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CALSHRM LEGISLATIVE REPORT

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2023 CALIFORNIA LEGISLATIVE UPDATE

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The 2023 California Legislative session ended on October 14, 2023, when the deadline for Governor Gavin Newsom to sign or veto pending bills expired. Overall, this session resulted in several significant new employment laws of widespread application, including our "Top Ten."

Notably, however, several potentially impactful bills were passed by the Legislature but vetoed by Governor Newsom. Among other things, these bills would have prohibited discrimination on the basis of family caregiver status, required notice before requiring remote workers to return to in-person work, significantly expanded CalWARN, precluded discrimination based on an employee's "caste," and provided unemployment insurance for striking workers. It is possible these bills could be re-introduced next year in the same or similar form.

There are also several notable so-called "two-year bills" (i.e., carried over to the second year of the two-year legislative session) that remain pending and will be decided early in 2024. These include bills to regulate the use of artificial intelligence in employment decision-making, restructure the recently enacted "Fair Chance Act" concerning the use of an applicant's criminal history, and allow private employers to grant a hiring preference to veterans.

Read on for details regarding the Top Ten New Employment Laws for all California Employers and Human Resources Professionals to know about, as well as additional laws with more limited application or narrower scope that are nonetheless worthy of attention and enacted in 2023, several notable new local ordinances, and new state and federal regulations. Unless otherwise noted, these laws will take effect January 1, 2024.

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TOP TEN NEW EMPLOYMENT LAWS

Paid Sick Leave Increases (SB 616)

This law amends California's Paid Sick Leave law (Labor Code section 245 *et seq.*) to (1) increase the number of paid sick leave days by amending Labor Code section 246, effective January 1, 2024; and (2) increase protections for workers covered by collective bargaining agreements.

KEY TAKEAWAYS

- → Employers must provide five days/40 hours of Paid Sick Leave each year.
- → Accrual may be limited to 10 days/80 hours; use may be limited to 5 days/40 hours per year.
- → Limited preemption of local paid sick leave laws – pay attention to the details!

First, citing lessons learned from the recent COVID-19 pandemic, this law increases the amount of required sick leave from 24 hours/3 days up to 40 hours/5 days:

- SB 616 increases the employer's authorized limitation to five days or 40 hours and changes the definition of "full amount of leave" to mean five days or 40 hours. (It also makes corresponding changes to the sick leave accrual rate for individual providers of in-home support services and waiver personal care services).
- SB 616 requires that employees accrue one hour of paid sick leave per every 30 hours worked.
    - Employers may use a different accrual method, provided employees have no less than 24 hours of accrued sick leave by the 120th calendar day and 40 hours of accrued sick time by the 200th calendar day of employment, or in each calendar year or in each 12-month period.
    - Employers may satisfy the accrual requirements by providing no less than 24 hours/3 days available by the completion of the 120th calendar day, and no less than 40 hours/5 days available for use by the completion of the 200th calendar day of employment.
- Employers are not currently required to provide additional paid sick days if they have a paid leave or paid time off policy (usable for the same purposes as paid sick leave) that satisfies the accrual, carryover, and use requirements of the law (or, for plans that were in place prior to January 1, 2015, a policy that provides for accrual of 5 days/40 hours within 6 months of employment).
- Further, while employers may presently limit an employee's total accrual of paid sick leave to 48 hours or six days, provided an employee's right to accrue and use paid sick leave is not otherwise limited, SB 616 increases these accrual thresholds for paid sick leave to 80 hours or 10 days.

Second, the law extends certain protections of the Paid Sick Leave Law (including the provision of paid sick days for certain purposes, prohibitions on retaliation, and prohibition on requiring an employee to find a replacement worker for paid sick days) to employees covered by collective bargaining agreements.

Responding to concerns California's various municipal paid sick leave laws present compliance challenges, this law partially (but not entirely) preempts local paid sick leave provisions on certain subjects. For instance, SB 616 preempts local ordinances conflicting with Labor Code section 246, subdivision (g) [regarding pay out of unused sick leave], subdivision (g) [lending paid sick leave], subdivision (h) [written notices of paid sick leave available], subdivision (l) [calculating paid sick leave pay], subdivision (m) [advance notice provisions] and subdivision (n) [payday rules]. However, this law does *not* preempt any other aspect of local ordinances regarding paid sick leave. Thus, to the extent a local ordinance requires the provision of *more* sick leave, or requires a different method of accrual, or provides for earlier entitlement to paid sick leave, or has different carryover rules, those local ordinances remain in effect.

Reproductive Loss Leave (SB 848)

In 2022, California enacted a new law (AB 1949, codified at Government Code section 12945.7) allowing employees to take up to five days of bereavement upon the death of a family member. This law incorporates much of the same framework in new Government Code section 12945.6 and allows employees to take "reproductive loss leave." Employers with five or more employees must allow an employee who has been employed for 30 or more days to take up to five days leave following a "reproductive loss event." Reproductive loss event is defined as "the day or, for a multiple-day event, the final day of a failed adoption, failed surrogacy, miscarriage, stillbirth, or an unsuccessful assisted reproduction. The law includes detailed definitions of the events giving rise to "reproductive loss event" and the people to whom the leave is applicable:

KEY TAKEAWAYS

- → Employers with 5 or more employees must give up to 5 days of leave for a "reproductive loss event."
- → Employers are not authorized to request supporting documentation.
- → Leave may be capped at 20 days per 12-month period.
- → Leave may be unpaid unless the employee chooses to use other paid leave.

Qualifying Event	Definition	Person(s) to Whom Applicable
Miscarriage	A miscarriage.	The person having the miscarriage, that person's current spouse or domestic partner, or another individual if the person would have been a parent of a child born as a result of the pregnancy.
Unsuccessful Assisted Reproduction	An unsuccessful round of intrauterine insemination or of an assisted reproductive technology procedure.	The individual, the individual's current spouse or domestic partner, or another individual, if that individual would have been a parent of a child born as a result of the pregnancy.
Failed Adoption	The dissolution/breach of an adoption agreement with the birth mother/legal guardian, or adoption is not finalized because another party contests it.	A person who would have been a parent of the adoptee if the adoption had been completed.
Failed Surrogacy	The dissolution or breach of a surrogacy agreement, or a failed embryo transfer to the surrogate.	A person who would have been a parent of a child born as a result of the surrogacy.
Stillbirth	A stillbirth.	The person who was pregnant, that person's current spouse or domestic partner, or another individual, if that person would have been a parent of a child born as a result of the pregnancy that ended in stillbirth.

As mentioned, this time off is modeled upon the recently enacted bereavement leave statute. Accordingly, this time off may be unpaid (unless the employer's policies provide paid leave or the employee chooses to use vacation, personal leave, accrued and available sick leave or compensatory time off). The time off need not be consecutive, and generally must be completed within three months of the qualifying event. However, if prior to or immediately following a reproductive loss event, the employee is on or chooses to go on leave pursuant to California's Pregnancy Disability Leave (PDL) or California Family Rights Act (CFRA) provisions (Government Code sections 12945 or 12945.2 respectively) or any other leave entitlement under state or federal law, the employee must complete their reproductive loss leave within three months of the end date of the other leave. This time off will also be considered separate and distinct from any other leave authorized by the Government Code (e.g., CFRA, bereavement leave, pregnancy disability leave, etc.).

If an employee experiences more than one reproductive loss leave event within a 12-month period, the employer is not obligated to grant total amount of reproductive loss leave in excess of 20 days within a 12-month period.

Unlike the bereavement leave statute, this law does not give employers authority to request documentation of the situation creating the need for leave. However, like with bereavement leave, the employer must maintain the confidentiality of any employee requesting reproductive loss leave, and any information provided to the employer shall not be disclosed except to internal personnel or counsel, as necessary, or as required by law.

Employers are prohibited from retaliating against employees who have taken reproductive loss leave or provided information or testimony regarding their own or another person's reproductive loss leave in an enforcement action regarding these rights and are required to maintain the confidentiality of employees requesting reproductive loss leave.

Strengthened Prohibition on Non-Compete Agreements (SB 699 and AB 1076)

Two new laws (SB 699 and AB 1076) expand California's law against non-compete agreements in diverse ways. Existing law (Business and Professions Code sections 16600 to 16607) voids every contract that restrains anyone from engaging in a lawful trade or business, with certain specific exceptions. However, there are concerns that despite these rules, many California employers continue to have their employees sign noncompete clauses and pursue frivolous noncompete litigation, which has a chilling effect on employee mobility, suppresses wages, and reduces entrepreneurship and innovation. Thus, the new laws make the following changes, effective January 1, 2024:

KEY TAKEAWAYS

- Employers are prohibited from requiring employees/applicants to enter into void non-compete agreements.
- Employers must send individualized notices to certain current and former employees who are subject to void non-compete agreements.
- Void non-compete agreements are unenforceable regardless of where signed.

