

California employment law legislative updates: What's new in the Golden State

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CALIFORNIA REPUBLIC

It's that time of the year again! The deadline for California Governor Gavin Newsom to sign, approve without signing, or veto bills on his desk was October 10, 2021. Now that the dust has settled, below is a comprehensive list of bills signed by the governor that will impact employers. Also listed are bills that the governor vetoed but that employers should keep on their radars in case they make a comeback. Employers should consider reviewing these new laws to determine whether they need to revise their policies and practices to ensure they are compliant and to make sure they are not caught off guard. These new laws go into effect on January 1, 2022, with the exception of Assembly Bill 654 dealing with COVID-19 outbreak reporting and Assembly Bill 73 dealing with employee protections from wildfire smoke, both of which went into effect immediately upon signing.

Signed into law

AB 73: Expanded wildfire smoke employee protections

On September 27, 2021, the governor signed Assembly Bill 73, which seeks to protect agricultural workers from wildfire smoke by including them in the definition of essential workers that can access the state's personal protective equipment (PPE) stockpile and specifying that wildfire smoke events are among the health emergencies that require the state to mobilize distribution of PPE. This law also requires employers to provide wildfire smoke training in a language and manner readily understandable by employees.

AB 286: Food delivery platforms and purchase prices and tips

On October 5, 2021, the governor signed Assembly Bill 286. The law makes it unlawful for food delivery platforms to charge a customer any purchase price, as defined, for food or beverage that is higher than the price posted on the food delivery platform's Internet website by the food facility at the time of the order. The law also makes it unlawful for food delivery platforms to retain any portion of amounts designated as a tip or gratuity, requiring food delivery platforms to pay any tip or gratuity for a delivery order, in its entirety, to the person delivering the food or beverage, and to pay any tip or gratuity for a pickup order, in its entirety, to the food facility. Finally, the law requires food delivery platforms to disclose to the customer and the food facility a cost breakdown of each transaction, including, with certain exceptions, prescribed information.

AB 654: COVID-19 outbreak reporting requirements

On October 5, 2021, the governor signed Assembly Bill 654, which went into effect immediately as an urgency statute. Among other things, this law expands the types of employers that are exempt from COVID-19 outbreak reporting requirements to include community clinics, adult day health centers, community care facilities, and child day care facilities.

The law requires employers to do the following within one business day of receiving notice of potential exposure to COVID-19:

- 1) Provide written notice in a manner the employer normally uses to communicate employment-related information to all employees and to the employers of subcontracted employees who were on the premises at the same worksite as the qualifying individual within the infectious period that they may have been exposed to COVID-19. Written notice may include, but is not limited to, personal service, email, or text message if it can reasonably be anticipated to be received by the employee within one business day of sending and shall be in both English and the language understood by the majority of the employees.
- 2) Provide written notice to the exclusive representative, if any, of qualifying individuals and employees who had close contact with the qualifying individuals.
- 3) Provide all employees who were on the premises at the same worksite as the qualifying individual within the infectious period and the exclusive representative, if any, with 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 anti-retaliation and anti-discrimination protections of the employee.
- 4) Notify all employees who were on the premises at the same worksite as the qualifying individual within the infectious period, and the employers of subcontracted employees who were on the premises at the same worksite as the qualifying individual within the infectious period and the exclusive representative, if any, of 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.

The law also requires employers to provide the State Department of Public Health certain information, within 48 hours or one business day, whichever is later, upon being notified of the number of cases that meet the definition of a COVID-19 outbreak, as defined by the State Department of Public Health.

AB 701: New requirements for warehouse distribution centers

On September 22, 2021, the governor signed Assembly Bill 701, which, among other things, requires employers with 100 or more employees at a single warehouse distribution center or 1,000 or more employees at one or more warehouse distribution centers in the state of California to provide to nonexempt employees, upon hire, or within 30 days of the effective date of this bill, with a written description of each quota to which the employee is subject, including the quantified number of tasks to be performed, or materials to be produced or handled, within the defined time period, and any potential adverse employment action that could result from failure to meet the quota.

