT CENTERS**—Any publicly or privately owned structure of more than 50,000 square feet or 1,000 seats and is used for events like public performances, sporting events, and business meetings, including concert halls, stadiums, sports arenas, racetracks, coliseums, and convention centers. Event centers also include “any contracted, leased, or sublet premises connected to or operated in conjunction with the event center’s purpose, including food preparation facilities, concessions, retail stores, restaurants, bars, and structured parking facilities.”
- **AIRPORT HOSPITALITY OPERATIONS**—Any business that is not an airline but provides services “in connection with the preparation of food or beverage for aircraft crew or passengers at an airport” or provides “food and beverage, retail, or other consumer goods or services to the public at an airport.”
- **AIRPORT SERVICE PROVIDERS**—Any business that is not an airline but performs services that “are directly related to the air transportation of persons, property, or mail,” including, but not limited to, the loading and unloading of property on aircraft, security, airport ticketing and check-in functions, ground-handling of aircraft, aircraft cleaning and sanitization functions, and waste removal.

- **BUILDING SERVICE PROVIDERS**—Businesses that provide janitorial, building maintenance, or security services to office, retail, or other commercial buildings.

For covered employers, the provisions of SB 93 apply to workers subject to a collective bargaining agreement unless the union and the employer explicitly waive them in clear and unambiguous terms.

How Do Covered Employers Comply?

SB 93 creates recall rights for “laid-off employees” who (1) worked for a covered company for at least six months in the 12 months preceding January 1, 2020; (2) worked two hours or more per week for a covered employer; and (3) were terminated for any reason related to the COVID-19 pandemic, including a public health directive, government shutdown order, lack of business, a reduction in force, or any other economic, nondisciplinary reason due to the COVID-19 pandemic.

Employers must offer those workers either the same or similar position within five business days of “establishing a position[.]” SB 93, however, does not define exactly when a position is considered “established.” The laid-off worker then has five days to respond before the offer expires. If two or more workers are entitled to the same position, the employer must first offer it to the laid-off employee with the greatest length of service, based on the total of all periods of time during which an employee has been in active service with the employer, including when the employee was on leave or on vacation.

If an employer declines to recall a laid-off employee on the basis of lack of qualifications, it must provide the laid-off employee with a written notice within 30 days that explains “all reasons for the decision” and includes the length of service of those hired in lieu of the laid-off employee.

An employer’s obligation to recall laid-off workers pursuant to SB 93 continues through December 31, 2024, and it survives (1) changes in ownership, so long as the employer is conducting the same or similar operations as before the COVID-19 state of emergency; (2) changes in the form of organization of the employer after the COVID-19 state of emergency; (3) the acquisition of substantially all of the assets of the employer if the acquiring entity conducts the same or similar operations using substantially the same assets; and (4) the relocation of the covered employer. Of note, however, neither the text of SB 93 nor its legislative history addresses whether its provisions protect laid-off employees who executed severance agreements and, in exchange for adequate consideration, agreed to a general release of all claims against the employer.

Covered employers are required to keep the following information for three years, measured from the date of the written notice regarding the layoff, for each laid-off employee: (1) the employee’s full legal name; (2) the employee’s job classification at the time of separation from employment; (3) the employee’s date of hire; (4) the employee’s last known address of residence; (5) the employee’s last known email address; (6) the employee’s last known telephone number; and (7) a copy of the written notices regarding the layoff provided to the employee and all records of communications between the employer and the employee concerning offers of employment made to the employee pursuant to SB 93. Though covered employers are required to keep such information only for three years, considering that layoffs due to the pandemic took place in 2020 and that SB 93 is in effect until the end of 2024, covered employers will likely have to maintain such information for longer periods of time.

Covered employers cannot retaliate against workers for exercising the rights guaranteed by, or participating in the enforcement of, the provisions of SB 93.

What Happens If A Company Does Not Comply?

Though SB 93 does not create a private right of action, workers can file complaints with the California Division of Labor Standards Enforcement (DLSE) against a covered employer that violates SB 93. The DLSE may direct a covered employer to reinstate a laid-off employee, and may also award economic damages. In addition, the employer may be subject to civil penalties of \$100 for each laid-off employee whose rights under SB 93 are violated and liquidated damages equal to \$500 per employees for each day such rights are violated.

How Does SB 93 Interplay With Other COVID-19 Worker Protection Laws?

SB 93 does not preempt the slew of COVID-19 worker protection laws already passed, or that may be passed in the future. For example, independent of SB 93, employers with operations in Los Angeles may be subject to the provisions of the City of Los Angeles's COVID-19 Right of Recall Ordinance or the County of Los Angeles's counterpart, each of which contains its own obligations. It is therefore imperative for employers to evaluate whether they are subject to any local ordinances that may affect their rehiring of laid-off employees.



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

Los Angeles

Cameron W. Fox
1.213.683.6301
cameronfox@paulhastings.com

New York

Sara B. Kalis
1.212.318.6021
sarakalis@paulhastings.com

Al Latham, Jr.
1.213.683.6319
allatham@paulhastings.com

Ankush Dhupar
1.213.683.6263
ankushdhupar@paulhastings.com

Paul Hastings LLP

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