- New Business and Professions Code section 16608 clarifies that an employer is prohibited from entering into a contract that presents an employee or prospective employee with any void non-compete agreement and specifies that an employer may not attempt to enforce such a contract. It provides that it is a civil violation for an employer to enter into an agreement that the employer knows or reasonably should know is prohibited. An employee, former employee, or prospective employee may bring a civil action for injunctive relief and/or actual damages, along with attorney's fees and costs to remedy the violation.

- New section 16600.1 also clarifies that it is unlawful to include a noncompete clause in an employment contract, or to require an employee to enter into a noncompete agreement, that does not satisfy an exception to the law. It provides that a violation of this rule constitutes an act of unfair competition under Business and Professions Code section 17200, *et seq.*, pursuant to which aggrieved individuals may bring civil suits for injunctive relief and restitution.

- New section 16600.5 establishes that any contract that is void is unenforceable regardless of where and when the contract was signed. It expressly prohibits an employer or former employer from attempting to enforce a contract that is void as a restraint on trade regardless of whether the contract was signed and if the employment was maintained outside of California. Although the text of the statute does not explain precisely what this means, the legislative findings and the author's statements in the bill analysis indicate that the law is intended to reach two scenarios:
    - This law appears intended to cover employees who work for California-based employers, even if they live and work outside California.
    - And the law is intended to cover people who seek employment in California, even if they signed a non-compete agreement while living outside of California and working for a non-California employer. Thus, it may be an attempt to prohibit a non-California employer from enforcing a non-compete agreement against a former employee who seeks employment with a California company.
- The new law also requires employers to affirmatively notify affected employees about these provisions. By **February 14, 2024**, employers must notify all current employes and any former employees employed after January 1, 2022 who are subject to impermissible non-compete provisions that the provisions are void. This notice must be in writing and be an "individualized communication" (suggesting that a general notice to all employees would not suffice) and must be delivered to the employee's or former employee's last known address and email address.

Workplace Violence Restraining Orders and Prevention Plans (SB 428 and SB 553)

These laws expand protections against workplace violence in several ways.

Authorizing Collective Bargaining Representative to Seek TRO/Injunction

First, the laws both amend the Workplace Violence Safety Act (codified at Code of Civil Procedure section 527.8), effective January 1, 2025. The law currently authorizes employers to seek a temporary restraining order (TRO) and injunction on behalf of employees who suffer unlawful violence or a creditable threat of violence (as defined) that can reasonably be construed to have been carried out or to have been carried out at the workplace.

Starting January 1, 2025, SB 553 will also allow a collective bargaining representative to seek such restraining orders and injunctions, including on behalf of employees who are not represented by the collective bargaining representative if the person serves as a collective bargaining representative for at least one person working for the employer.

Citing concerns that employers should be able to seek such protections before the conduct escalates to violence, SB 428 will also allow employers or collective bargaining representative to seek a TRO and injunction on behalf of an employee who has suffered "harassment" starting January 1, 2025. The law's authors note that individuals already may seek a TRO on their *own* behalf based on harassment under Code of Civil Procedure section 527.6, and this law allows employers to seek restraining orders on behalf of employees who are subject to harassment due to their job responsibilities. For purposes of this law, "harassment" is defined as "a 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," and 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."

KEY TAKEAWAYS

- Starting January 1, 2025, employers *or* collective bargaining representatives can seek workplace violence restraining orders *and* orders may be based on harassment.
- Starting July 1, 2024, most employers must establish, implement, and maintain effective workplace violence protection plans.
- Employers must record information about every workplace violence incident in a violent incident log and retain specified records.
- Employers are obligated to review plans and provide detailed training at least once per year.

Recognizing concerns that employers may inadvertently create additional concerns for employees outside the workplace by seeking a TRO, the new law laws specifies that before seeking such an order, the employer or collective bargaining representative will need to provide the employee who has suffered harassment, unlawful violence, or a credible threat of violence an opportunity to decline to be named in the TRO. If the employee declines to be named, the employer will still have the ability to seek a TRO on behalf of other employees at the workplace and, if appropriate, other employees at other workplaces of the employer.

While presently section 527.8 precludes any court order prohibiting constitutionally protected speech or activities, this law also specifies that any such order also cannot abridge labor-related protections in the National Labor Relations Act or the California Government Code.

To address concerns TRO's or injunctive relief targeting harassment might abridge free speech, particularly in the public employer context, an employer seeking such relief must provide "clear and convincing" evidence that an employee suffered harassment, that great or irreparable harm would result to an employee, that the course of conduct served no legitimate purpose, and that the order would not impermissibly restrict constitutionally-protected speech or activities (as opposed to simply "reasonable proof" for unlawful violence or threats of violence).

As noted, these changes take effect January 1, 2025.

Requiring Workplace Violence Prevention Plans

Second, the law amends the California Occupational Safety and Health Act's (CalOSHA) requirement regarding Injury and Illness Prevention Programs (Labor Code section 6401.7) to add that – starting July 1, 2024 – most employers must establish, implement, and maintain a workplace violence prevention plan. The law creates Labor Code section 6401.9 to detail the requirements of the workplace violence prevention plans. This law essentially enacts CalOSHA's Draft Multi-Industry Standard for workplace violence prevention (available at: (Workplace Violence Prevention in General Industry - Advisory Meetings (ca.gov)). Earlier drafts of this law would have imposed much more burdensome requirements on employers, but recent amendments aligned the law more closely with CalOSHA's rulemaking effort.

This new requirement applies to any employer with one or more employees and the state and any subdivision of the state, *except* (1) health care facilities covered by the healthcare workplace violence regulations (8 Cal. Code Regs. § 3342) and other employers that comply with those standards; (2) Department of Corrections and Rehabilitation facilities; and (3) law enforcement agencies, all as defined in the law. Additionally, the workplace violence prevention plan requirements do *not* apply to any employee teleworking from a location of the employee's choice, which is not under the control of the employer *or* to places of employment where there are fewer than 10 employees working at any given time and that are not accessible to the public if the location is in compliance with the Illness and Injury Prevention rules. All of these exemptions could be overruled by CalOSHA, if it issues an order for any exempt employer to comply with the rules.

SB 553 requires covered employers to:

- Establish, implement, and maintain an effective workplace violence prevention plan. The law lists detailed elements that must be included in the plan, including but not limited to procedures for the employer to accept and respond to reports of workplace violence and to prohibit retaliation against employees who make such a report, procedures to respond to actual or potential workplace violence emergencies, procedures to identify and evaluate workplace violence hazards, procedures to correct workplace violence hazards, and procedures for post incident response and investigation.
- Record information in a violent incident log about every workplace violence incident. There is a detailed list of the information that must be included in such a log.
- Review the effectiveness of the plan and revise it as needed at least annually.
- Provide training to employees at least annually that addresses a list of topics, including the workplace violence prevention plan, how to report workplace violence incidents, and workplace violence hazards specific to the employees' jobs, the corrective measures the employer has implemented, and strategies to avoid physical harm.
- Maintain records of workplace violence hazard identification, evaluation, and correction for at least five years and make all such records available to employees and their representatives upon request for examination and copying.

This is not an exhaustive summary of the requirements of the new law. Employers should carefully consider whether they are covered and, if so, begin working on compliance before the law becomes operative.

Prohibition on Inquiring about an Applicant's Prior Cannabis Use (SB 700)

In 2022, California enacted a new law (AB 2188, set to take effect January 1, 2024), precluding discrimination based upon an applicant's or employee's use of cannabis off the job and away from the workplace, or based upon a drug-screening test revealing non-psychoactive cannabis metabolites (as opposed to THC revealing active impairment). This law further amends new Government Code section 12954 in two ways:

KEY TAKEAWAYS

- In addition to implementing AB 2188 on January 1, 2024, employers must not request information from job applicants relating to prior use of cannabis.
- Employers must not use information about a person's prior cannabis use obtained as part of their criminal history unless specifically permitted by law.

- First, it precludes employers from requesting information from an applicant relating to the applicant's prior use of cannabis. Notably, while AB 2188 had stated that its limitations on drug-testing or employment decisions regarding non-workplace usage would not apply in certain circumstances (i.e., in building and construction trades or where required by enumerated federal laws), SB 700 only exempts applicants for positions requiring a federal government background investigation or security clearance from its broad prohibition on inquiries about prior cannabis usage; it does not exempt the building and construction trades from this new rule.
- Second, it prohibits an employer from inquiring about or using information about a person's prior cannabis use obtained as part of their criminal history unless the employer is permitted to do so under Government Code section 12952 (which places strict limits on the use of criminal history in hiring) or other state or federal law.

