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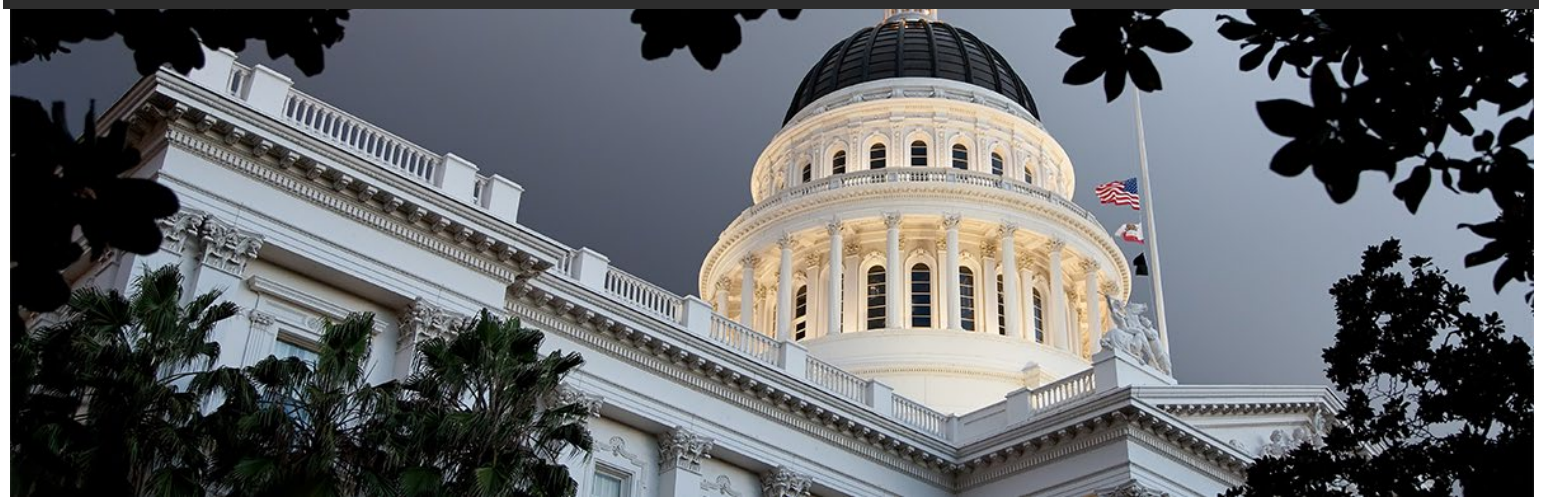

December 2023

'Tis the Season for California's 2024 Legislative Update: What Employers Need to Prepare for

With the festive season upon us, California employers can look forward to hanging lights, holiday cheer, and, of course, the new employment laws and compliance challenges taking effect in the New Year. Instead of interrupting your favorite holiday tradition to trek through California's new legislation (likely without appropriate cold-weather clothing in true California fashion), this GT Alert summarizes some key changes employers should consider before toasting to the New Year.

Unless otherwise noted, the new laws will go into effect Jan. 1, 2024.

Expanded Paid Sick Leave Benefits (SB 616)

Effective Jan. 1, 2024, California employers will need to increase the amount of paid sick leave provided to employees to not less than 40 hours or five days per year, whichever is greater (up from 24 hours/three days). For employers that provide paid sick leave on an accrual basis, paid sick leave may be capped at no less than 80 hours or 10 days, whichever is greater. In addition, employers must ensure that employees have accrued not less than 24 hours within the first 120 days of employment, and at least 40 hours by the 200th day of employment. On Jan. 1, 2024, employers may either frontload the additional days or move the measurement of the 12-month period to commence Jan. 1, 2024, and frontload not less than 40 hours/five days on that day.

The new law provides that *local* ordinances *cannot* contradict the state paid sick leave law requirements regarding the lending of paid sick leave, paystub statements, calculation of paid sick leave, providing notice if the leave is foreseeable, reinstatement of paid sick leave for rehired employees, timing of sick leave payment, and whether payment of sick leave is required upon termination. If a local ordinance contradicts the state law on these specific topics, the state law will prevail over (or preempt) the local law even if the local law is more generous in these respects, according to an updated guidance recently released from the Labor Commissioner's office.

Please see our October 2023 GT Alert for more information. In addition, the Labor Commissioner's office recently released updated FAQs regarding the state paid sick leave mandate. Employers should update their paid sick leave policies and wage statements to stay compliant with the new requirements.

