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Alert | Labor & Employment

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’Tis the Season for California’s 2023 Legislative Update: Employer Considerations

California employers know the holidays bring chilly nights (by California standards), holiday cheer, decked halls, and… ringing in the New Year with a host of new employment laws and compliance challenges. Here’s a summary of what we believe are some key aspects of new legislation that employers should be aware of before popping the bubbly and toasting to 2023.

Pay Scale Disclosures and Pay Data Reporting (SB 1162)

One of the most talked about new laws taking effect is the new pay scale disclosure requirement, which is consistent with the growing trend in states around the country. Specifically, employers must now provide the “pay scale” to any California employee that requests the pay scale for the position in which they are currently employed, and to applicants applying for employment “upon reasonable request.” In addition, employers that employ at least 15 employees will need to include the pay scale in job postings that are targeted at or could be filled by a California employee (whether remotely or otherwise). Employers will also need to provide the pay scale to third parties used to announce or post job openings (e.g., recruiters, job boards, etc.) so they can include such scale in the job posting. A “pay scale” is defined as the salary or hourly wage range the employer reasonably expects to pay for the position, and thus cannot be an open-ended figure.

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Employers will need to maintain records of job title and wage rate history for each employee for the period of employment plus three years, so the California Labor Commissioner can determine if there is a pattern of wage inequities, if the Commissioner deems it appropriate to do so. Employers that fail to comply with these requirements will be subject to civil penalties of $100-$10,000 per violation by the Labor Commissioner.

Separately, California's recently enacted pay data reporting law has been amended in several significant ways. California employers with at least 100 employees must file an annual pay data report for any employee on their payroll (for the prior calendar year) with the California Civil Rights Department (formerly known as the Department of Fair Employment and Housing) containing the following employee information on or before the second Wednesday of May 2023 and each year thereafter, and covering each establishment (to the extent the employer has multiple establishments):

- Number of employees by race, ethnicity, and sex in each of the 10 specified job categories;
- Number of employees by race, ethnicity, and sex, whose annual earnings fall within the pay bands the U.S. Bureau of Labor Statistics uses in the Occupational Employment Statistics survey;
- Median and mean hourly rate within each job category, for each combination of race, ethnicity, and sex;
- Total number of hours worked by each employee counted in each pay band during the "Reporting Year";
- The employer's North American Industry Classification System (NAICS) code; and
- A section for any clarifying remarks regarding the information provided (when applicable).

The amended law also requires private employers with 100 or more *employees hired through labor contractors* to submit a *separate* pay data report for those employees in accordance with the timeframe described above.

A court may impose civil penalties of $100-200 per employee for a failure to file the required pay data report (depending on whether it is an initial or subsequent violation).

While state agencies have not yet released guidance, employers should be on the lookout in the coming months for additional clarity on the new requirements.

New Protections for Reproductive Health Decision-Making (SB 523)

Enacted in response to the U.S. Supreme Court overturning *Roe v. Wade*, the California Fair Employment and Housing Act has been amended to include "reproductive health decisionmaking" as a new protected class, which includes, but is not limited to, "a decision to use or access a particular drug, device, product, or medical service for reproductive health." It will now be unlawful for an employer to require, as a condition of employment, continued employment, or a benefit of employment, the disclosure of information relating to an applicant or employee's reproductive health decision-making. Employers should consider updating their employee handbooks to add this new category to the list of protected categories.

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Expanded Reasons for Taking Time Off Work Under the California Family Rights Act and California's Paid Sick Leave Laws (AB 1041)

This new law expands the list of individuals for whom an employee can take protected time off under the California Family Rights Act and California's paid sick leave laws to include care for a "designated person." A "designated person" is defined as any individual "related by blood or whose association with an employee is the equivalent of a family relationship," and the employee has the right to identify the "designated person" at the time the employee requests the leave or paid sick time. Employers may limit the employee to one designated person per 12-month period.

