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Your Guide to 2023 California Employment Laws

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Can you believe it's already October?! That means fall is here, and with it comes the arrival of two seemingly inevitable things — pumpkin spice lattes and new employment laws.

The California Legislature finished up its legislative session with a rush of activity, ultimately sending hundreds of bills to the governor, who, as usual, signed many labor and employment bills that will impact employers in the new year.

So, grab that latte and let's take a look at some of the new laws, which, unless otherwise noted, take effect January 1, 2023.

The governor signed leaves of absence, discrimination, pay scale and pay data, and workplace safety laws, among others.

Leaves of Absence

With AB 1041, California expands who an employee can care for under both the California Family Rights Act (CFRA) and California's paid sick leave law, the Healthy Workplaces, Healthy Families Act (HWHFA). Currently, both laws allow employees to take leave to care for a spouse, registered domestic partner, child, parent, parent-in-law, grandparent, grandchild and sibling. Beginning January 1, 2023, employees can also take CFRA leave or paid sick leave to care for a "designated person." It's important to note that AB 1041 amends two distinct laws, the CFRA and the HWHFA, and it defines a designated person in each of them — but the definitions are slightly different in each.

For the CFRA, the law defines designated person as "any individual related by blood or whose association with the employee is the equivalent of a family relationship. The designated person may be identified by the employee at the time the employee requests the leave."

For the HWHFA, the Labor Code was amended to define designated person more broadly as "a person identified by the employee at the time the employee requests paid sick days."

In both instances, an employer may limit an employee to one "designated person" per 12-month period.

The governor also signed AB 1949, making bereavement leave a protected leave of absence. The law applies to all private-sector employers with five or more employees and all public-sector employers. It allows employees to take up to five days of bereavement leave upon the death of a family member, defined as including a spouse, child, parent, sibling, grandparent, grandchild, domestic partner or parent-in-law. To be eligible for bereavement leave, the person must be employed by the employer for at least 30 days prior to starting the leave.

Bereavement leave may be unpaid, but employees can use existing leave available to the employee (e.g., vacation, paid time off [PTO], sick leave, etc.). Employers can require documentation to support the leave, which may include a death certificate; a published obituary; or a verification of death, burial or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution or government agency. Leave must be completed within three months of the family member's death.

Discrimination

Two new laws will expand the scope of California's Fair Employment and Housing Act (FEHA).

First, AB 2188 adds cannabis protection to the state's discrimination law. Specifically, employers will be prohibited from discriminating against an employee or job applicant based on the person's use of cannabis **off the job and away from the workplace**. Employers may still conduct preemployment drug testing, and an employer can still refuse to hire someone based on a valid preemployment drug screening that doesn't screen for non-psychoactive cannabis metabolites.

Beginning January 1, 2024, AB 2188 will prohibit employers from discriminating against employees or applicants based on their off-duty, offsite cannabis use.

The law also doesn't permit an employee to possess, be impaired by or use cannabis on the job, and it maintains employers' rights and obligations in keeping a drug- and alcohol-free workplace.

Importantly, AB 2188 doesn't go into effect until **January 1, 2024**.

Governor Gavin Newsom also signed SB 523, which, among other things, amends the FEHA to make it unlawful to discriminate against an employee or job applicant based on their "reproductive health decision-making," which includes, but is not limited to, a decision to use or access a particular drug, device, product or medical service for reproductive health.

Pay Scales and Pay Data

As previously reported, SB 1162 requires employers to make pay scale information available to job applicants and employees, and expands California's pay data reporting requirements.

Under the new law, employers must, upon request, provide a pay scale to an employee for the position the employee is working. Additionally, employers with 15 or more employees must include the pay scale information for a position in any job posting. If an employer uses a third party to

"announce, post, publish or otherwise make known a job posting," the employer must provide the pay scale to the third party, who must include it in the job posting.