Reproductive Loss Leave (SB 848)

Employers with at least five employees must provide their employees up to five days of unpaid time off for a reproductive loss event, which includes a miscarriage, failed surrogacy, stillbirth, unsuccessful "assisted reproduction" (such as artificial insemination or embryo transfer), or failed adoption. An employee who has worked for the employer for at least 30 days at the time of the request and who would have been a parent had the loss not occurred may request the leave.

The leave may be taken at any time within the three-month period following the reproductive loss event, and the five days do not need to be taken consecutively. However, if the employee is on or chooses to take alternate statutorily provided/protected leave, such as pregnancy disability leave or leave under the California Family Rights Act, they may take reproductive loss leave within three months of the conclusion of that leave. In the case of multiple reproductive loss events in a 12-month period, the total amount of leave for this purpose can be limited to 20 days within that 12-month period.

While leave can be unpaid, the employee should be permitted to use certain other leave balances otherwise available to them, including accrued and available paid sick leave. As the statute is silent on the issue, it is not yet clear whether employers will be permitted to request documentation from employees supporting the need for leave.

Please see our November 2023 GT blog post for additional information.

Amendments to California's Noncompete Laws

SB 699: This new law makes it a civil violation for an employer to enter into a contract with an employee or prospective employee that includes a noncompete clause or any other restrictive covenants that are void under California Business & Professions Code section 16600 (*i.e.,* any provision that restrains a party from engaging in a lawful profession, trade, or business of any kind). It also establishes that any contract that is void under the law is unenforceable regardless of where and when the contract was signed, *including if the individual was never employed in California and/or enters into the agreement while living outside of California but then later moves to California*, and it prohibits an employer from attempting to enforce a contract that is void (which would include sending a cease-and-desist letter). An individual may bring an action for injunctive relief or for the recovery of actual damages, or both, to enforce their rights, and the prevailing worker will be entitled to recover their reasonable attorney's fees and costs.

It is not yet clear whether this law is intended to broadly encompass employee non-solicitation covenants (a promise not to solicit or recruit the former employer's employees and other workers), which several

California courts have held are a form of noncompete and thus similarly void because they restrict an individual's behavior after the employment relationship has concluded and may hinder people in engaging in their profession or trade. Accordingly, employers should tread carefully in this area until there is more clarity. Read more in our September 2023 GT Alert.

AB 1076: This law creates an *affirmative* employer obligation to send out written, individualized notices to current or former California employees who were employed after Jan. 1, 2022, and subject to a noncompete clause that did not satisfy one of the permitted statutory exceptions to California's prohibition on noncompete agreements, informing them that such clause or agreement is *void*. An employer's failure to comply with the notice requirement violates California's unfair competition law. The law further codifies and reaffirms existing case law construing noncompete clauses in the employment context as void, no matter how narrowly tailored. Read more in our November 2023 GT blog post.

Workplace Violence Prevention (SB 553)

SB 553 requires nearly all California employers to establish, implement, and maintain an effective workplace violence prevention plan, which must be put into place by July 1, 2024. Certain employers are excluded from the requirement, including, for example, employers with locations not open to the public where fewer than 10 employees work at a given time.

The workplace violence prevention plan, which may be included either in the employer's existing Injury and Illness Prevention Plan or as a separate standalone document, must identify the persons responsible for implementing the plan, and include, among other things, procedures for identifying, evaluating, and correcting workplace violence hazards, and accepting and responding to reports of workplace violence. Employers are also required to maintain workplace violence incident logs, conduct annual training on the program, and perform periodic reviews of the plan and periodic inspections to identify unsafe conditions and work practices. Records of workplace violence hazard identification, evaluation, and correction; violent incident logs; and records of related investigations must be retained for five years, while training records must be maintained for at least one year. In addition, employees will have a right to request inspection and/or copying of such records (excluding investigation records), which must be produced within 15 days of the request.

Effective Jan. 1, 2025, any employer or collective bargaining representative of an employee who has "suffered harassment, unlawful violence, or a credible threat of violence from any individual, that can reasonably be construed to occur at the workplace," may seek a temporary restraining order (TRO) on behalf of employees at the workplace, and, if appropriate, employees at other worksites of the employer. Under existing law, TROs are based on actual violence or a credible threat of violence. Thus, SB 553 now expands the bases for an employer to seek a TRO on behalf of its employees when there has been harassment (defined as "knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be that which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress.") Read more in our October 2023 GT Alert.