Statutory Time Off for Bereavement Leave (AB 1949)

For the first time, California employees will be entitled to take up to five days of legally protected time off work for bereavement leave for the death of an employee's family member (child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law), to be completed within three months of the date of death of the family member, and not necessarily consecutive. While there is no limit on the number of times an employee may take bereavement leave in any given year (and each death entitles the employee to up to five days of leave), employers may request documentation of the death of the family member (such as a death certificate, a published obituary, or written verification of death, burial, or memorial services) and have the employee provide such documentation within 30 days of the first day of leave. If an employer doesn't already have a bereavement policy, the leave may be unpaid, but the employee can use certain other available leave balances, such as accrued vacation and paid sick leave, as a substitute for unpaid time. If no such paid time off is available or has been exhausted, the time may be unpaid.

Employers will be required to maintain the confidentiality of any employee taking bereavement leave.

Restrictions on Cannabis Testing (AB 2188)

Beginning Jan. 1, 2024, employers will be prohibited from taking any adverse action against a person based upon their use of cannabis off the job and away from the workplace or based on an employer-required drug screening test that has found the person to have non-psychoactive cannabis metabolites. Employers will still be able to utilize preemployment drug screening that does not screen for non-psychoactive cannabis metabolites. Notably, this law does not permit an employee to possess, to be impaired by, or to use cannabis on the job, nor does it impact the rights of an employer to maintain a drug- and alcohol-free workplace or preempt other state or federal laws requiring applicants or employees to be tested for controlled substances as a condition of employment.

The new law will not apply to an employee in the building and construction trades, or to applicants or employees hired for positions that require a federal government background investigation or security clearance.

Although employers have some time before this law takes effect, they may wish to start preparing to make changes to drug testing protocols.

Relocated Call-Center Employees Now Covered Under Cal-WARN (AB 1601)

Under the federal Worker Adjustment and Retraining Notification (WARN) and the California Worker Adjustment and Retraining Notification Act (Cal/WARN), covered employers are required to comply with various obligations, including providing 60 days' notice of plant closings/terminations, relocations or

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mass layoffs. Under Cal/WARN, a covered employer typically includes any employer that has employed, within the preceding 12 months, 75 or more employees and (i) in a 30-day window lays off 50 or more employees, (ii) relocates or substantially relocates 100 miles or more away, or (iii) closes or substantially closes its operations. Beginning Jan. 1, 2023, the notice requirements of Cal/WARN will expand to call-center employers that intend to relocate a call center, including when the employer intends to move its call center, or one or more facilities or operating units within a call center comprising at least 30% of the call center or operating unit's total volume when measured against the average call volume for the previous 12 months, or substantially similar operations to a foreign country.

Under the new law, "call center" means a facility or other operation where employees, as their primary function, receive telephone calls or other electronic communication for the purpose of providing customer service or other related functions. All call-center employers who relocate their call center, regardless of whether or not they provided notice (i) will be ineligible to be awarded or have renewed any direct or indirect state grants or state-guaranteed loans for five years; and (ii) will be ineligible to claim a tax credit for five taxable years.

Emergency Conditions in the Workplace (SB 1044)

This new law, effective Jan. 1, 2023, prohibits employers from taking or threatening retaliatory action against an employee who leaves or refuses to report to a workplace during an "emergency condition" if the employee has a reasonable belief that the workplace or worksite is unsafe. When feasible, an employee must notify the employer of the emergency condition requiring the employee to leave or refuse to report to the workplace or worksite prior to leaving or refusing to report, or if not feasible, as soon as possible. Notably, "emergency condition" is defined as (i) 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; and (ii) 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 criminal act. An "emergency condition" does not include a health pandemic.

Certain workers, including first responders, disaster service workers, employees of licensed residential care facilities, employees or contractors who support patient care during emergencies or who are required to participate in emergency response and employees working on a military base, are not protected under this new law.

Union Elections for Agricultural Laborers (AB 2183)

Existing law grants agricultural employees the right to form and join labor organizations and engage in collective bargaining with respect to wages, terms of employment, and other employment conditions, and authorizes employees to elect exclusive bargaining representatives for these purposes. This is done by secret ballot and conducted by the Agricultural Labor Relations Board. Due to concern that some employers may discourage agricultural employees from voting in favor of union representation, beginning Jan. 1, 2023, employers must choose whether to agree to a "labor peace compact" 30 days prior to Jan. 1 of each new year. Employers who sign the compact agree to (i) not speak for or against union representation, (ii) allow labor organizations access to employees on company property, (iii) not hold "captive audience meetings" where unions are discussed, (iv) not disparage a union in communications to employees or the public, and (v) not express a preference for one union over another. In this scenario, employees make a choice regarding union representation through a mail ballot. Employers who do not sign the compact will not be held to the additional restrictions, in which case a union can become the exclusive bargaining representative simply by using a petition, authorization cards, or other "appropriate" proof of majority support.