Retaliation Protections Expanded (SB 497)

This law amends multiple Labor Code provisions to expand protections against retaliation and/or increase the statutory penalties available. For instance, it amends the current retaliation protections in Labor Code section 98.6 (dealing with wage-related complaints) and Labor Code section 1197.5 (Equal Pay Act complaints) to state that any adverse actions taken within 90 days of a complaint will create a rebuttable presumption of retaliation in favor of the employee. Further, while California's general whistleblowing provision (Labor Code section 1102.5) presently authorizes a civil penalty up to $10,000 for each violation, this law allows up to $10,000 to be awarded to each employee who was retaliated against for each violation, in addition to any other remedies. In assessing the penalty, the Labor Commissioner must consider the nature and seriousness of the violation, including the type of violation, the economic or mental harm suffered, and the chilling effect on the exercise of employment rights in the workplace.

KEY TAKEAWAYS

- Rebuttable presumption of retaliation if adverse employment action is taken within 90 days of a wage-related complaint or Equal Pay Act complaint.
- Increased penalties for retaliation under section 1102.5 to $10,000 per employee per violation to be paid to the employee.

Rehiring of Displaced Workers (SB 723)

In April 2021, California enacted SB 93, which created rehire rights for employees in the hospitality and business services industries who had been laid off for reasons related to the COVID-19 pandemic. That law was codified in a new section 2810.8 of the Labor Code and was set to expire December 31, 2024. This new law (SB 723) amends Section 2810.8 to extend the expiration date to December 31, 2025, expand the group of affected employees, and create a rebuttable presumption that a layoff is due to the COVID-19 pandemic.

As a reminder, Section 2810.8 applies to the following businesses (which are defined in detail in the statute): hotels, private clubs, event centers, airport hospitality operations, airport service providers, and building services. This law does not change the definition of covered businesses but changes the definition of "laid-off employee." Currently, the law applies to employees who were employed for at least 6 months in the 12 months preceding January 1, 2020. SB 723 expands this definition to include employees who were employed for at least 6 months and whose most recent separation from active service occurred on or after March 4, 2020. In addition, the existing law applies to employees who lose their jobs 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, non-disciplinary reason. SB 723 creates a presumption that any separation due to lack of business, reduction in force, or other economic non-disciplinary reason is due to a reason related to the COVID-19 pandemic, unless the employer establishes otherwise by a preponderance of the evidence.

KEY TAKEAWAYS

- COVID-19 re-hire rights for employees in hospitality and business services industries extended to December 31, 2025.
- Definition of covered employees expanded to include those employed for at least 6 months whose employment ended after March 4, 2020.
- Rebuttable presumption that separation for economic non-disciplinary reasons is due to COVID-19 pandemic (and thus, there is a right to re-hire).

SB 723 does not change the substantive requirements of Section 2810.8 with respect to laid-off employees (offering re-hire to laid-off employees pursuant to a specified procedure and giving laid-off employees five business days in which to accept or decline the offer; written notice to laid-off employees if the employer declines to recall the laid-off employee on grounds of lack of qualifications; retaining records; non-retaliation). However, because of the new definition of "laid-off employee," the scope of the statute's rehire obligation is dramatically increased to cover a broader range of employees. Moreover, covered employers must take care to determine whether they have evidence to demonstrate that a layoff is *not* related to COVID-19 before choosing not to comply with the law's rehire requirements.

Alternative Enforcement of Labor Code Provisions (AB 594)

Citing claims that employers continue to engage in wage theft and that existing resources are insufficient to protect workers, this law provides several alternative Labor Code enforcement mechanisms. First, it authorizes a "public prosecutor" (e.g., the Attorney General, a district attorney, city attorney, county counsel, etc.) to pursue civil or criminal actions for certain Labor Code violations or to enforce certain Labor Code provisions without specific direction from the Division of Labor Standards Enforcement (DLSE). This expanded enforcement authority does *not* extend to the workers' compensation law, the Agricultural Labor Relations Act, the Private Attorneys General Act, the regulation of apprenticeship or pre-apprenticeship, or occupational health and safety laws. The public prosecutor will be limited to redressing violations within their geographic jurisdiction unless the public prosecutor has statewide authority or enforcement authority pursuant to Business & Professions Code section 17204 (regarding competition). Any money recovered by public prosecutors will be applied first to payments due to affected workers. All civil penalties recovered will be paid to the General Fund of the state. Public prosecutors will also be entitled to also recover reasonable attorneys' fees and expert costs to the extent the Labor Commissioner would be entitled to such fees, and to seek injunctive relief to prevent continued Labor Code violations.

A public prosecutor must provide a 14-day notice to the DLSE prior to prosecuting an action (although failure to do so would not be a defense to the action), and the DLSE will have the right to intervene unless the public prosecutor has statewide authority or authority pursuant to Business & Professions Code section 17204.

The public prosecutor's right to pursue Labor Code violations expires January 1, 2029.

Second, any arbitration agreement between the employer and its employees that purported to limit representative actions or to mandate private arbitration will be deemed inapplicable to the authority of the public prosecutor or the Labor Commissioner to enforce the Labor Code. Further, any appeal of a denial of a motion to compel arbitration or other court proceedings shall not stay enforcement actions by the public prosecutor or the Labor Commissioner.

Third, in 2011, California enacted SB 459 (codified in Labor Code section 226.8), creating a procedure for the Labor and Workforce Development Agency or a court to examine potential willful misclassification of an individual as an independent contractor instead of an employee. This law amends that section to authorize the Labor Commissioner or a public prosecutor to enforce these provisions through specified methods, including by issuing a citation or filing a civil action. If the Labor Commissioner or a public prosecutor recovered damages payable to an affected employee, the employee may recover either these damages or enforce the penalties under the Private Attorneys General Act (PAGA), but not both for the same violation.

KEY TAKEAWAYS

- Public Prosecutors (e.g., the Attorney General, a district attorney, city attorney, county counsel, etc.) may bring actions to enforce many sections of the Labor Code.
- Employment Arbitration Agreements do not apply to the Labor Commissioner or Public Prosecutors.
- The Labor Commissioner or Public Prosecutors may enforce the prohibition on willful misclassification of independent contractors.

Statewide Minimum Wage Increases to $16.00 on January 1, 2024

Enacted in 2016, SB 3 implemented a series of annual increases to the statewide minimum wage until reaching $15.00 per hour (codified at Labor Code section 1182.12). However, Section 1182.12 also contains provisions requiring further minimum wage increases if the Consumer Price Index exceeds certain enumerated levels, which it has over the last several years. Accordingly, the statewide minimum wage will increase to $16.00 per hour for all employers, regardless of the number of employees, on January 1, 2024. The minimum salary threshold necessary to maintain an employee's exempt status will also increase to $66,560 annually and to $5,546.57 per month on January 1, 2024.

On July 1, 2023, a number of California cities or counties (including Los Angeles, San Francisco, and Berkeley) increased their minimum wage, including often dramatically above the state minimum wage, and many more will do so on January 1, 2024. For example, on January 1, 2024, the minimum wage in San Diego will increase to $16.85/hour. The minimum wage in the city of Los Angeles is already $16,78, and the minimum wage in the remainder of Los Angeles County is $16.90; and in San Francisco, the minimum wage is currently $18.07. A complete list of these city and county-level minimum wage increases in California is available at https://laborcenter.berkeley.edu/inventory-of-us-city-and-county-minimum-wage-ordinances/#s-2.

KEY TAKEAWAYS

- California statewide minimum wage increases to $16.00 on January 1, 2024.
- Salary threshold for exemption status increases to $66,560/year and $5,546.57 per month.
- Computer Professional Exemption salary threshold increases to $55.58/hour, $9,646.96/month, or $115,763.35/year.

Increased Industry-Specific Minimum Wages (AB 1228 and SB 525)

Two new laws significantly increase the minimum wage in the fast food and health care industries, which may put upward pressure on wages in other industries.

Increase in Fast Food Minimum Wage and New Fast Food Council (AB 1228)

In 2022, the Legislature passed, and the Governor signed, AB 257, a first-in-the nation law that was touted by its proponents as a step toward sectoral bargaining, in which workers and employers negotiate compensation and working conditions on an industrywide basis. The law established the Fast Food Council within the Department of Industrial Relations (DIR) for the purpose of establishing sector-wide minimum standards on wages, working hours, and other working conditions for fast food workers. However, a referendum quickly qualified for the November 2024 ballot to repeal that law, and the law was put on hold.

