California Employment Laws for 2023 Employers Need to Know

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2023 saw more people engaged with in-person, positive community as COVID-19 infections and serious cases declined. Yet, last year in our state was also marked with difficult impacts of politics, social media, the economy, divergent weather, wildfires and water scarcity. And, almost as sure as the sun rises each day, regulation of California employers increased too. More than 580 bills introduced in the last California legislative session mention "employer," compared to about 330 bills in 2021.

While most bills did not pass the Legislature, many were signed into law by Gov. Gavin Newsom, bringing more rules and risks for employers dealing with workplace safety, privacy, leaves of absence, anti-discrimination, wages, benefits and working conditions.

Elements of key state Assembly Bills (AB) and Senate Bills (SB) affecting private employers that became law Jan. 1, 2023 (unless otherwise noted) follow.

COVID-19 & WORKPLACE SAFETY

COVID-19 Supplemental Paid Sick Leave

AB 152 extended the expiration of COVID-19 Supplemental Paid Sick Leave (SPSL) from Sept. 30 to Dec. 31, 2022. No further extension was in effect at the time this article went to press; but, employers should be on the lookout for that possibility.

This bill also established 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 and provide grants to qualified small businesses or nonprofits that are incurring costs for SPSL through Dec. 31, 2023.

This bill makes several changes to the Government, Labor and the Revenue and Taxation codes.

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COVID-19 Exposure

AB 2693 provides that employers are no longer required to give notice to the local public health agency in the event of a COVID-19 outbreak. Likewise, the California Department of Public Health will no longer need to post workplace information received from local public health departments about COVID-19 cases and outbreaks.

Prior law required that an employer who received a notice of potential exposure to COVID-19 was required to take specified actions within one business day of the notice of potential exposure, including providing written notice to all employees on the premises at the same worksite that they may have been exposed to COVID-19. Until Jan. 1, 2024, AB 2693 changes the notification requirements and authorizes an employer to either provide written notification or prominently display a notice in all places where notices to employees concerning workplace rules or regulations are customarily posted and requires the notice to remain posted for 15 days. Employers also must keep a log of all the dates the notice was posted and allow the Labor Commissioner to access notice records.

This bill amends Labor Code Secs. 6325 and 6409.6.

Illness & Wildfire Smoke

Previously enacted law requires employers to comply with certain safety and health standards, including a heat illness standard for the prevention of heat-related illness of employees in an outdoor place of employment. There's also an existing standard for workplace protection from wildfire smoke.

AB 2243 requires the Division of Occupational Safety and Health (Cal/OSHA) and its related rule-making process—before Dec. 1, 2025—to consider (a) requiring employers to periodically distribute their Heat Illness Preventions Plans to employees, to train new hires

accordingly, and to provide respiratory protective equipment to farmworkers subjected to certain levels of wildfire smoke; (b) developing additional regulatory protections related to acclimatization to higher temperatures, especially following an absence of a week or more from working in ultrahigh heat settings, including after an illness.

This bill amends Labor Code Sec. 6721.

Workers' Rights in Emergencies

SB 1044 prohibits an employer, in the event of an "emergency condition," from taking or threatening 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. This bill does not apply to 13 worker categories, such as first and emergency responders, patient care workers in a health care or residential facility, employees required by law to render aid or remain on the premises in case of an emergency, and those whose primary duties include assisting members of the public to evacuate in case of an emergency.

"Emergency condition" means (a) disaster or extreme peril to the safety of persons or property at the workplace or worksite caused by natural forces or a crime, or (b) an order to evacuate a workplace, a worksite, a worker's home or the school of a worker's child due to natural disaster or a crime. "Emergency condition" does not include a health pandemic.

The bill requires an employee to notify their employer in advance of the emergency condition requiring them to leave or refuse to report to the workplace or worksite. When advance notice is not feasible, notice must be as soon as possible after leaving or refusing to report.

In the event of an emergency condition, the employer must not prevent any employee 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 confirm their safety.

Finally, in the event a current or former employee brings an action that could be brought pursuant to the Labor Code Private Attorneys General Act (PAGA) for violations of these prohibitions, the bill gives employers certain rights to cure alleged violations.

This bill adds Labor Code Sec. 1139.

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PRIVACY RIGHTS

Digital License Plates

AB 984 permits the use of digital license plates and vehicle location technology (such as GPS functionality) to track the employer's fleet of vehicles.

If employers use digital plates to monitor employees, the tracking must be "strictly necessary" to the employee's duties and only done during work hours. The company must provide a detailed notice, such as how the data will be used, and the time and frequency of the monitoring, among many other things.

Penalties for non-compliance are $250 per employee for the initial

violation. For subsequent violations, penalties are $1,000 for each employee, per day.

California Privacy Rights & Enforcement Act

The California Privacy Rights and Enforcement Act (**CPRA**), amends the California Consumer Privacy Act (CCPA), and eliminates the "employee" exception to certain rights that "consumers" already had under the CCPA. Employers now have new privacy-related obligations involving California applicants and workers' data.