The new law provides that an employee shall not be required to meet a quota that prevents compliance with meal or rest periods, use of bathroom facilities, or occupational health and safety laws, as specified. The law also prohibits an employer from taking adverse action against an employee for failure to meet a quota that has not been disclosed or for failure to meet a quota that does not allow a worker to comply with meal or rest periods or occupational health and safety laws. The law requires that any action taken by an employee to comply with occupational health and safety laws or division standards be considered time-on-task and productive time for the purposes of any quotas or monitoring system.

AB 825: Personal information to include genetic data

On October 5, 2021, the governor signed Assembly Bill 825, which expands the definition of personal information to include genetic data. Existing law requires a business that owns, licenses, or maintains personal information about a California resident to implement and maintain reasonable security procedures and practices. Existing law also requires a person or business that conducts business in California, and that owns or licenses computerized data that includes personal information, to disclose a breach of the security of the system following discovery or notification of the breach. This new law defines genetic data as any data, regardless of its format, that results from the analysis of a biological sample of an individual, or other source, and concerns genetic material, as specified.

AB 1003: Wage theft punishable as grand theft

On September 27, 2021, the governor signed Assembly Bill 1003, which makes the intentional theft of wages, including gratuities, in an amount greater than \$950 from any one employee, or \$2,350 in the aggregate from two or more employees, by an employer in any consecutive 12-month period punishable as grand theft. Grand theft is generally punishable either as a misdemeanor by imprisonment in a county jail for up to one year or as a felony by imprisonment in a county jail for 16 months or two or three years. The law specifies that, for the purposes of these provisions, independent contractors are included within the meaning of employee, and hiring entities of independent contractors are included within the meaning of employer.

The law defines “theft of wages” as “the intentional deprivation of wages, as defined in Section 200 of the Labor Code, gratuities, as defined in Section 350 of the Labor Code, benefits, or other compensation, by unlawful means, with the knowledge that the wages, gratuities, benefits, or other compensation is due to the employee under the law.”

AB 1033: California Family Rights Act expanded to include parents-in-law

On September 27, 2021, the governor signed Assembly Bill 1033, which expands the California Family Rights Act by now requiring employers to provide eligible employees with up to 12 workweeks of unpaid protected leave during any 12-month period for family care and medical leave to care for a parent-in-law. Existing law defines family care and medical leave to include, among other things, leave to care for a parent.

This bill also requires the Department of Fair Employment and Housing (DFEH) to provide written notification to employees who request an immediate right to sue alleging a violation of the family care and medical leave provisions of the mediation requirement prior to filing a civil action if mediation is requested by the employer or the employee. This only applies to employers who have between five and 19 employees. This portion of the bill requires, among other things, that the employee contact the DFEH’s dispute resolution division prior to filing an action and indicate whether they are requesting mediation. Significantly, the bill entitles a respondent or defendant in a civil action who did not receive the required notification as a result of the employee’s failure to contact the department’s alternative dispute resolution prior to filing a civil action and who had five to 19 employees at the time that the alleged violation occurred, to a stay of any pending civil action or arbitration until the mediation is complete or deemed unsuccessful.

AB 1407: Implicit bias training for hospitals and nursing training programs

On October 1, 2021, the governor signed Assembly Bill 1407, which requires all nursing schools and programs to incorporate implicit bias training into their curriculum, and hospitals to implement evidence-based implicit bias into new graduate training.

AB 1506: Independent contractors – AB 5 and Dynamex exemption extension for newspaper distributors and carriers

On September 27, 2021, the governor signed Assembly Bill 1506, which extends from January 1, 2022, to January 1, 2025, the exemptions provided to newspaper distributors working under contract with a newspaper publisher and newspaper carrier under AB 5 and *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903, 416 P.3d 1 (2018).