This new law is the result of an agreement between the proponents of AB 257 and the supporters of the referendum. Assuming the referendum is withdrawn by January 1, 2024 (which is expected), the law will repeal the Labor Code sections created by AB 257 and re-establish the Fast Food Council under slightly different conditions.

KEY TAKEAWAYS

- Minimum wage in covered fast food establishments will increase to $20.00/hour on April 1, 2024, and may increase in future years.
- Fast Food Council may recommend additional rule changes re: health, safety, and wages.
- New rules may not be *less* protective than existing law.

Like the former law, this law applies to fast food restaurants, but the definition is now broader. This law applies to establishments that are part of a chain of 60 or more establishments *nationally* (the former law applied to chains of 100 or more) that share a common brand or standards, and that primarily provide food or beverages for immediate consumption either on or off the premises to customers who order or select items and pay before eating, with items prepared in advance, with limited or no table service. As with the former law, this law exempts bakeries that produce bread for sale as a stand-alone menu item on the premises and restaurants located within "grocery establishments," as defined.

The most significant immediate impact of this new law will be on wages. The law mandates that the minimum wage for fast food restaurant employees will be $20 per hour, effective April 1, 2024. (This is somewhat less than the former law, which would have allowed the Council to establish a wage of up to $24 per hour for the 2023 calendar year.) The Fast Food Council (described below) will be able to increase the minimum wage in subsequent years by not more than 3.5% or the rate of change of the non-seasonably adjusted Consumer Price Index for Urban Wage Earners and Clerical Workers through the 2029 calendar year, and the Council will be able to provide advice to any appropriate state agencies regarding minimum wages that take effect on or after January 1, 2030.

As with the former version, this law creates a Fast Food Council to operate until January 1, 2029. The composition of the Fast Food Council is slightly different under this law: the Council will have nine voting members comprised of representatives of the fast-food restaurant industry, fast food restaurant franchisees or restaurant owners, employees, advocates for employees, and one unaffiliated member of the public (this is new under the new law), all to be appointed by the Governor, the Speaker of the Assembly, and the Senate Rules Committee. The Council will also include two nonvoting members: a representative of the DIR and a representative of the Governor's Office of Business and Economic Development. (These two members would have been voting members under the old law.)

Like the former law, this law provides that the Council is authorized to establish minimum standards for fast-food workers, including setting minimum wages and developing standards for working hours and other conditions related to health, safety, and welfare. Decisions by the Council shall be made by a vote of at least five of the Council members, meaning decisions could be made over the objection of the two representatives of the fast-food industry and the two representatives of fast-food franchisees or owners. The Council will not be allowed to make standards that are less beneficial than existing standards, rules, or regulations, but will be able to take account of regional differences.

Except for standards regarding the minimum wage, the Council will not have sole authority to promulgate standards under this law, but will instead share any standards, rules, and regulations it develops with the Labor Commissioner, the Occupational Safety and Health Standards Board, or the Civil Rights Council, as applicable, which may take action based on those recommendations pursuant to existing Administrative Procedure Act rulemaking provisions. (This is a different procedure than was established under the former version of the law and restricts the power of the Council to act unilaterally outside the normal rulemaking procedures.)

The law will not permit the Council to promulgate new paid time off benefits or regulations regarding predictable scheduling. And the standards set by the Council will not supersede those provided for in a collective bargaining agreement if the agreement expressly provides for wages, hours of work and working conditions that are better than the minimum standards established by the Council.

This law will also protect employees from retaliation and defines the Fast Food Council as a "government agency" for purposes of Labor Code section 1102.5, which prohibits an employer from preventing an employee from disclosing information to a government agency if the employee has reasonable cause to believe the information discloses specified violations of the law.

Health Care Worker Minimum Wage (SB 525)

Citing staffing shortages in the healthcare industry, particularly post pandemic, this law is intended to set the highest minimum wage in the nation ($25.00 per hour) for "covered healthcare employees." It establishes this new healthcare specific minimum wage with various phase-in schedules based upon a classification system using factors such as health care facility size, type of facility and the governmental payor mix percentage. Each of these definitions and criteria are quite complicated with specific definitions so such employers should consult SB 525's specific language to assess its applicability. Broadly speaking, the minimum wage reaches $25.00 per hour for large hospitals and health systems in 2026, for other hospitals in 2028, and for hospitals that are rural or have a high government payer mix by no later than 2033. Following the implementation of these various phased in minimum wage increases, the minimum wage for health care workers will also be adjusted annually with the Director of Finance calculating by August 1st the lesser of either 3.5 percent or the changes in the Consumer Price Index. The result of these changes would then be rounded to the nearest ten cents and take effect on the following January 1st.

KEY TAKEAWAYS

- Law applies broadly to employees of health care facilities.
- Minimum wage will increase annually until it reaches $25.00 per hour by 2026, 2028, or 2033 (depending on hospital type).
- Salary threshold for exemption status will be greater of 150% of health care minimum wage or 200% of statewide minimum wage.

For purposes of this new minimum wage, "covered health care employee" is defined broadly as "an employee of a health care facility employer who provides patient care, health care services, or services supporting the provision of health care." The definition continues that this "includes, but is not limited to, employees performing work in the occupation of a nurse, physician, caregiver, medical resident, intern or fellow, patient care technician, janitor, housekeeping,

staff person, groundskeeper, guard, clerical worker, nonmanagerial administrative worker, food service worker, gift shop worker, technical and ancillary services worker, medical coding and medical billing personnel, scheduler, call center and warehouse worker, and laundry worker, regardless of formal job title."

"Covered health care employee" also includes "contracted or subcontracted employees" if (1) the employee's employer contracts with the health care facility, or with a contractor or subcontractor to the health care facility employer, to provide health care services or services supporting the provision of health care; and (2) the health care facility employer directly or indirectly, or through an agent or any other person, exercises control over the employee's wages, hours or working conditions. It also provides that "covered health care employee" includes all employees performing contracted or subcontracted work primarily on the premises of a health care facility to provide health care services or services supporting the provision of health care.

Along with this broad definition of "covered health care employee," SB 525 also specifically identifies the following categories that are not included within this definition: (1) employment as an outside salesperson; (2) any work performed in the public sector where the primary duties performed are not health care services; (3) delivery or waste collection work on the health care facility premises where the delivery or waste collection worker is not an employee of any person that owns, controls or operates a covered health care facility; and (4) medical transportation services in or out of a covered health care facility, provided that the medical transportation services worker is not an employee of any person that owns, controls or operates a covered health care facility.

The law further mandates that to qualify as exempt from the payment of minimum wage and overtime, an employee paid on a salary basis must earn a monthly salary equivalent of at least 150% of the health care worker minimum wage or 200% of the generally applicable minimum wage, whichever is greater, for full-time employment.

SB 525 requires the Department of Health Care Access and Information to publish by January 31, 2024, a list of hospitals falling within the various classifications noted above for determining the appropriate minimum wage phase-in schedule. It also provides, until January 31, 2025, a process for hospitals excluded from that list to request classification. By January 1, 2024, the Department of Industrial Relations must develop a waiver system to allow a covered health care facility to apply for a temporary pause or an alternative phase in schedule of these minimum wage requirements.

Lastly, SB 525 preempts any ordinance, regulation, or administrative action applicable to a covered health care facility relating to wages or compensation for covered health care workers and prohibits any such local ordinances from being enacted.

ADDITIONAL NEW CALIFORNIA LAWS

HARASSMENT/DISCRIMINATION/RETALIATION

Expanded Defamation Protections Regarding Complaints of Sexual Assault, Harassment, or Discrimination (AB 933)

Civil Code section 47, subdivision (c) presently provides qualified or conditional privilege protection against a defamation claim for a complaint of sexual harassment by an employee, without malice, to an employer based upon credible evidence, as well as communications between the employer and interested persons, without malice, regarding a complaint of sexual harassment.

AB 933 is motivated by the author's concern that this protection is not broad enough and should cover any communications made by an individual who has experienced an incident of sexual assault, harassment, or discrimination, regardless of whether they have filed any formal complaint. It was prompted, at least in part, by the case of a lobbyist who publicly accused an Assemblymember of sexual assault, and who was later sued for defamation by another Assemblymember.

Accordingly, this law adds a new section 47.1 to the Civil Code. It specifies that a communication made by an individual, without malice, regarding an incident of sexual assault, harassment, or discrimination is privileged under Section 47. This rule applies only to an individual that has, or at any time had, a reasonable basis to file a complaint of sexual assault, harassment, or discrimination, regardless of whether the complaint was filed. Further, it defines the privileged "communication" as "factual information related to an incident of sexual assault, harassment, or discrimination experienced by the individual making the communication" including but not limited to sexual assault; sexual harassment under various statutory provisions (including the FEHA and the Unruh Act), discrimination or retaliation for reporting sexual harassment, and cyber sexual bullying under the Education Code, amongst others. Notably, this protection extends beyond communications regarding sexual assault and sexual harassment to cover communications relating to all workplace harassment or discrimination, failure to prevent workplace harassment or discrimination, and retaliation for reporting workplace harassment or discrimination.