Among other things, covered employers must:

- Give requisite notice to applicants, employees and contractors about the categories of personal information collected by the employer and its purposes, sharing of the information with third-parties and retention of the information;
- Honor certain employee requests to access, correct or delete, or restrict the use or disclosure of certain categories of personal information; and
- Safeguard against unauthorized disclosure of personal information.

The CCPA and CPRA apply to companies with gross annual revenue of $25 million or more. They also apply to companies who buy, receive or sell certain high volumes of personal information of California residents or devices, or are in the business of selling consumers' personal information.

The bill also establishes the California Privacy Protection Agency, which is responsible for implementing and enforcing the law, including issuing potential fines of $2,500 per violation and $7,500 per intentional violation. Although the CPRA took effect Jan. 1, any personal information about employees collected by employers dating back to Jan. 1, 2022, will be subject to compliance with the CPRA.

LEAVES OF ABSENCE

More California Family Rights

The California Family Rights Act (CFRA) allows employees up to 12 weeks leave of absence due to their own medical condition or to care for an immediate family member. Under previously enacted law, a "family member" for CFRA purposes already included: a spouse or a child, parent, legal guardian, sibling, grandparent, grandchild, registered domestic partner, and parent-in-law.

AB 1041 now expands "family member" to include a designated person. The bill defines "designated person" as any individual related by blood or whose association with the employee is the equivalent of a family relationship. The employee may identify the designated person at the time leave is requested. The employer may limit the employee to one designated person per 12-month period.

This bill also makes parallel changes to the Healthy Workplaces, Healthy Families Act of 2014. An employee can now use CA Paid Sick Leave to care for a "designated person" and designate that person at the time leave is requested, and employers can limit the employee to one designated person in a 12-month period.

This bill amends Secs. 12945.2 of the Government Code and 245.5 of the Labor Code.

Bereavement Leave

AB 1949 creates a new CFRA right to as much as five days bereavement leave related to the death of a family member in addition to other CFRA leave rights. To be eligible, an employee must have been

employed for at least 30 days. The same CFRA definition of "family member" applies here, including a "designated person" (see above).

Bereavement leave need not be taken in consecutive days, but it must be completed within three months of the date of death of the family member. Within 30 days of the first day of the leave, the employer may request that the employee provide documentation of the death of the family member. "Documentation" includes a death certificate, a published obituary or written verification of death, burial or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution or governmental agency. The employer must maintain the confidentiality of any employee requesting bereavement leave. Any documentation the employee provides to the employer must be maintained as confidential and must not be disclosed except to internal personnel or counsel, as necessary, or as required by law.

AB 2188 prohibits drug screening for nonpsychoactive cannabis metabolites.

The bereavement leave must be taken pursuant to any existing bereavement leave policy of the employer. If the policy provides for less than five days of bereavement leave, the employee will be entitled to no less than a total of five days of bereavement leave, consisting of the number of days of leave under the policy and the remainder as CFRA bereavement leave. The CFRA does not provide for paid leave. To the extent the employer does not have a paid bereavement leave policy, the employee can use vacation, accrued and available sick leave, or compensatory time off that is otherwise available to the employee.

Finally, the bill exempts employees subject to a collective bargaining agreement if certain conditions are met.

This bill amends Government Code Secs. 12945.21 and 19859.3, and adds Sec. 12945.7.

ANTI-DISCRIMINATION

DFEH Renamed to CRD

Effective July 1, 2022, **SB 189** changed the name of the Department of Fair Employment and Housing (DFEH) to the "**Civil Rights Department**." The CRD's website notes that the change more accurately reflects the CRD's powers and duties, which include enforcement of laws prohibiting hate violence, human trafficking, discrimination in business establishments, and discrimination in government-funded programs and activities, among others. The Fair Employment and Housing Council is now known as the California Civil Rights Council.

This bill affects many areas of California law.

Reproductive Health Decision-making is Protected

SB 523 expands the Fair Employment and Housing Act's (FEHA) protected classes of applicants and employees by prohibiting employers from discriminating based on their reproductive health decision-making, defined as "a decision to use or access a particular drug, device, product or medical service for reproductive health." The bill clarifies that discrimination based on "sex" under FEHA includes reproductive health decision-making.

Employers also are prohibited from requiring applicants or employees to disclose information relating to their reproductive health decision-making.

This bill affects Government Code secs. 12920, 12921, 12926, 12931, 12940, 12941, 12993 and 22853.3 as well as sections of the Health & Safety, Insurance and Public Contract Codes.

Off Duty Use of Cannabis

Effective Jan. 1, 2024, **AB 2188** amends FEHA to prohibit discrimination of applicants and employees based on use of cannabis off the job and away from the workplace or worksite, or employer-required drug screening test that finds "… the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine or other bodily fluids."