Prohibitions on Cannabis-Use Inquiries (SB 700)

SB 700 makes it unlawful for an employer to request information from a job applicant relating to their prior cannabis use. It also prohibits employers from using information obtained from a criminal history background check relating to an applicant or employee's prior cannabis use, unless the employer is permitted to consider or inquire about that information under the state's Fair Chance Act, or other state or federal law. Notably, the new law neither preempts state or federal laws requiring an applicant to be

tested for controlled substances nor prohibits an employer from asking about an applicant's criminal history, provided the employer complies with state law requirements.

This law expands upon last year's legislation (also taking effect Jan. 1, 2024) prohibiting employers from discriminating against or otherwise penalizing applicants and employees based on recreational cannabis use while off the job and away from the workplace. Employers should update their policies to ensure they are not requesting or considering information they are not otherwise permitted to use under these laws.

Expanded Whistleblower Retaliation Rights (SB 497)

Current legislation forbids the dismissal, discrimination, retaliation, or any adverse treatment of employees or job applicants because they participated in protected activities, such as, for example, making a written or oral complaint relating to unpaid wages, initiating a Private Attorneys General Act (PAGA) action, or participating in a proceeding with the California Labor Commissioner's office. If an employee suffers any adverse employment action (including threats of adverse action), or any form of discrimination in their employment terms and conditions due to engaging in such protected conduct, they are entitled to reinstatement and compensation for lost wages and work benefits resulting from the employer's actions.

Effective Jan. 1, 2024, the new law creates a *rebuttable* presumption of retaliation if an employee is disciplined or discharged within 90 days of engaging in a protected activity. The burden then rests on the employer to overcome that presumption (rather than the burden remaining on the employee to establish retaliation). It also stipulates that, beyond existing remedies, an employer faces a civil penalty of up to $10,000 per employee per violation, which is awarded to the employee who suffered retaliation.

'Fast Food' Worker Minimum Wage (AB 1228)

As a negotiated compromise between labor and industry leaders with respect to the Fast Food Accountability and Standards (FAST) Recovery Act (AB 257) and an earlier version of AB 1228, an agreement was reached in which FAST Act opponents agreed to abandon the voter referendum scheduled for vote in November of 2024 in exchange for modifications to the FAST Act legislation, and the removal of joint employer liability provisions in AB 1228 by labor advocates. AB 1228 repeals the FAST Act and implements employment standards applicable to restaurant brands operating over 60 or more limited-service restaurants nationally, where patrons pay before eating, there is limited or no table service, items are sold or prepared in advance, and the food/beverages are for immediate consumption on or off premises.

The new law also provides for the creation of a "Fast Food Council" within the Department of Industrial Relations, as contemplated by the original FAST Act. The Fast Food Council will consist of nine (9) members and be tasked with creating a process to develop minimum "fast food" restaurant employment standards.

Effective April 1, 2024, covered employers must pay "fast-food" workers a minimum wage of $20.00 per hour. The new law, however, exempts certain businesses, such as those who meet the definition of a "bakery" under CFR Part 136, restaurant brands operating in grocery stores (and staffed by grocery store employees). In addition, employees covered by a collective bargaining agreement that expressly provides for the wages, working conditions, and hours of work as well as "a regular hourly rate of pay not less than 30 percent more than the state minimum wage" are also not entitled to the fast-food worker minimum wage.

The new law is enforceable by either the Labor Commissioner or a worker covered by the law, and it prohibits a covered employer from discriminating or retaliating against an employee for participating in or testifying to any proceeding held by the Fast Food Council. Read more in our July 2023 GT blog post.

Health Care Facility Worker Minimum Wage (SB 525)

Effective June 1, 2024, SB 525 increases minimum wage requirements for health care workers at "covered health care facilities" beyond California's state minimum wage. Coverage is expansive, as the law defines a "covered health care employee" as an employee providing patient care, health care services, *or other services supporting the provision of health care*, which may broadly include janitors, gift shop employees, security guards, etc. It also includes certain independent contractors. Excluded from coverage, however, are outside salespersons, "work performed in the public sector where the primary duties performed are not health care services," and waste management and medical transportation services, so long as the worker is not an employee of a covered health care facility.

