

California employment law legislative update: Employers must ring in 2023 with a host of new obligations

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Looking ahead to 2023 in California employment law

This year, California's governor signed into law a multitude of new provisions that will reshape the employment law landscape. With the ink now dry, employers have a clearer picture of the obligations that will be ushered in with 2023 and beyond. In addition to a continued focus on the effects of the COVID-19 pandemic on the workplace, employers must prepare for legislative changes in the areas of leaves, benefits, privacy rights, and more. Here is a compilation of the major new laws and obligations that employers in the Golden State should know. As always, it is wise to consult with counsel to ensure that workplace policies and practices are in compliance.

Minimum wage increase



California's minimum wage, which was set to increase to \$15 per hour on January 1, 2023, is instead rising to \$15.50 per hour. This is due in part to an inflation provision incorporated into Senate Bill (SB) 3, a bill signed into law by former governor Jerry Brown in 2016. For employers in "white-collar" spheres, this change will raise the annual salary requirements for those exempt employees, assuming the other legal requirements under California law are met.

As a reminder, many local jurisdictions have enacted their own minimum wage ordinances that establish higher rates than that of the state. While these local rates do not affect the salary requirements for exempt employees, employers need to ensure compliance.

SB 1162: Pay transparency law requires increased data reporting and pay scale disclosures

SB 1162, signed into law by Governor Newsom on September 27 and effective on January 1, 2023, expands existing pay data reporting obligations for employers of 100 or more employees. These employers must now submit annual reports to the California Civil Rights Department with the median and hourly pay rates for employees broken down by race, ethnicity, and sex. Employers who fail to file the reports will be subject to penalties of up to \$100 per employee for the first reporting failure, and \$200 per employee for any subsequent failure.

Following in the footsteps of Colorado and other states, including New York, Washington, and Rhode Island, SB 1162 also mandates that employers provide pay transparency, requiring employers with 15 or more employees to include the "pay scale" for a position in any job posting, even if posting the position with a third party, with possible penalties for noncompliance. The new legislation defines "pay scale" as "the salary or hourly wage range that the employer reasonably expects to pay for the position." There is substantial subjectivity inserted in this and other provisions of this new law, which makes it essential to consult with experienced counsel.

SB 951: Increased benefits under the state disability insurance program

On September 30, 2022, Governor Newsom signed SB 951, which most notably will revise the formulas used for calculating the weekly benefits available for qualified applicants under California's family temporary disability insurance program. Starting in 2025, this increases the disability benefits, including paid family leave, that low-wage earners may apply for while out on unpaid leaves, such as under the California Family Rights Act (CFRA) and the federal Family Medical Leave Act (FMLA).

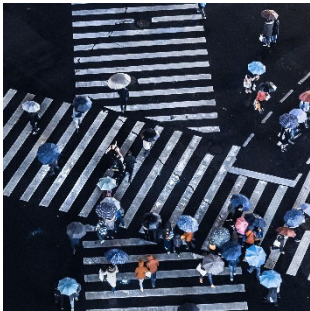
AB 1949: Bereavement leave is now mandatory, and may be paid

Under Assembly Bill (AB) 1949, effective January 1, 2023, it will be illegal for employers with five or more employees to deny employees up to five days of unpaid bereavement leave upon the death of a family member, so long as: (1) the employee seeking leave was employed for at least 30 days before the commencement of leave, and (2) for private employers, the employer has five or more employees. There are separate requirements for public employers. Notably, eligible private employees do not include those under collective bargaining agreements when their agreements expressly provide: (1) equivalent bereavement leave and for the wages, hours of work, and working conditions of the employees, and (2) premium wages for all overtime hours worked, where applicable, and a regular hourly rate of pay for those employees of not less than 30 percent above the state minimum wage.

If an employer already has a bereavement leave policy in place, they can still have their employees take leave under that existing policy, but if the policy provides less time off than under AB 1949, then additional time off must be granted to align with the new legislation. While bereavement leave can be taken on nonconsecutive days, it must be completed within three months of the death of the family member. Under the legislation, family members are defined to include: (a) spouses, (b) children, (c) parents, (d) siblings, (e) grandparents, (f) grandchildren, (g) domestic partners, and (h) parents-in-law.

While AB 1949 appears to be a simple expansion of the unpaid leave already afforded to employees under the CFRA, the new law goes further. Instead of strictly unpaid leave, it allows employees to use both accrued and available paid sick leave, as well as vacation time, for bereavement purposes. AB 1949 changes bereavement leave from optional for employers to mandatory.

AB 1041: Employees will soon be permitted to take leave to care for a “designated person”



Beginning January 1, 2023, AB 1041 considerably expands the definition of “family members” for purposes of leave under both CFRA and the California Healthy Workplaces, Healthy Families Act, more commonly referred to as California’s Paid Sick Leave (PSL) law.