To further safeguard against defamation claims regarding the types of allegations in this new privilege, AB 933 also specifically authorizes a prevailing defendant (i.e., the speaker accused of making a defamatory statement) to recover their reasonable attorneys' fees and costs plus treble damages for any harm caused as well as potentially punitive damages under Civil Code section 3294.

LEAVES OF ABSENCE/TIME OFF/ACCOMMODATION REQUESTS

Religious and Cultural Observances for State Employees (SB 461)

Existing law (Government Code section 19854) provides state employees with one personal holiday per year. This law provides that a state employee may elect to receive eight hours of holiday credit for observance of a holiday or ceremony of the employee's religion, culture, or heritage in lieu of receiving eight hours of personal holiday credit. This section only applies to a bargaining unit that has met and conferred with the Department of Human Resources in the ordinary process and timeline for negotiating and renegotiating the bargaining unit's collective bargaining agreement.

Extension of Mediation Program for Small Employers (AB 1756)

Existing law (Government Code section 12945.21) created a mediation pilot program for small employers with between 5 and 19 employees. Before an employee can sue their employer over the employee's right to family or medical leave (California Family Rights Act leave) and/or bereavement leave, the employee must first ask the Civil Rights Department (CRD) for a "right-to-sue notice." Under the mediation pilot program, when an employee requests a right-to-sue notice against an employer with 5 to 19 employees in connection with a CFRA leave claim and/or bereavement leave claim, the parties are informed about their right to participate in no-cost mediation of the claim, and either the employer or employee can request to participate in mediation before the case may proceed to court. The program was set to expire January 1, 2024. This law extends the deadline to January 1, 2025.

HUMAN RESOURCES/WORKPLACE POLICIES

Changes to Wage Theft Prevention Act Notices (AB 636)

Existing law – the "Wage Theft Prevention Act" (Labor Code section 2810.5) requires employers to provide a written notice to employees at the time of hiring with certain specified information. This law requires the notice to now also include information about the existence of a federal or state emergency or disaster declaration applicable to the county or counties where the employee is to be employed, that was issued within 30 days before the employee's first day of employment, which may affect their health and safety during employment.

In addition, the law requires that any notice given to employees admitted under the federal H-2A agricultural visa program must include more detailed information, including information about pay rates, frequency of pay, rest periods, meal breaks, compensation for travel time, and many more topics. The law contemplates that the Labor Commissioner will provide a template for such disclosures.

Employer Electronic Notification Requirements of Employee Benefits (AB 1355)

This law allows California employers the option to provide certain required documents to employees via email, but only if the recipient has opted into the receipt of electronic statements. It separately allows electronic distribution of: (1) required notifications regarding various tax credits, including the federal and California earned income tax credit and (2) information about unemployment benefits claims, but only if the employee or unemployed individual affirmatively, and in writing or by electronic acknowledgement, opts in to receipt of electronic statements or materials. With respect to the notice of unemployment benefits, if an electronic acknowledgment is used, it must meet certain specified requirements, including creating a record of the employee's agreement to electronic delivery and providing information about how to revoke the consent to electronic receipt.

The law does not specify whether employees must specifically opt into receipt of each type of document, or whether a generic opt-in to receipt of electronic messages will suffice.

AB 1355 prohibits an employer from discriminating against or retaliating against an employee who does not opt into receipt of electronic statements or materials.

These changes will remain effective only until January 1, 2029.

Human Trafficking Notice – Pediatric Care Facilities (AB 1740)

Existing law requires specified businesses (including airports, hotels, etc.) to post a notice from the Department of Justice relating to slavery and human trafficking. This new law extends the posting requirement to facilities that provide pediatric care, effective January 1, 2024.

WAGE AND HOUR

Meal and Rest Period Exemption for Flight Crews Covered by Collective Bargaining Agreement (SB 41)

Signed by Governor Gavin Newsom on March 23, 2023, this immediately effective law adds new Labor Code section 512.2 exempting airline cabin crew employees from state law and regulations requiring meal and rest periods under two circumstances:

1. The employees are covered by a valid collective bargaining agreement under the Railway Labor Act containing a provision addressing meal and rest periods for cabin crew members; or

2. The employees are organized pursuant to the Railway Labor Act but not yet covered by a collective bargaining agreement for at least the first 12 months of organization, or longer if agreed to by the employer and the labor organization representing the employee.

For purposes of this exemption, a CBA must have a provision providing for meal and rest periods, provide compensation in lieu of meals or per diem (in lieu of meals), or recognize a right to eat on board an aircraft during the course of a duty day.

As mentioned, this law was deemed an urgency statute and took effect immediately once signed. Starting December 5, 2022 (the date the law was introduced), the new law prohibits a person from filing a new legal action for alleged meal and rest breaks violations on behalf of an employee covered by a CBA that meets the listed requirements. However, this new section does not affect a settlement agreement or final judgment of any civil action brought by a cabin crew employee, or class thereof, against an employer on a claim of a meal or rest break violation.

Compensable Time for Obtaining Food Handling Cards (SB 476)

California's Retail Food Code requires a food handler to obtain a food handler card within 30 days of hire and to maintain a valid food handler card for the duration of their employment as a food handler. This law requires the employer to consider the time it takes for the employee to complete the training and examination as compensable "hours worked," for which the employer shall pay. In addition, pursuant to Section 2802 of the Labor Code, the employer is required to pay the employee for any necessary expenditures or losses associated with obtaining the food handler card. Employers must also relieve the employee of all other work duties while the employee is taking the training course and examination. Employers are also prohibited from conditioning employment on the applicant or employee having an existing food handler card.

The State Department of Public Health is required, by January 1, 2025, to publish on its website a link to the website of ANSI-accredited food handler training programs. Local public health organizations must also post a link to this page on their internet website.

Extension of Joint and Several Liability for Property Services to Public Entities (AB 520)

To address concerns about wage theft in the property service and long-term care industries, in 2015 the California Legislature enacted SB 588 making businesses that contract for services in the property services or long-term care industries jointly and severally liable for certain wage and hour violations by the vendor actually employing the individuals doing the work. This law further extends this joint and several liability to public entities (other than the state) that contract for such services in the property service or long-term care industries.

Payroll Records for Public Works Projects (AB 587)

Existing law requires each contractor and subcontractor on a public works project to keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by the contractor or subcontractor in connection with the public work. Existing law specifies that any copy of records made available to a Taft-Hartley trust fund for the purposes of allocating contributions to participants be marked or obliterated only to prevent disclosure of an individual's full social security number, as specified.

This law requires that any copy of records made available for inspection by, or furnished to, a multiemployer Taft-Hartley trust fund or joint labor-management committee must be provided on forms provided by the Division of Labor Standards Enforcement or contain the same information as in the DLSE forms. The law specifies that copies of electronic certified payroll records do not satisfy payroll records requests made by Taft-Hartley trust funds and joint labor-management committees.

PUBLIC SECTOR/LABOR RELATIONS

Legislative Employees Allowed to Organize (AB 1)

Entitled the Legislature Employer-Employee Relations Act, this law authorizes certain employees of the California Legislature to unionize.

STATE PROVIDED BENEFITS

Extension of Authorization to Deposit Workers' Compensation Disability Indemnity Payments in Prepaid Cards (AB 489)

Existing law allows an employer to deposit disability indemnity payments in a prepaid card account for employees who have workers' compensation injuries (with the employee's written consent). That law is set to expire January 1, 2024. This new law extends the authorization for this program to January 1, 2025.

MISCELLANEOUS

Court Cases Not Automatically Stayed Following Denial of Arbitration Motion (SB 365)

The California Arbitration Act (Code Civ. Proc. Section 1294(a)) allows a party to appeal an order dismissing or denying a petition to compel arbitration. Existing law generally stays the proceedings in the trial court while an order is being appealed, subject to specified exceptions (Code Civ. Proc. Section 916). This law provides that notwithstanding the general rule, an appeal of an order dismissing or denying a petition to compel arbitration does not *automatically* stay the trail court proceedings, thereby giving the superior court the discretion to decide whether or not to stay the trial court proceedings pending appeal. Notably, the U.S. Supreme Court recently held that when a federal district court denies a motion to compel arbitration, the district court *must* stay its proceedings pending appeal of that decision pursuant to the Federal Arbitration Act (9 U.S.C. § 16.) *Coinbase, Inc. v. Bielski* (2023) 143 S. Ct. 1915. It is not yet clear whether, if SB 365 passes, California state courts considering motions to compel arbitration under agreements governed by the Federal Arbitration Act would consider themselves nonetheless bound by the *Coinbase* decision to stay the proceedings in the trial court pending appeal.