This new law also requires every newspaper publisher or distributor that hires or directly contracts with newspaper carriers to submit specified information related to their workforce to the Labor and Workforce Development Agency on or before March 1, 2022, March 1, 2023, and March 1, 2024, as provided. This information includes: (1) the number of carriers for which the publisher or distributor paid payroll taxes in the previous year and the number of carriers for which the publisher or distributor did not pay payroll taxes in the previous year; (2) the average wage rate paid to carriers classified as independent contractors and as employees; and (3) the number of carrier wage claims filed, if any, with the Labor Commissioner or in a court of law. For the March 1, 2022, reporting date only, every newspaper publisher and distributor shall also report the number of carrier wage claims filed with the Labor Commissioner or in a court of law for the preceding three years.

AB 1561: Independent contractors – AB 5 exemptions for licensed manicurists and construction trucking

On September 30, 2021, the governor signed Assembly Bill 1561, which extends the sunset dates until January 1, 2025, on exemptions from AB 5 (concerning the classification of employees and independent contractors) granted to licensed manicurists and construction trucking subcontractors. The bill also clarifies the scope of the data aggregator exemption, extends the Department of Insurance licensee exemption to include persons providing claims adjusting and third-party-administration work, and further clarifies that the duties of a manufactured housing dealer under the Health and Safety Codes are not considerations for the classification test.

SB 62: Garment manufacturing – limitation on piece rate compensation

On September 27, 2021, the governor signed Senate Bill 62, which prohibits the practice of piece-rate compensation for garment manufacturing, except in the case of worksites covered by a valid collective bargaining agreement. The law specifies that a garment manufacturer, contractor, or brand guarantor (such as a retailer) who contracts with another person for the performance of garment manufacturing operations shares joint and several liability with any manufacturer and contractor for the full amount of unpaid wages and any other compensation, including interest, due to any and all employees who performed manufacturing operations for any violation, attorney's fees, and civil penalties, as specified. The law further makes garment manufacturers and contractors liable for the full amount of damages and penalties for any violation, as specified.

SB 331: Settlement and non-disparagement agreements

On October 7, 2021, the governor signed Senate Bill 331, which further limits the ability of employers to use nondisclosure and non-disparagement agreements. Existing law prohibits a settlement agreement from preventing the disclosure of factual information regarding sex-related discrimination, harassment, and retaliation claims filed in a civil action or a complaint filed in an administrative action. The new law expands that prohibition to include acts of workplace harassment or discrimination based on other protected categories, such as race, age, and physical disability. The law further requires any contractual provision that restricts an employee's disclosure to include language related to the employee's rights to disclose factual information about unlawful acts in the workplace. The law applies to agreements entered into on or after January 1, 2022.

SB 362: Chain community pharmacist quotas

On October 27, 2021, the governor signed Senate Bill 362, which prohibits chain community pharmacies from establishing quotas for pharmacists.

SB 606: Expansion of Cal/OSHA's enforcement power

On September 27, 2021, the governor signed Senate Bill 606, which substantially expands Cal/OSHA's enforcement power.

First, the law creates a rebuttable presumption that an employer with multiple worksites has committed an "enterprise-wide" violation if Cal/OSHA determines either that the employer has a noncompliant written policy or procedure or that the agency has evidence of a pattern or practice of the same violation committed by the employer involving more than one of the employer's worksites. Enterprise-wide citations carry the same penalties as willful or repeated citations.

Second, the law authorizes Cal/OSHA to seek an injunction restraining certain uses or operations if the agency has grounds to issue a citation.

Third, the law permits Cal/OSHA to issue citations for “egregious violations,” which may include incidents such as the following: (1) the employer intentionally made no reasonable effort to eliminate a known violation; (2) violations resulted in worker fatalities, worksite catastrophe, or large number of injuries or illnesses; (3) violations resulted in persistently high rates of worker injuries or illnesses; (4) the employer has an extensive history of prior violations; (5) the employer intentionally disregarded its health and safety obligations; (6) the employer’s conduct, as a whole, clearly amounts to bad faith; and (7) the employer committed a large number of violations that significantly undermined the effectiveness of any implemented safety and health program.