Qualified employees under the old versions of both laws were not permitted to take family care and medical leave for non-blood relatives apart from spouses and domestic partners, but CFRA will now permit leave to include a “designated person,” defined as “any individual related by blood or whose association with the employee is equivalent of a family relationship.” Under the PSL law, a designated person is defined as “a person identified by the employee at the time the employee requests paid sick days.” Under both CFRA and PSL law, however, employers are permitted to limit an employee to one designated person per 12-month period.

Notably, while employees can identify the designated person at the time they seek medical leave under CFRA, the new legislation does not define “equivalent of a family relationship.” The subjectivity of the phrase leaves many questions unanswered for employers. For example: What constitutes a family relationship? What can employers legally ask the employee regarding their relationship with the designated person? Given the apparent subjectivity in the law, it is important for employers to consult with legal counsel on new leave requests that fall within this revised definition.

SB 1044: Employees may leave work or refuse to report to work during “emergency conditions,” and employers may not retaliate

On September 29, Governor Newsom signed SB 1044 into law. This new law, effective January 1, 2023, excuses employees from work during “emergency conditions” when they have a “reasonable belief” that their workplace is unsafe. The law defines “emergency condition” as a disaster, a condition of extreme peril to people or property, or an evacuation order at an employee’s workplace or their child’s school, whether caused by natural forces or crime. It does not include a health pandemic, nor does it apply to first responders and other essential or health services workers.

In the event of an emergency condition, SB 1044 prohibits employers from taking or threatening to take adverse action against employees who fail to report to work or who leave work. It also makes it unlawful for employers to prevent employees from using their mobile devices for specific reasons related to the emergency.

Since this law only requires employees to notify employers of their absence “when feasible,” SB 1044 could put employers in tricky situations where they immediately and unexpectedly need to hire replacement workers to keep their business operating, but in doing so leave themselves vulnerable to a retaliation lawsuit.

SB 523: The Contraceptive Equity Act of 2022 will expand reproductive health care protections for employees and health care options for insureds

While reproductive health care in 2022 was thrust into the spotlight in large part due to the U.S. Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, California has not shied away from making legislative decisions that expand protections related to reproductive care. SB 523, known as the Contraceptive Equity Act of 2022, rolls out significant changes to California's employment laws to take effect on January 1.

The new legislation expands protections related to reproductive health decision-making. Under California's Fair Employment and Housing Act (FEHA), the list of protected categories is now expanded to include "reproductive health decision-making," which, under the new law, "includes, but is not limited to, a decision to use or access a particular drug, device, product, or medical service for reproductive health." This means that employers are forbidden from discriminating against an employee or applicant based on "reproductive health decision-making" or requiring employees to disclose information related to "reproductive health decision-making" as a "condition of employment, continued employment, or a benefit of employment."

AB 2188: Protection for off-duty marijuana use

By January 1, 2024, AB 2188 will amend the FEHA to add employment discrimination protections for certain types of cannabis use. Under the new law, employers will be prohibited from taking adverse action based on an employee's use of cannabis "off the job and away from the workplace" or based on a drug screening test that finds "nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids."

Employers may still maintain a drug-free workplace policy and take action against an employee who possesses or is impaired by cannabis at the workplace, or who fails a drug screening test that does not screen for nonpsychoactive cannabis metabolites. The law excludes (1) building and construction employees; (2) applicants or employees hired for positions that require a federal government background investigation or security clearance; and (3) applicants or employees who must be tested for controlled substances by law or as a condition of receiving federal funding or federal licensing-related benefits, or who are entering into a federal contract. There may be challenges under federal law to the application of AB 2188.

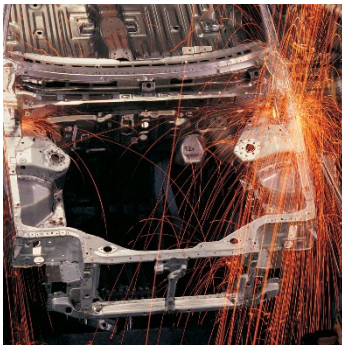
AB 2693: COVID-19 notice requirements are extended but also eased to allow for posting notices

AB 2693 extends existing legislation regarding COVID-19 exposure notification requirements. Now, an employer's duty to provide such notification continues for an additional year, until January 2024. Notably, AB 2693 also amends the notice requirements. Previously, employers were required to provide individual written notice within one business day of exposure. Now, employers have the option to post a notice of potential exposure instead. The notice must be "prominently" displayed for 15 days "in all places" where workplace rules are customarily posted. Employers who opt to post a notification must maintain for three years a log of all dates the notice was posted and make the log accessible to the Labor Commissioner.

AB 1632: Employee restroom access for individuals with medical conditions

This Bill requires businesses that are open to the general public for the sale of goods to share their employee restrooms with individuals who have medical conditions such as Crohn's disease, ulcerative colitis, irritable bowel syndrome, or any other medical condition that requires immediate access to a toilet facility.

Notable industry-specific laws



AB 257: A newly created fast-food council will now regulate the fast-food chain industry

The Fast Food Accountability and Standards Recovery Act (FAST Recovery Act), AB 257, is one of California's most significant and controversial new laws. Signed on Labor Day and effective January 1, 2023, it creates rules and standards related to fast-food employees' wages, working hours, and other health and safety conditions. It has garnered national attention as the first of its kind in the country.