Workplace Readiness/Work Permits (AB 800)

This law is intended to inform and educate young people about their rights as workers, including their explicit rights as employed minors, as they enter the workforce.

Pursuant to that goal, it requires the week of each year that includes April 28th to be known as "Workplace Readiness Week" and requires secondary schools to educate pupils on their rights as workers on specified topics during that week (including child labor, wage and hour protections, workers compensation, retaliation protections, the right to organize a union, the labor movement's role in winning various specified employee protections, and state-approved apprenticeship programs). This will be mandatory for students in grades 11 and 12 and optional for other grades.

It also requires that any minor seeking a signature on a work permit must receive a document clearly explaining basic labor rights extended to workers. It encourages the University of California Labor Center to produce, with input from bona fide labor organizations, a draft template of the document to be provided to minors, including translations in Spanish, Chinese, Tagalog, Vietnamese and Korean.

Proposed Standard to Require Women's Restrooms (AB 521)

This law is motivated by the concern that women and nonbinary individuals are underrepresented in the trades, and that one barrier they face is access to clean and secure restrooms on construction jobsites. Accordingly, it requires the Occupational Safety and Health Standards Board to draft a rulemaking proposal to consider a regulation to require at least one single-user toilet facility at all construction jobsites, designed for employees who self-identify as female or nonbinary. The deadline for submitting the proposal will be December 1, 2025.

Changes to Protections for Grocery Workers Upon Change in Control of Grocery Establishment (AB 647)

AB 647 expands the protections for grocery workers upon a change in control, but also exempts from all the protections of the law certain small grocery employers.

First, AB 647 expands the definition of "grocery establishment," specifying that "distribution centers" owned and operated by a grocery establishment and used to distribute goods from its owned stores, shall be considered a grocery establishment, regardless of the distribution center's square footage.

Second, it specifies that in addition to a list of workers, the incumbent grocer must provide the successor with cell phone numbers and e-mail addresses for eligible workers. If the incumbent employer does not provide the information within 15 days, the successor employer may obtain the information from a collective bargaining representative.

Third, it prohibits retaliation against a person seeking to enforce rights under the law, including employees who mistakenly but in good faith, allege noncompliance by the employer of these protections.

Fourth, it creates an enforcement mechanism for violations of this law. An employee, collective bargaining representative, or nonprofit corporation will be able to bring a civil action and recover hiring and reinstatement rights, front pay or back pay, the value of benefits the employee would have received, punitive damages, and attorneys' fees and costs. Before an employee or employee representative brings a civil action, the employee must provide written notice to the employer, and the employer will have 33 days to cure the alleged violation. In addition, the Labor Commissioner may enforce these provisions, and an employer, agent of any employer, or other person who violates the law or causes the law to be violated is subject civil penalties of $100 for each employee whose rights are violated and liquidated damages of $100 per employee, per day until the violation is cured, not to exceed $1,000 per employee. The liquidated damages shall be recovered by the Labor Commissioner and paid to the employee as compensatory damages.

And finally, AB 647 exempts certain incumbent grocery employers and successor grocery employers from all the requirements of the law (Labor Code sections 2500-2522) based on their total nationwide employment. Specifically, it adds Labor Code section 2517 to provide that the law does not apply if the *sum total* number of grocery workers employed nationwide by *both* the incumbent grocery employer and the successor grocery employer is less than 300.

Notice of Acquisition of Retail Grocery Stores and Retail Drug Stores (AB 853)

As mentioned above regarding AB 647, California already has "grocery establishment" specific rules regarding worker retention and preferential rehire eligibility following a change in control. (Labor Code section 2500, *et seq.*) This law is motivated by concern that increasing consolidation retail chain grocery stores and pharmacies potentially affects the supply and affordability of food and medicine and the supply of experienced retail workers and pharmacy workers in California.

Based on these public health and safety concerns, AB 853 adds several sections to the California Corporations Code and requires any person planning to acquire any voting securities or assets of a retail grocery firm or retail drug firm, as defined, to provide written notice (under penalty of perjury) to the California Attorney General at least 180 days before the acquisition becomes effective. This requirement will apply only if the Acquiring party is required to provide notice of the merger or acquisition to the Federal Trade Commission (FTC) or the United States Department of Justice (DOJ) pursuant to the federal Hart-Scott-Rodino Antitrust Improvements Act, or if the Acquiring party is acquiring more than 20 retail drug firms or retail grocery firms. The notice must include certain information. If the acquiring party is required to file notice with the FTC or the DOJ under the Hart-Scott-Rodino Antitrust Improvements Act, the notice must contain the same information required under that act and any implementing regulations. If the acquiring party is not required to file notice with the FTC or DOJ, the notice shall contain information including (1) any plans or proposals to liquidate the retail grocery or retail drug firm, to sell its assets or merge or consolidate it, or to make any other material changes in its businesses or corporate structure or management; (2) information required to assess the competitive effects of the proposed acquisition, including factors affecting the supply of experienced grocery workers, including wages, benefits, and unemployment; and (3) information required to assess economic and community impact of any planned divestiture or store closures, including but not limited to possible impacts on unemployment.

The Attorney General will be required to charge the acquiring party a filing fee to review and analyze the notice under the section based on the size of the transaction. The Attorney General will also have the authority to seek an order temporarily staying or preliminarily enjoining the acquisition if they need additional time to analyze the competitive effects of the acquisition. And the Attorney General may seek injunctive relief for violation of the law, along with attorney's fees and civil penalties of up to $20,000 for each day of noncompliance with the requirements of the new law.

NEW LOCAL ORDINANCES

Los Angeles Retail Worker Predictive Scheduling (Los Angeles Municipal Code Sections 185 and 188)

The Los Angeles "Fair Work Week Law" went into effect April 1, 2023. The ordinance covers retail businesses with 300 or more employees globally (at least one of whom works in the city of Los Angeles). The new ordinance creates numerous detailed obligations for covered employers, including the duty to: provide a good faith estimate of an employee's work schedule, consider employee scheduling preferences, provide advance notice of a schedule and pay penalties for schedule changes, offer new work to existing employees before hiring, retain records and post notices, and more. WTK's original summary of the ordinance is available here. For more detailed information, including the text of the ordinance, the City's FAQs regarding implementation, and required posters, visit the City's website here.

Berkeley Fair Workweek Ordinance

Berkeley recently enacted a "Fair Workweek Ordinance" that will impose scheduling restrictions on Berkeley employers. For more information, see: https://drive.google.com/file/d/1feM4zFSpbkEQasiHWAVrxF4EqAE-47lF/view.

Los Angeles Enacts "Freelance Worker Protections" Ordinance

In recent years, several cities (e.g., Minneapolis, New York, and Seattle) have enacted local ordinances regulating freelance workers. Effective July 1, 2023, the City of Los Angeles joined this club by enacting the "Freelance Worker Protections Ordinance," which its authors state is intended to ensure that "freelance workers are treated fairly and receive the compensation they are due."

Broadly speaking, this ordinance applies to work performed in the City of Los Angeles by a "freelance worker" for a "hiring entity" pursuant to a written or oral contract entered into or after July 1, 2023 that is valued at $600 or more, either by an individual job or cumulative jobs in a calendar year. A "freelance worker" is defined as an individual or entity composed of no more than one person that is hired by a "hiring entity" to provide services in exchange for compensation. A "hiring entity" is defined as being regularly engaged in a business or commercial activity but does not include entities that hire app-based drivers for transportation or delivery services.

In light of the stated goal of ensuring freelance workers are timely compensated, the ordinance requires hiring entities to provide freelance workers with a written contract for all agreements valued at $600 or more, either by itself or combined with previous oral or written agreements between the parties in a calendar year. This written contract must include at least the following: (1) the name, mailing address, phone number and email address for both the hiring entity and the freelance worker; (2) an itemization of all services to be provided by the freelance worker, the value of services to be provided pursuant to the contract, and the rate and method of compensation; and (3) the date by which the hiring entity must pay the contracted compensation or the manner by which such date will be deterring. Hiring entities must also provide full payment by the date specified in the written contract, or no later than 30 days after work is completed if no date is specified.

The ordinance also requires both hiring entities and freelance workers to retain records (including contracts and payment records) for four years and prohibits a hiring entity from retaliating against a freelance worker for exercising their rights under this ordinance.