Finally, the law authorizes Cal/OSHA to issue a subpoena if an employer fails to promptly provide requested information, and to enforce the subpoena if the employer fails to provide the requested information within a reasonable time.

SB 639: Minimum wage for persons with disabilities

On September 27, 2021, the governor signed Senate Bill 639, which prohibits the Industrial Welfare Commission from issuing special licenses that authorize the employment of a person with disabilities for less than the minimum wage. Current licenses may only be renewed for those who meet the requisite benchmarks that will be released by the State Council on Developmental Disabilities. However, by January 1, 2025, or based on a multiyear phaseout plan (to be released by January 1, 2023), whichever is sooner, all such licenses will no longer be operative. At that point, an employee with a disability must not be paid less than the minimum wage.

SB 646: Represented janitorial employees exempted from PAGA

On September 27, 2021, the governor signed Senate Bill 646, which exempts certain janitorial employees from the Private Attorneys General Act (PAGA). The exemption applies to janitorial employees represented by a labor organization and covered by a collective bargaining agreement in effect before July 1, 2028. The exemption does not cover workers specializing in window washing, housekeeping staff who primarily make beds and change linens, or workers at airport facilities, cabin cleaning, hotels, card clubs, restaurants or other food service operations, grocery stores, or drug retailers.

SB 657: Workplace postings via email

On September 27, 2021, the governor signed Senate Bill 657, which permits an employer to distribute required notices and postings to employees by email with documents attached whenever an employer is required to physically post information. Employers are still obligated to physically display postings.

SB 727: Direct contractor liabilities expanded

On September 27, 2021, the governor signed Senate Bill 727, which expands a direct contractor’s liability to include penalties, liquidated damages, and interest owed by the subcontractor on account of the performance of the labor. This law applies to contracts entered into on or after January 1, 2022.

SB 807: Revised Department of Fair Employment and Housing procedures and extended employer record keeping

On September 23, 2021, the governor signed Senate Bill 807, which modifies various DFEH procedures, including extending the time period in which an individual can file an action, tolling that time period while the DFEH investigates or otherwise takes action on a complaint, and extending to two years the period that DFEH has to complete its investigation and issue a right-to-sue notice. The law further expands current record retention mandates to now require employers to retain personnel records for four years from when the records are created or from the date on which an employment action was taken.

Vetoed

AB 123: Paid family leave weekly benefit amount

On September 28, 2021, the governor vetoed Assembly Bill 123, which would have revised formulas for determining leave benefits under the Disability Insurance and Paid Family Leave programs. The governor vetoed the law because a number of other measures changing paid leave had been signed into law, and the bill would create significant new costs and higher contributions.

AB 616: Mail ballots for agricultural employees

On September 22, 2021, the governor vetoed Assembly Bill 616, which would have created a procedure for agricultural employees to elect a labor representative through a ballot card election. The governor vetoed the law because the bill "contained various inconsistencies and procedural issues related to the collection and review of ballot cards."

AB 1074: Displaced hotel workers

On September 28, 2021, the governor vetoed Assembly Bill 1074, which would have extended the protections offered to janitors under the Displaced Janitor Opportunity Act to hotel workers. Currently, the Displaced Janitor Opportunity Act requires contractors and subcontractors that are awarded contracts or subcontracts to provide janitorial or building maintenance services at a particular jobsite or sites to retain, for a period of 60 days, certain employees who were employed at that site by the previous contractor or subcontractor, and offer continued employment if their performance during that 60-day period is satisfactory. The governor vetoed the bill because it overlapped with SB 93, which was signed into law earlier this year and provides recall and retention protections for displaced hospitality workers.

SB 665: Voluntary veteran's preference

On October 6, 2021, the governor vetoed Senate Bill 665, which would have allowed private employers to give voluntary hiring preference for veterans and would deem these policies as not violating anti-discrimination laws. The governor vetoed the bill because it could have negatively impacted employment opportunities for other groups underrepresented among veterans.

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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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