The FAST Recovery Act establishes a 10-member statewide Fast Food Council within the Department of Industrial Relations. All 10 members are government appointed. The council is charged with setting industry standards for fast-food restaurants with 100 or more establishments nationwide, and these standards will be enforced by the California Division of Labor Standards Enforcement. The council may assume its duties after 10,000 fast-food workers in the state sign a petition approving the creation of the council. AB 257 also allows for the formation of local city or county councils that can provide recommendations to the state council.

Notably, the Fast Food Council has the authority to dramatically increase the minimum wage for fast-food workers in 2023, up to \$22 an hour, which is \$6.50 more than the state minimum wage for that year. After raising the minimum wage, the council may thereafter make increases at a rate that is the lesser of 3.5 percent or the rate of change in the Consumer Price Index.

AB 257 also creates greater vulnerability for employers to lawsuits. It creates a private right of action for fast-food workers to sue for discharge, discrimination, or retaliation regarding health and safety rights established by the FAST Recovery Act. Moreover, it creates a rebuttable presumption of unlawful discrimination or retaliation when an employer takes adverse action against an employee within 90 days following the employer's knowledge of the employee exercising their rights.

Specific employers are exempt from the FAST Recovery Act, including fast-food restaurants located within grocery stores if the grocery store employs the restaurant workers, and bakeries, as long as they produce bread on the premises and sell it as a stand-alone menu item. Also, the council does not have the authority to supersede certain standards that are covered by valid collective bargaining agreements.

Restaurant industry representatives unsuccessfully urged the governor to veto the FAST Recovery Act and have voiced great concern about the law. Currently, a coalition called Protect Neighborhood Restaurants is attempting to place a referendum on the 2024 ballot to allow voters to overturn AB 257. Time will tell if the law sticks, or if it spreads to other industries and states.

AB 1601: Cal/WARN layoff requirements now apply to call center employers



As with other federal statutes, California has its own version of the federal Worker Adjustment and Retraining Notification (WARN) Act, dubbed Cal/WARN. Cal/WARN applies to industrial and commercial facilities employing 75 or more employees. It mandates that employers of such facilities provide advance written notice of mass layoffs, relocations, or terminations of operations. Effective in 2023, Cal/WARN will also apply to call center employers.

The bill defines a “call center” as “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.” It defines “relocation of a call center” as “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 percent of the call center’s 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.”

The Employment Development Department (EDD) will publish a list of call center employers that provide notice under Cal/WARN. If an employer is on the EDD’s list or fails to provide the requisite notice, it will be ineligible for state grants, loans, and tax credits.

AB 2183: Voting changes create an easier path for farm workers to unionize

The Agricultural Labor Relations Voting Choice Act (AB 2183) makes it easier for farm workers to organize into unions by allowing workers to vote by mail or ballot card drop-off, also known as a “card check.” Previously, such union elections required in-person voting. Governor Newsom had originally declined to sign AB 2183, but did an about-face after President Biden announced his strong support for the bill. The governor conditioned his signature on an agreement with the United Farm Workers president and the California Labor Federation to pass clarifying language in next year’s legislative session.

AB 1788: Civil penalties for hotels with knowledge of sex trafficking

Under AB 1788, hotels will be subject to civil penalties if a supervisory employee knew or acted with reckless disregard of sex trafficking activity within the hotel and failed to inform law enforcement, the National Human Trafficking Hotline, or another appropriate victim service organization. Penalties may also be imposed if any hotel employee was acting within the scope of their employment and knowingly benefited from participating in a venture that the employee knew, or acted in reckless disregard of the activity constituting sex trafficking.

For violations of this new law, a city, county, or city and county attorney may file a lawsuit against the hotel for equitable relief, as well as civil penalties ranging between \$1,000 to \$10,000 per violation. AB 1788 has a five-year statute of limitations, from the date of the violation or the date a minor victim turns 18 years old.

AB 1102 was not passed: Employers will have significant new privacy obligations under the CPRA

Last but far from least, California employers will soon be required to comply with the privacy obligations set forth in the California Privacy Rights and Enforcement Act (CPRA). The CPRA takes effect January 1, 2023, and amends the California Consumer Privacy Act (CCPA). Critically, the state legislative session ended without the passage of AB 1102, a bill that would have extended the employer exemptions under the CCPA and prevented them from expiring at the end of the year. Therefore, employers must come into compliance with the CPRA's obligations regarding employee/applicant data, including specific notifications about personal information that is collected and disclosed, and honoring employees' and applicants' rights concerning the collection, correction, deletion, portability, and disclosure of their personal data. The CPRA will be enforced by a newly established California Privacy Protection Agency. Employers should consult with counsel to ensure proper compliance with these new and significant privacy obligations.

Key contacts

If you have questions or would like to learn more about recent California legislation, please contact one of the lawyers below or the Reed Smith Lawyer with whom you normally work.



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