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Expanded Human Trafficking Notice Posting Requirements (AB 1661)

Beginning Jan. 1, 2023, barbers, hair salons, nail salons, and electrolysis centers will have to post a notice, as developed by the Department of Justice, that contains information relating to slavery and human trafficking, including information regarding specified nonprofit organizations that a person can call for services or support in the elimination of slavery and human trafficking.

Notice of Cal/OSHA Citations in Spoken Languages (AB 2068)

Existing law requires citations, orders, and special orders the California's Division of Occupational Safety and Health issues to be prominently posted at or near each place a violation referred to in the citation or order occurred, in accordance with specified timeframes and procedures. These citations, orders, and special orders are inadvertently not always posted in a language understood by the workforce. Beginning Jan. 1, 2023, the citations, orders, and special orders must now be provided in English and in the top seven non-English languages used by limited-English-proficient adults in California, as determined by the most recent American Community Survey by the United States Census Bureau (and Punjabi if not already included in the top seven non-English languages).

Fast Food Accountability and Standards (FAST) Recovery Act (AB 257)

The California Legislature has determined that the fast-food sector has been "rife with abuse, low pay, few benefits, and minimal job security." For this reason, on Jan. 1, 2023, the FAST Recovery Act will establish a "Fast Food Sector Council" (FFS Council), which is granted broad authority to regulate employment standards applicable to the Covered Restaurants (i.e., 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). The FFS Council's purpose is to establish minimum standards on wages, maximum hours of work, and other working conditions for workers at the Covered Restaurants.

Shortly after California Governor Gavin Newsom signed the FAST Recovery Act, there was backlash, and on Dec. 5, 2022, the Save Local Restaurants coalition, which includes the International Franchise Association, National Restaurant Association, and U.S. Chamber of Commerce submitted more than 1 million signatures to place a referendum on the November 2024 ballot. If the California Secretary of State verifies the petition signatures (only 623, 000 California voter signatures are required) implementation of the law would be suspended.

COVID-19 Notice/Reporting Requirements (AB 2693)

Under existing law, if an employer receives notice of potential exposure to COVID-19, the employer must provide written notice of the potential exposure within one business day to all employees who were at the worksite. This notification requirement was set to expire Jan. 1, 2023. The new law extends the reporting requirement through Jan. 1, 2024.

In addition, as an alternative to providing written notice of the potential exposure within one business day to all employees who were at the worksite, an employer may prominently display a notice in all places where notices to employees concerning workplace rules or regulations are customarily posted, including, if applicable, an already existing employee portal.

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If an employer chooses to display a notice, the notice must be (i) posted within one business day and remain posted for not less than 15 calendar days and (ii) in English and the language understood by the majority of employees. The notice must also include the following information: (1) the dates on which an employee, or employee of a subcontracted employer, with a confirmed case of COVID-19 was on the worksite premises within the infectious period; (2) the location of the exposures, including the department, floor, building, or other area, but the location need not be so specific as to allow individual workers to be identified; (3) contact information for employees to receive information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state, or local laws, including, but not limited to, workers' compensation and options for exposed employees, including COVID-19-related leave, company sick leave, state-mandated leave, supplemental sick leave, or negotiated leave provisions, as well as antiretaliation and antidiscrimination protections of the employee; and (4) contact information for employees to receive the cleaning and disinfection plan that the employer is implementing per the guidelines of the federal Centers for Disease Control and Prevention and the COVID-19 prevention program per the Cal-OSHA COVID-19 Emergency Temporary Standards.