Lending to the law's far-reaching coverage is its definition of "covered health care facility," which encompasses most varieties of health care employers. This includes but is not limited to medical hospitals, psychiatric hospitals, clinics, ambulatory surgical centers, licensed skilled nursing facilities, home health agencies, and a patient's home when health care services are delivered by an entity owned or operated by a general acute care hospital or acute psychiatric hospital. The only exceptions to coverage are hospitals owned, controlled, or operated by the State Department of Hospitals, a tribal clinic exempt from licensure, and an outpatient setting run by a federally recognized tribal organization.

Depending on the type and size of a covered health care facility employer, the law establishes five separate minimum wage schedules. For example, from June 1, 2024, to May 31, 2025, the requisite minimum wage is $23.00 per hour for covered health care facilities that (1) have 10,000 or more full-time equivalent employees; (2) are part of an integrated health care delivery system or health care system with 10,000 or more full-time equivalent employees; (3) are dialysis clinics; or (4) are facilities owned, affiliated, or operated by a county with a population of more than 5,000,000 as of Jan. 1, 2023. In contrast, from June 1, 2024, to May 31, 2033, the requisite minimum wage is $18.00 per hour, with 3.5% annual increases for a covered hospital health care facility that (1) has a high governmental payor mix; (2) is an independent hospital with an elevated governmental payor mix; (3) is a rural independent covered health care facility; or (4) is a covered health care facility that is owned, affiliated, or operated by a county with a population of less than 250,000 as of Jan. 1, 2023.

Compliance with the new law is not required until Jan. 1, 2025, for county-owned, -affiliated, or -operated covered health care employers. Certain covered employers may seek a temporary one-year pause or an alternative phase-in schedule for the new minimum wage requirements if they can demonstrate that compliance "would raise doubts about the covered health care facility's ability to continue as a going concern under generally accepted accounting principles."

In addition, the new law affects the salary threshold requirement for covered employers that want to treat certain employees as exempt. Effective June 1, 2024, to satisfy the threshold, employees must earn a monthly salary of no less than 150% of the health care worker minimum wage, or 200% of the applicable state minimum wage, whichever is greater, for full-time employment.

Consistent with California's approach to its wage and hour laws, the law also provides a private right of action to workers who believe their rights under the law have been violated.

Meal and Rest Period Exemption for Airline Flight Crew Members (SB 41)

In effect since March 23, 2023, SB 41 adds Section 512.2 to the Labor Code to provide that California's meal and rest break requirements do not apply to airline cabin crew employees who are subject to a collective bargaining agreement (CBA) under the Railway Labor Act that "contains any provision addressing meal and rest periods for airline cabin crew employees."

The law's meal and rest break exemption also extends to airline cabin crew employees "represented by a labor organization pursuant to the Railway Labor Act" but not yet subject to a CBA. In this instance, however, the exemption is applicable only for the first 12 months of representation, unless the employer and representative labor organization agree, in writing, to an extension.

In addition, the law is retroactive to Dec. 5, 2022, prohibiting new legal actions for meal or rest break violations brought by (or on behalf of) airline cabin crew employees subject to a CBA that qualifies for the exemption.

New Employer Obligations Related to Food Handler Cards (SB 476)

In general, the California Retail Food Code provides uniform health and sanitation standards for retail food facilities. Under existing law, the Code requires food handlers to obtain a food handler card within 30 days of hire and to maintain it for the duration of their employment.

SB 476, effective Jan. 1, 2024, requires employers to treat as compensable time the time it takes the employee to complete the food handler training and certification program, and to cover the costs associated with obtaining their food handler card. Employers also must relieve the employee of their work duties while participating in the food handler training course and sitting for the examination. In addition, the new law prohibits employers from requiring, as a condition of employment, that the applicant already possess a valid food handler card.

Revised Grocery Worker Recall Rights (AB 647)

Under existing law, the buyer of an operational grocery store that is over 15,000 square feet is required to retain the store's employees for a transition period of 90 days. During the transition period, the retained employees may only be discharged for cause and must be considered for continued employment at the end of the 90-day period. In addition, upon a change of control at a grocery establishment, existing law requires an incumbent grocery employer to provide a list of eligible grocery workers to the successor employer within 15 days post-execution of the transfer document.

Effective Jan. 1, 2024, AB 647 extends its reach to encompass distribution centers owned and operated by a grocery entity, responsible for distributing goods to or from its own stores, regardless of square footage. Concurrently, the new law exempts from this coverage any grocery store that has been non-operational for at least 12 months. Also exempt are incumbent and successor grocery employers, parties to the same transaction, if the sum of the grocery workers employed at their establishments nationwide immediately preceding the change in control is less than 300.