Employers must maintain records of job titles and wage rate histories for each employee for the duration of their employment plus three years after their employment ends so the California Labor Commissioner can determine if there are any wage discrepancies. The Labor Commissioner must be able to inspect the records. If an employer fails to keep records as required, the law creates a rebuttable presumption in favor of an employee's claim, meaning a court would assume the employee's claim is true unless the employer proves otherwise.

Employers that don't comply with the new pay scale requirements could be subject to civil penalties from the California Labor Commissioner, which range from $100 to $10,000. However, the Labor Commissioner will not assess a penalty for the first violation of the law if the employer demonstrates that all job postings for open positions have been updated to include the pay scale as required.

SB 1162 also revises and expands California's pay data reporting requirements for employers with 100 or more employees.

Under SB 1044, employers can't take or threaten adverse action against an employee who, in an 'emergency condition,' refuses to report to or leaves a workplace because they feel unsafe.

In addition to reporting the number of employees by race, ethnicity and sex in 10 different job categories and by the U.S. Bureau of Labor Statistics in the Occupational Employment Statistics survey pay bands, California employers must report the "median and mean hourly rate within each job category, for each combination or race, ethnicity, and sex in the report."

The law also requires separate pay data reports from employers with 100 or more employees hired through labor contractors within the prior calendar year.

Lastly, SB 1162 changed the pay data report due date to the second Wednesday of May, annually. The first report under the new requirements will be due **May 10, 2023**.

Workplace Safety

SB 1044 prohibits an employer, in the event of an emergency condition, from taking or threatening adverse action against the employee for refusing to report to, or leaving, a workplace because the employee has a "reasonable belief that the workplace is unsafe."

An emergency condition is defined as:

- Conditions of disaster or extreme peril to the safety of persons or property at the workplace or worksite caused by natural forces or a criminal act.
- An order to evacuate a workplace, worksite, worker's home, or the school of a worker's child due to natural disaster or a criminal act.

The law specifically states that "emergency condition" does not include a health pandemic.

The provisions above don't apply to certain employees, such as first responders, disaster service workers, certain health care facility employees, residential care facility employees and others.

SB 1044 also prohibits an employer from preventing any employee from accessing their mobile device or other communications device to get emergency assistance, assess a situation's safety or communicate with someone to verify their safety.

The law requires employees to, "when feasible," notify employers in advance of the emergency condition that requires they either leave the workplace or refuse to report to work. If it's not feasible, then the employee must notify the employer as soon as possible.

Another workplace safety measure, AB 2068, imposes new posting requirements for employers that receive citations from the California Division of Occupational Safety and Health (Cal/OSHA). Currently, employers that receive citations and orders from Cal/OSHA must post them at or near each place a violation referred to in the citation or order occurred.

Beginning in 2023, employers will also have to post a new employee notification prepared by Cal/OSHA containing specific information specified in the statute. In addition to English, the notice must be posted in the top seven non-English languages as specified.

The current COVID-19 Emergency Temporary Standard will expire at the end of 2022, but Cal/OSHA is considering a new "permanent" COVID-19 regulation with some significant changes from the current standard.

COVID-19-Related Laws

AB 2693 made several helpful changes to the state's COVID-19 notice requirements. The 2020 law required employers to provide notice to their employees when there's a potential COVID-19 exposure at the worksite and report cases to local health departments under certain conditions.

Among other things, the revisions allow an employer to satisfy the notice requirements by prominently displaying a notice of the potential exposure in the workplace. The posted notice must contain the dates on which the COVID-19 case was at the worksite within the infectious period, and it must remain posted for 15 days.

AB 2693 also removes the requirement that employers report cases to their local health departments.

The COVID-19 notice requirements were set to expire on January 1, 2023, but AB 2693 extended the notice requirements to January 1, 2024.