Cal/OSHA COVID-19 Permanent Standard (View here)

On April 21, 2022, the California Division of Occupational Safety and Health (Cal/OSHA) Standards Board adopted the fourth iteration of its COVID-19 Emergency Temporary Standards (ETS), which became effective May 5, 2022, and remains in effect until Dec. 31, 2022. At various board meetings, employers, union and worker advocates, hospitals, and other organizations have expressed weariness of the ever-changing regulations. For this reason, among others, the Board has drafted a Permanent Standard which will become effective pending a vote the Occupational Safety and Health Standards Board (the "Board") on Dec. 15, 2022.

The Permanent Standard, if passed as written, will mean *employers **no longer** will be required* to (1) provide exclusion pay to employees excluded from the workplace due to COVID-19; (2) make COVID-19 testing available to employees who have close contact with a COVID-19 case ***outside*** of the workplace and/or who experience symptoms; and (3) provide notice in a set time period (however, employers still would have to follow Cal. Lab. Code section 6409.6 [set to be extended per AB 2693], which requires notice be given in one day). The Permanent Standard, if passed as written, will also increase requirements such as: (1) the definition of "close contact" will broaden to "sharing the same indoor space as a COVID-19 case for a cumulative total of 15 minutes or more over a 24-hour period during the COVID-19 case's infectious period"; (2) employers will need to keep records of COVID-19 cases, outbreaks, and ***close contacts***; and (3) employers not covered by the Aerosol Transmissible Diseases standard will need to evaluate the need for respiratory protection for employees who are exposed to procedures that may aerosolize potentially infectious materials.

Sexual Abuse and Cover Up Accountability Act (AB 2777)

The California Legislature has determined, based on data regarding sexual assault in general and news reports accusing certain companies of covering up sexual assaults by their employees, there is a need to re-open statutes of limitation for sexual assault to prevent a "covering-up company to enjoy the fruits of their cover-up." For this reason, the California Legislature has opened a one-year window (Jan. 1, 2023, to Dec. 31, 2023) for plaintiffs who allege they are victims of sexual misconduct to bring claims, *no matter how old*, against entities for allegedly covering up "a previous instance or allegations of sexual assault or other inappropriate conduct, communication, or activity of a sexual nature by an alleged perpetrator of such abuse." It also revives any related claims, including, but not limited to, wrongful termination and sexual harassment, arising out of the sexual assault that is the basis for a claim.

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Employer Restrictions on Vehicle Tracking (AB 984)

Over the past several years, there has been a significant increase in the use of vehicle technology (e.g., geolocation, AI, and facial recognition), leading to privacy concerns. Beginning Jan. 1, 2023, the new law will prohibit an employer from using an alternative device equipped with tracking technology to monitor employees, except to use an alternative device to locate, track, watch, listen to, or otherwise surveil an employee during work hours if strictly necessary for the performance of the employee's duties. An employer or a person acting on behalf of the employer must provide an employee with a notice stating that monitoring will occur before conducting any monitoring with an alternative device and may not retaliate against an employee for removing or disabling an alternative device's monitoring capabilities, including vehicle location technology, outside of work hours.

Meal and Rest Periods for Public Sector Hospital Employees (SB 1334)

In general, California's Labor Code has not been found to cover public sector employees unless explicitly stated. Section 512, the provision on meal and rest periods, does not state that it applies to public sector employees. Beginning January 1, 2023, public sector workers who provide direct patient care or support direct patient care in a general acute care hospital, clinic, or public health settings will be entitled to meal and rest periods.

Workers' Compensation COVID-19 Presumption (AB 1751)

Under existing law, there is a current rebuttable presumption that places the burden on California employers to prove specified employees did not contract COVID-19 at work. This presumption was set to expire Jan. 1, 2023. The new law extends the expiration date through Jan. 1, 2024. It also expands the definition of employees to include firefighting members in the following fire departments: (i) the State Department of State Hospitals; (ii) the State Department of Developmental Services; (iii) the Military Department, and (iv) the Department of Veterans Affairs.

Minimum Wage Increases (SB 3)

Effective Jan. 1, 2023, the state minimum wage will increase to $15.50 per hour for all California employers, which also means the new state salary basis threshold for California exemptions also will increase to $64,480 per year.

In addition, the minimum annual salary for computer professionals paid on a salary basis will increase from $104,149.81 to $112,065.20, and the new minimum hourly rate of pay for physicians and surgeons paid an hourly rate will increase from $91.07 to $97.99.

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