The ordinance also outlines various remedies for potential violations and authorizes a freelance worker to file a civil lawsuit or to file a complaint with the Bureau of Contract Administration. The full text of the ordinance is available at: https://clkrep.lacity.org/onlinedocs/2021/21-0107_ord_draft_02-21-23.pdf.

NEW STATE REGULATIONS

Expanded Regulations re: California's "Ban the Box" Law (Fair Chance Act)

In 2018, California enacted the Fair Chance Act (AB 1008, codified at Government Code section 12952) enacting new limits upon employer consideration of applicant conviction history and detailing the procedures regarding when and how such information could be obtained and considered. As a general matter, employers with five or more employees are prohibited from asking about an applicant's criminal history until after a conditional offer of employment has been made. In addition, an employer cannot rescind a conditional offer of employment without conducting an individualized assessment regarding whether the criminal history "has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position," and giving the applicant notice and an opportunity to respond. The Civil Rights Division (CRD) has adopted revised regulations implementing the law (codified at 2 Cal. Code Regs. § 11017.1), which went into effect **October 1, 2024**. The new regulations expand the protections of the law and increase the steps employers must take to comply. The key changes include:

- **Expanded definition of "applicant"** to include *existing employees* who have applied or indicated a specific desire to be considered for a different position, and existing employees who are subject to background checks because of a change in ownership, management, policy, or practice.
- **Expanded definition of "employer"** to include any direct and joint employer, any entity that evaluates the applicant's conviction history on behalf of an employer or acts as an agent of any employer, directly or indirectly, any staffing agency, and any entity that selects, obtains, or is provided workers from a pool or availability list.
- **New rules about job postings:** Employers are now prohibited from including statements in job advertisements, postings, etc. that no persons with criminal history will be considered for hire.
- **Restriction on using information shared voluntarily:** If an applicant raises their criminal history voluntarily prior to receiving a conditional offer, the employer cannot consider any information they would otherwise be prohibited from considering.
- **Increased requirements for initial individualized assessment.**
    - The regulations now specify that the individualized assessment must be a "reasoned, evidence-based determination."
    - The individualized assessment must still include consideration of (1) the nature and gravity of the offense or conduct, (2) the time that has passed since the offense or conduct and/or completion of the sentence, and (3) the nature of the job held or sought. But the new regulations have added numerous examples of what might be included in consideration of each factor.
- **Increased Details in notice to Applicant:** If, after conducting initial individualized assessment, an employer makes a preliminary decision to disqualify an applicant, it must now give additional details in the notice to the applicant beyond what was previously required. It must now specifically inform the applicant of a long list of the types of evidence the applicant may present. Applicants previously had five business after *receipt* of the notice to respond, but the new regulations specify that if the notice is transmitted though email, the notice shall be deemed received two business day safter it is sent.
- **Consideration of Mitigating Circumstances:** While employers were already required to consider evidence of rehabilitation and mitigating circumstances, the new regulations specify the factors the employer may consider in reassessing information submitted by the applicant before making final decision regarding whether to rescind the conditional offer of employment.

For more information, you can visit the CRD's website: https://calcivilrights.ca.gov/fair-chance-act/.

New FAQs on Bereavement Leave

The California Civil Rights Department (CRD) has released FAQs on bereavement leave to address changes to the right to bereavement leave, which became effective on January 1, 2023, available at: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/04/Bereavement-Leave_AB-1949_FAQ_ENG.pdf.

New FAQs and Guidance re: Pay Data Reporting

The California Civil Rights Department (CRD) issued a revised User Guide, FAQs, Excel Templates, examples of data submissions, and other resources reflecting recent changes to California's Pay Data Reporting Law (Government Code section 12999, as amended by SB 1162). The updated information can be accessed at: https://calcivilrights.ca.gov/paydatareporting/.

Proposed New Indoor Heat Regulations

CalOSHA has proposed new regulations that would apply when the temperature reaches 82 degrees in indoor work areas. The regulation would not apply to places of employment where employees are teleworking from a location of the employee's choice. The regulations are detailed, and potentially affected employers should review them carefully. The following is a summary of the key obligations the regulations would impose:

- Written Prevention Program – Employers must establish, implement, and maintain a written indoor heat illness prevention program with numerous requirements, including procedures for accessing water, close observations, cool down areas, and emergency response measures.
- Training – Employers must provide training to employees and supervisors.
- Water – Employers must provide access to water, as specified.
- Cool-Down Areas – Employers must provide access to cool-down areas, at temperatures below 82 degrees, blocked from direct sunlight, and shielded from other high radiant heat sources.
- Additional Rest Periods – Employers must allow and encourage employees to take preventative cool-down rest periods and monitor employees taking such rest periods for symptoms of heat-related illness.
- Observation Obligation – Employers need to closely observe new employees during a 14-day acclimation period, as well as employees working during a heat wave where no effective engineering controls are in use.

The regulations will likely be voted on in early 2024. For more information on the status and to review the text of the regulation itself, visit CalOSHA's website: Heat Illness Prevention in Indoor Places of Employment (ca.gov).

NEW FEDERAL REGULATIONS AND GUIDANCE

Federal Guidance re: Artificial Intelligence

Employers should note that even though AB 331 (which sought to impose restrictions on the use of artificial intelligence and automated decision tools) did not pass this year, it is possible that use of AI or an ADT could lead to a discrimination claim. Indeed, in May 2023, the federal Equal Employment Opportunity Commission (EEOC) issued new guidance regarding the use of software, algorithms, and artificial intelligence used in employment selection procedures and the ways in which such tools could cause a violation of Title VII. (Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964 | U.S. Equal Employment Opportunity Commission (eeoc.gov)) Previously, in May 2022, the EEOC and Department of Justice issued guidance regarding the use of algorithms and artificial intelligence to assess job applicants and employees and warned that use of AI may violate the Americans with Disabilities Act. (The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees | U.S. Equal Employment Opportunity Commission (eeoc.gov) and Guidance Document: Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring (ada.gov)) These are all part of the EEOC's Artificial Intelligence and Algorithmic Fairness Initiative. More information is available here: Artificial Intelligence and Algorithmic Fairness Initiative | U.S. Equal Employment Opportunity Commission (eeoc.gov). And in March 2022, California's Fair Employment and Housing Counsel issued proposed amendments to the regulations implementing the Fair Employment and Housing Act which would regulate the use of Automated Decision Systems in employment and specifically define the ways in use of such systems could constitute unlawful discrimination. (AttachB-ModtoEmployRegAutomated-DecisionSystems.pdf (ca.gov))

Federal Guidance re: COVID, the ADA, and the Rehabilitation Act

The EEOC issued new guidance on May 15, 2023 regarding COVID-19, the ADA, the Rehabilitation Act, and other employment laws. (What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws | U.S. Equal Employment Opportunity Commission (eeoc.gov)) Employers should review this updated information, including numerous questions and answers about how to treat requests for accommodations and sick leave;, the questions an employer may ask employees about testing, symptoms, and exposure; vaccinations; and more.

Federal Guidance re: the ADA and Individuals with Visual Disabilities at Work

On July 26, 2023, the U.S. Equal Employment Opportunity Commission (EEOC) released an updated technical assistance document, "Visual Disabilities in the Workplace and the Americans with Disabilities Act," explaining how the Americans with Disabilities Act (ADA) applies to job applicants and employees with visual disabilities.

The document outlines when an employer may ask an applicant or employee questions about their vision, how an employer should treat voluntary disclosures about visual disabilities, and what types of reasonable accommodations applicants or employees with visual disabilities may need.

Change to Form I-9 Flexibilities

On July 21, the Department of Homeland Security issued new I-9 flexibilities that will alleviate the need for employers who use E-Verify to conduct physical I-9 document inspections going forward, and to conduct physical re-inspections of documents examined remotely during the COVID flexibilities August 30, 2023.

The new rule allows all employers participating in E-Verify to conduct remote inspections of I-9 documents so long as they are also creating an E-Verify case for the employee. Further, for employers who were participating in E-Verify during the pandemic and created an E-Verify case for employees whose documents were examined during COVID-19 flexibilities, they can use the new flexibilities to re-examine the documents remotely (instead of having to do it physically) by the August 30 deadline. The new remote inspection procedure for E-Verify employers requires the following steps:

- Have the employee transmit a copy of the document to the employer (front and back).
- Conduct a live video interaction with the individual presenting the document to ensure the documentation reasonably appears to be genuine and related to the individual.
- Annotate the I-9 by completing the box on the new I-9 stating that an alternative procedure was used, or by noting this in the box in Section 2 of the current form.
- Retain a clear and legible copy of the documentation in a manner consistent with current regulations.