In addition, the new law requires the incumbent grocer to provide the list of eligible grocery workers to "any collective bargaining agreement representative."

As to enforcement, the new law allows an employee or their representative to initiate legal proceedings in state court. It also outlines potential remedies, such as front pay, back pay, and punitive damages. Additionally, the new law permits the court to grant reasonable attorney's fees and costs.

Revised Rights of Laid-Off Hospitality and Building Services Employees (SB 723)

Existing law, effective until Dec. 31, 2024, requires certain employers in the hospitality and service industries to offer their "laid-off employees" in writing all newly available job positions for which they are qualified within five business days of establishing a position. A laid-off employee is considered qualified for a new position if they held the same or similar position when they were most recently laid off and has five business days from the receipt of the offer to accept. Additionally, current law forbids employers from declining to hire, dismissing, cutting pay, or imposing any other detrimental actions against laid-off employees who seek to assert their rights under the law. As currently defined, "laid-off employee" means any employee employed for at least six months in the 12 months preceding Jan. 1, 2020, and whose most recent separation was due to a COVID-19-related reason.

As noted, the law covers employers in the hospitality and service industries, applying to hotels, private clubs, and event centers. It also applies to airport hospitality operations that provide services in connection with providing food and beverage, retail or consumer goods to the public, and the preparation of food and beverages for aircraft crew and passengers; employers in the building service industry that provide janitorial, building maintenance, or security services to office, retail, or other commercial buildings; and airport service providers that contract with a passenger air carrier, airport facility management, or airport authority to provide services at an airport that are directly related to the air transportation of persons, property, or mail. Additionally, the law applies to successor employers that conduct the same or similar operations as the incumbent employer before the COVID-19 state of emergency.

Effective immediately, SB 723 extends the sunset date until Dec. 31, 2025. It redefines "laid-off employee" to mean an employee who worked for an employer for at least six months and whose most recent separation from active service occurred on or after March 4, 2020, "and was due to a reason related to the COVID-19 pandemic, including a public health directive, government shutdown order, lack of business, a reduction in force, or other economic, nondisciplinary reason due to the COVID-19 pandemic." It also creates a presumption that, unless established otherwise by a preponderance of evidence, "a separation due to a lack of business, reduction in force, or other economic, nondisciplinary reason is due to a reason related to the COVID-19 pandemic."

Eliminating Automatic Stays During Pendency of Appeal of Order Dismissing or Denying Petition to Compel Arbitration (SB 365)

Under existing law, when an appeal of an order dismissing or denying a petition to compel arbitration is officially filed, it typically results in a suspension of proceedings in the trial court regarding the order being appealed, with certain specified exceptions.

Effective Jan. 1, 2024, SB 365 provides that during an appeal of an order that dismisses or denies a petition to compel arbitration, trial courts are not required to stay the underlying proceedings.

Minimum Wage Increases

Effective Jan. 1, 2024, the state minimum wage will increase to $16.00 per hour for all California employers, which also means the new state salary basis threshold for most California exemptions will increase to $66,560 per year ($5,546.67/month).

In addition, the minimum annual salary for computer professionals paid on a salary basis will increase from $112,065.20 to $115,763.35; the new minimum hourly rate of pay for licensed physicians and surgeons paid an hourly rate will increase from $97.99 to $101.22; and the new minimum wage rate to qualify for the collective bargaining exemption will rise to $20.80 per hour.

Amended Wage Theft Notice Requirements (AB 636)

Existing law mandates that employers provide employees, at the time of hire, a written notice containing specified information, such as their applicable rate of pay, the designated regular payday, and their paid sick leave rights, in the language typically used by the employer when communicating employment-related information to the employee.

Effective Jan. 1, 2024, AB 636 requires an employer to include in the written notice additional information concerning the existence of a federal or state emergency or disaster declaration for the county or counties of employment, issued within 30 days before the employee's start date, that may impact their health and safety during employment.

In addition, effective March 15, 2024, the new law requires an employer to give federal H-2A agricultural workers detailed information on their additional rights and protections under California law, including but not limited to the federal H-2A program wage rate for the contract period, frequency of pay, nonretaliation protections for complaints or organizing, and sexual harassment prohibitions. The information must be provided, in Spanish, in a separate and distinct section of the written notice. Upon an H-2A employee's request, an employer must also provide the written notice in English.

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