In 2020, along with the COVID notice requirements, SB 1159 established a rebuttable workers' compensation presumption for workers that contract COVID-19 under certain conditions and required employers to report COVID-19 cases to their workers' compensation carriers. The presumption was originally set to expire on January 1, 2023, but AB 1751 extended the presumption an extra year to January 1, 2024.

The new year may also see a new version of the Cal/OSHA COVID-19 regulation. As previously reported, the current COVID-19 Emergency Temporary Standard (ETS) will expire at the end of the year. Cal/OSHA is considering a new "permanent" COVID-19 regulation with some significant changes from the ETS. The Occupational Safety and Health Standards Board is expected to vote on the regulation in November or December of this year.

Lastly, as previously reported, AB 152 extended employee's eligibility to use 2022 COVID-19 Supplemental Paid Sick Leave through December 31, 2022.

California's Paid Family Leave and State Disability Insurance wage replacement rates are extended through 2024 and will increase in 2025.

Paid Family Leave

SB 951 extends the current wage replacement rates for California's Paid Family Leave (PFL) and State Disability Insurance (SDI) programs, which were scheduled to sunset at the end of 2023, and sets up an increase in PFL and SDI rates beginning in 2025. Currently, employees are eligible for up to 70 percent of their regular wages under the program, depending on their earnings. Beginning in 2025, wage replacement rates under these programs will increase to 90 percent.

Additionally, as previously reported, California has started a PFL grant program geared toward helping small businesses offset the increased costs that may arise when an employee is out on leave, such as cross-training existing staff, and hiring and training new and/or temporary employees. Eligible business can receive up to $2,000. The grant period ends on May 31, 2024, or when funds run out.

Privacy

At the end of 2020, California voters approved Proposition 24, known as the California Privacy Rights Act (CPRA). The CPRA amended the California Consumer Privacy Act (CCPA), but many of the changes don't take effect until January 1, 2023. As previously reported, a notable change for employers is the expiration of the CCPA's exemption of employment information from most of the law's requirements.

This means that, effective January 1, 2023, employers covered by the CPRA will have to comply with the law's notice and disclosure requirements with respect to personal information collected from their employees and job applicants. Employers will also have numerous obligations with respect to employees' rights under the CPRA, including the right to view, access, correct and delete their personal information, subject to various exceptions. Employers should consult with their legal counsel to ensure they have compliant policies and procedures in place next year.

CalSavers Retirement Savings Program

California revised its CalSavers Retirement Savings Program (CalSavers) with SB 1126, which expands the definition of "eligible employer" to a person or entity with at least one employee, down from five. The law, however, specifically excludes from the definition sole proprietorships, self-employed individuals or other business entities that don't employ individuals beyond the owners.

The bill requires eligible employers that don't offer their own employer-sponsored retirement savings program to employees to have a payroll deposit retirement savings arrangement by **December 31, 2025**, so employees can participate in CalSavers.

Industry-Specific Measures

This year, California continued its practice of enacting employment laws specific to certain industries and sectors.

AB 257 will create the Fast Food Council within the Department of Industrial Relations, composed of 10 members to be appointed by the governor, the speaker of the Assembly and the Senate Rules Committee. This unelected council will work to establish minimum wages, working hours and other working conditions for fast food restaurants.

AB 2183 changes the union election process for agricultural workers. Currently, elections are held by secret ballot conducted by the Agricultural Labor Relations Board (ALRB). AB 2183 establishes alternative means for election, permitting a labor organization to be certified as the exclusive bargaining representative of a bargaining unit by submitting a petition with proof of majority support. This process is commonly referred to as a "card check." The ALRB will then review the petition to determine whether the union should be certified.

California also passed new requirements for call center employers. AB 1601 requires an employer of customer service employees in a call center to follow the California Worker Adjustment and Retraining Act (Cal/WARN) requirements prior to relocating a call center to a foreign country, which means providing 60 days prior notice to affected employees. The law applies to call center employers that employ or have employed within the preceding 12 months, 75 or more persons.

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