Employers who decide to use the alternative procedure for verifying/reverifying documents should use the same method for all employees, except that it is permissible to distinguish between remote and in-person/hybrid employees by remotely inspecting for fully remote employees and physically inspecting for in-person/hybrid employees. In addition, for any employee for whom remote inspection is the default, the employee can opt-out in favor of physical inspection of their documents.

The new ongoing remote inspection process will be available to E-Verify employers starting August 1, 2023. Employers who do not use E-Verify will not be eligible to use the new remote inspection process and instead will need to return to physical examination of I-9 documents.

Guidance re: Calculating FMLA Leave in Holiday Weeks

On May 30, 2023, the federal Department of Labor (DOL) issued an opinion letter addressing how to calculate the amount of Family and Medical Leave Act (FMLA) leave used when an employee takes leave during a week which includes a holiday. Consistent with the general rule that an employee's usual workweek is the appropriate basis for determining that employee's FMLA leave entitlement, the DOL takes the position that in situations where the employee is taking only a partial week of FMLA leave, the holiday is *not* counted as FMLA leave unless the employee was actually scheduled to work on that holiday. *See* 29 C.F.R. § 825.205(b). In such an instance, to calculate the fraction of the workweek of FMLA leave used, the amount of leave taken (not including the holiday) is divided by the total workweek (including the holiday). Thus, for example, if an employee takes leave for one workday in a workweek with a holiday, and they were not scheduled to work on the holiday, the employee has taken one-fifth (1/5) of a week of leave.

However, if an employee takes a *full* workweek of FMLA leave in a week containing a holiday, the entire week (including the holiday hours) will count against the employee's FMLA entitlement. See 29 C.F.R. § 825.200(h). Thus, an employee taking leave for a full workweek that includes a holiday has taken one week of leave.

For more information, review the entire opinion letter here.

Guidance re: Remote Work and FMLA Intermittent Leave

On February 9, 2022, the Wage and Hour Division (WHD) of the federal Department of Labor issued new guidance and an Opinion Letter with information about how the WHD interprets various issues under the Family and Medical Leave Act (FMLA) and the Fair Labor Standards Act (FLSA). These are the following takeaways regarding remote work: (1) non-exempt employees working remotely must be paid for short breaks of twenty minutes or less; (2) employers must provide an appropriate place for an employee to pump breast milk when the employee is working off-site and must be free from observation by any employer-provided or required video system when they are expressing breast milk, even if they are working at home; (3) to be eligible for FMLA leave, an employee must

be employed at a worksite where 50 or more employees are employed within 75 miles of the worksite – for remote employees, the worksite is considered to be the location to which the employee reports or from which assignments are made for those employees working remotely.

These are the following takeaways regarding intermittent FMLA leave: (1) an eligible employee with a serious health condition may use FMLA leave to work a reduced schedule for an indefinite period as long as they do not exhaust their FMLA leave entitlement; and (2) employees are entitled to 12 workweeks of FMLA leave in a 12-month period. However, if an employee is scheduled to regularly work more than 40 hours per week, they are entitled to more than 480 hours of FMLA leave in a 12-month period.

Guidance re: the PUMP Act

On May 17, 2023, the U.S. Department of Labor ("DOL") issued Field Assistance Bulletin No. 2023-2 (FAB) which provides guidance to its agency officials responsible for enforcing the Providing Urgent Maternal Protections for Nursing Mothers Act (the "PUMP Act"). The PUMP Act expands the Fair Labor Standards Act (FLSA) to provide additional workplace protections for lactating employees by requiring employers to provide all employees who are nursing with reasonable time and breaks, and a private space other than a bathroom to express breast milk at work. The bulletin, which outlines the general break time requirements, compensation, space requirements, exemptions, and includes an updated FLSA poster can be accessed at: https://www.dol.gov/sites/dolgov/files/WHD/fab/2023-2.pdf.

Proposed Federal Guidance re: Harassment

On September 29, 2023, the EEOC published for public comment its proposed "Enforcement Guidance on Harassment in the Workplace." (https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace#_ftnref117) If finalized, this guidance will constitute the first update on the EEOC's Harassment guidance since 1999, and will cover the following areas: (1) Social media conduct that occurs in a non-work-related context but impacts the workplace; (2) Sex-based harassment regarding sexual orientation and gender identity; (3) Conduct not directed at the complainant that contributes to a hostile working environment; (4) Individuals harmed by unlawful harassment of a third party; (5) Conduct on employer's e-mail system contributing to a hostile work environment; and (6) Conduct that occurs in a work-related context outside of the regular place of work.

The proposed guidance describes the legal standards applicable to harassment claims under Title VII, the ADA, and the ADEA, emphasizing that harassment based on protected characteristics includes harassment based on social or cultural expectations regarding how people act, appear, or behave, including assumptions about racial, ethnic, or sex-based stereotypes. Further, with regard to sexual orientation and gender identity (which also fall under sex-based harassment), the guidance protects the rights of LGBTQ+ workers by citing the 2020 U.S. Supreme Court ruling in *Bostock v. Clayton County*, which held that discrimination against LGBTQ workers is a form of unlawful sex-based bias. Further, the guidance includes protections for employee decisions pertaining to contraception or abortion, including such decisions in the category of sex-based discrimination under pregnancy and other "related medical conditions."

Finally, the guidance addresses how social media postings and other online content can contribute to hostile work environments, even where such activity occurs outside the workplace and is unrelated to the job. This is especially true for communications conveyed using work-related systems, accounts, or platforms.

Proposed Regulations re: Pregnancy Accommodations

On June 27, 2023, the federal Pregnant Workers Fairness Act (PWFA) went into effect. And in August, the Equal Employment Opportunity Commission issued a proposed regulation implementing the PWFA. The public comment period is still open, and the regulations may change before being finalized, but employers may wish to review the proposed regulations to understand how the EEOC may interpret the law.

For more information about the PWFA, see our Special Alert here. In sum, the PWFA increases employers' obligations to make reasonable accommodations for qualified employees affected by pregnancy, childbirth, or related medical conditions nationwide. Because California Employers are already obligated to grant reasonable accommodations to employees affected by pregnancy, childbirth, or a related medical condition, the federal law is not likely to significantly alter California employers' obligations. However:

- California's reasonable accommodation obligation is explicitly tied to medical advice, while the federal law obligates employers to grant reasonable accommodations when to *known* limitations. The proposed regulation would further explain the definition of "known limitations," and would emphasize that the limitation may be a modest, minor, and/or episodic impediment or problem.

- In addition, the federal law explicitly provides that a person may be entitled to reasonable accommodation in limited circumstances when they *cannot* perform the essential functions of the job for a temporary period. The proposed regulation defines "temporary" as lasting for a limited time, not permanent, and may extend beyond "in the near future," and "in the near future" means generally within forty weeks but seeks comment on whether it should be interpreted to mean *one year*.

The Regulations, if implemented, will provide more detailed definitions of the terms in the statute and examples of scenarios that may merit accommodation and the types of accommodation that may be required under the law. To review the proposed regulation in detail and track implementation, visit the EEOC's website here.

Proposed Increase in the Salary Threshold for Overtime Exemption

On August 30, 2023, the Department of Labor (DOL) announces a proposed update to the regulations implementing the federal overtime pay requirements. The proposed regulations would increase the salary threshold for the federal overtime exemption to $1,059 per week (or $55,068 annually) from the current level of $684 per week ($35,568 per year). It would also increase the salary threshold for the Highly Compensated Employee exemption to $143,988 per year. Finally, the rule would automatically update these earnings thresholds every 3 years based on current wage data. The proposal would *not* change the duties test. The DOL has published updated FAQs about the proposed rule here. The proposed regulation will be open to public comment for 60 days before the DOL publishes the final rule.

Note that even if this new *federal* proposal goes into effect, the salary threshold for the overtime exemption in *California* will still be higher: as of January 1, 2024, it will be $66,560 per year or $5,546.57 per month.

NOVEMBER 2024 BALLOT

Initiative to Raise the Minimum Wage

This ballot measure seeks to increase the minimum wage by $1.00 per year until it reaches $18.00 per hour and then to increase the minimum wage annually to adjust for inflation. This initiative has received the requisite number of signatures and is set to be qualified for the November 2024 election unless withdrawn by the proponent.

Initiative to Repeal PAGA

This ballot measure seeks to repeal the Private Attorneys General Act, which allows employees to file lawsuits on behalf of themselves and other employees to recover monetary penalties for certain state employment law violations. The Labor Commissioner would retain the authority to enforce these laws and impose penalties. The initiative would require the legislature to provide funding for Labor Commissioner enforcement. This initiative has received the requisite number of signatures and is set to be qualified for the November 2024 election unless withdrawn by the proponent.

If you have questions about how these new laws and regulations may affect your business, please contact us.

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