The bill does not permit an employee to possess, be impaired by or use cannabis on the job, or affect the rights or obligations of an employer to maintain a drug free workplace. Employers may conduct pre-employment drug testing and refuse to hire someone based on a valid preemployment drug testing that does not screen for non-psychoactive cannabis metabolites. The bill does not apply to employees in the building and construction trades, or to applicants and employees hired for positions that require a federal government background investigation or security clearance. Nor does the bill pre-empt state or federal laws that require testing for controlled substances as a condition of employment or for the employer to receive federal funding, licensing benefits or contracts.

This bill adds Government Code Sec. 12954.

Sexual Assault: Statute of Limitations & Cover-Ups

AB 2777, known as the Sexual Abuse and Cover Up Accountability Act, provides that actions commenced on or after Jan. 1, 2019, based on conduct that occurred on or after Jan.1, 2009, will not be time-barred, even if the 10-year statute of limitations has expired, provided that such claims are commenced by Dec. 31, 2026, and had not previously been resolved to finality through litigation or settlement.

Significantly, this bill also provides that where a party seeks to recover damages based on a sexual assault that was "covered up" by an entity, the action may be commenced between Jan. 1 and Dec. 31, 2023, even if that claim would otherwise be time-barred. "Cover up" under this law means "a concerted effort to hide evidence relating to a sexual assault that incentivizes individuals to remain silent or prevents information relating to a sexual assault from becoming public or being disclosed to the plaintiff, including, but not limited to, the use of nondisclosure agreements or confidentiality agreements."

This bill amends Code of Civil Procedure Sec. 340.16.

WAGES & WORKING CONDITIONS

Fast Food Restaurant Employment Standards Stayed

AB 257, the Fast Food Accountability and Standards Recovery Act (or FAST Recovery Act), was signed by Gov. Newsom on Sept. 5, 2022, to be effective Jan. 1. The bill established a 10-member "Fast Food Council" of political appointees within the Department of Industrial Relations until Jan. 1, 2029, who are authorized to set sector-wide rules on minimum wages, working hours, working conditions and training for fast food restaurant workers. The bill permits the Council to raise the sector's minimum wage to $22 per hour in 2023 and up to 3.5 percent annually after that.

Restaurants affected by the bill are those 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—including franchisees.

Excepted from Fast Food Council standards are employees subject to a valid collective bargaining agreement.

Following the bill's enactment, a referendum launched to stay the new law and have California voters decide in the November 2024 ballot whether the law will be implemented. Reportedly, more than 1 million registered voter signatures have been obtained. Assuming that the California Secretary of State verifies collection of the required number of voter signatures, the FAST Recovery Act will not take effect unless after the voters approve it in November 2024, or any legal challenge that may come reveals a different path or outcome.

AB 257 permits the Council to raise the sector's minimum wage to $22 per hour in 2023 and up to 3.5 percent annually after that.

Pay Transparency

With the stated purpose of enforcing a worker's right to be free from discriminatory employment practices, **SB 1162** requires employers with 15 or more employees to (a) disclose pay scales for a position in any job posting (and upon request by an existing employee), and (b) maintain records of job titles and wage rate history for each employee for the duration of employment plus three years. The bill defines "pay scale" as "the salary or hourly wage range that the employer reasonably expects to pay for the position."

The bill also expands existing pay data reporting requirements (akin to federal EEO-1s) for employers of 100 or more employees based on protected characteristics, and adds such data reporting separately for employers of 100 or more employees hired through labor contractors (including the names and owners of the labor contractors). The data must now include, "[w]ithin each job category, for each combination of race, ethnicity, and sex, the median and mean hourly rate." For employers with multiple establishments, the employer must now submit a report covering each establishment. "Establishment" is defined by the bill as "an economic unit producing goods or services."

Finally, the bill changes the date for submitting these pay data

SB 1162 states employers with multiple establishments, the employer must now submit a report covering each establishment.

reports from March 31 to the second Wednesday of each year, and establishes significant civil penalties for non-compliance.

This bill amends Government Code Sec. 12999 and Labor Code Sec. 432.3.

Minimum Wage Increases

Minimum wage in California increased to $15.50 per hour on Jan. 1 for all employers based on legislation signed by Gov. Jerry Brown in 2015. Gone is the lower rate phase-in for smaller employers.

State minimum wage changes impact classification 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 must pay to meet the exempt salary requirement will advance to $64,480. 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.

Many local city and county governments continue to create and increase their own minimum wage ordinances 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 already exceed $16 per hour. Employers should

monitor the requirements to assure compliance in each municipality in which they have employees working. A good starting place is the UC Berkeley Labor Center database: https://laborcenter.berkeley.edu/inventory-of-us-city-and-county-minimum-wage-ordinances/#s-2.

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 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 2023, the minimum rates of pay required for this exemption are $53.80 per hour, or $9,338.78 salary monthly or $112,065.20 annual salary.

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. CPA

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