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California Rings in 2023 with New Employment Laws

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This year, Governor Newsom has signed into law employment bills on disparate subjects such as pay equity, cannabis use, and leaves of absence. These new laws also concern industry-specific mandates for wage and hour compliance and human trafficking avoidance. These new laws take effect on January 1, 2023, unless otherwise noted.

New Pay Equity Law Requiring Disclosure of Employee Pay Scales

Senate Bill (SB) 1162 amends the existing requirement for private employers with 100 or more employees to submit pay data reports to the California Civil Rights Department. The employer pay data reports are now due by the second Wednesday of May 2023, and the second Wednesday of May for each year thereafter. SB 1162 also requires private employers with 100 or more employees hired through labor contractors to submit, by the second Wednesday of May, a separate pay data report to the Civil Rights Department for those employees.

These pay data reports must now include the median and mean hourly rate for each combination of race, ethnicity, and sex within each enumerated job category (for example, executive/senior level officials/managers, professionals, administrative support workers, service workers, etc.). Employers with multiple establishments need not submit a consolidated report, as previously required. Importantly, employers can no longer submit an EEO-1 in lieu of a pay data report.

This law also adds a requirement that an employer with 15 or more employees include the pay scale for any position in a job posting. "Pay scale" means the salary or hourly wage range the employer reasonably expects to pay for the position. If an employer engages a third party to announce, post, publish or otherwise make known a job posting, the employer must also provide the pay scale to the third party who must include the pay scale in the job posting.

Employers must maintain records of the job title and wage rate history for each employee for the duration of the employment plus three years and such records are subject to inspection by the Labor Commissioner. SB 1162 creates a rebuttable presumption "in favor of an employee's claim" if an employer fails to keep records in violation of these provisions.

Job Protections for Cannabis Use

Assembly Bill (AB) 2188 seeks to override the California Supreme Court's 2008 decision in *Ross v. Raging Wire*

Communications, which found that nothing in the text or history of the Compassionate Use Act – the statewide initiative legalizing marijuana use for medicinal purposes – indicates the voters intended the measure to address the respective rights and duties of employers and employees. As a result, the Court ruled an employer may require preemployment drug testing for marijuana use and may refuse to accommodate an employee's use of marijuana.

After past failed legislative efforts, AB 2188 was signed by the governor making it unlawful for an employer to "discriminate against [an applicant or employee] in hiring, termination, or any other term or condition of employment, or otherwise penalizing a person" based on either:

1. the individual's use of cannabis *off the job and away from the workplace*;
2. an employer-required drug screening test that has found the person to have *non-psychoactive cannabis metabolites in hair, blood, urine, or other bodily fluids.*

What this means is that an employer may not withdraw a job offer to a job applicant who has tested positive for a nonpsychoative cannabis metabolite. Tetrahydrocannabinol (THC) is stored in the body as nonpsychoactive cannabis after it is metabolized – which may occur in a matter of hours or days. A post-accident or reasonable suspicion test, however, may detect THC in the employee's system if the test is administered within a few hours of the employee consuming cannabis containing THC.

AB 2188 makes clear that it does not permit an employee to possess, to be impaired by, or to use, cannabis on the job, or affect the rights and obligations of an employer to maintain a drug- and alcohol-free workplace. The law also carves out an exception for the building and construction trades and positions requiring a federal government background investigation or security clearance under the US Department of Defense or "equivalent regulations applicable to other agencies."

This legislation has a delayed operative date and will not take effect until January 1, 2024.

Expanded Leave Laws

CFRA Leave Broadened

AB 1949 expands the California Family Rights Act (CFRA) to require bereavement leave of up to five days for eligible employees following the death of a family member. The employee must have been employed for at least 30 days prior to the commencement of the leave. "Family member" includes a spouse or a child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law. The bereavement leave must be completed within three months of the date of death and need not be taken on consecutive days. An employer may request documentation of the death of the family member.

The leave must be taken pursuant to the employer's existing bereavement leave policy, if any. If an employer does not have an existing paid bereavement leave policy, the bereavement leave may be unpaid, though the employee has the option of applying any accrued paid vacation, personal leave or sick leave, or compensatory time off that is otherwise available to the employee. As with any CFRA leave, an employer may not engage in acts of discrimination, interference, or retaliation relating to an individual's exercise of rights to bereavement leave. The employer must also maintain employee confidentiality as to the bereavement leave. There are

exceptions for employees covered by a valid collective bargaining agreement that meets certain requirements.

Another bill, AB 1041, expands the categories of people for whom an employee may take leave to provide care. The amendment recognizes a covered family member that includes a "designated person," which means an individual related by blood or whose association with the employee is the equivalent of a family relationship. An employee may identify the designated person when the employee requests the leave. An employer may limit an employee to one designated person per 12-month period for family medical leave.

Emergency Leave

SB 1044 provides a right to leave during an emergency condition, as defined, by precluding employers from taking adverse or threatening action against employees who refuse to report to or who leave a workplace during such a situation. "Emergency condition" is defined in the bill as either of the following:

1. Conditions of disaster or extreme peril to the safety of persons or property at the workplace or worksite caused by natural forces or a criminal act;
2. An order to evacuate a workplace, a worksite, a worker's home, or the school of a worker's child due to natural disaster or a criminal act.

The definition of "emergency condition" explicitly excludes "a health pandemic," so this not related to COVID-19.

Leave for Inactive Military Duty

SB 984 makes changes to the leave entitlements for military service. The bill requires employee members of reserve military units and the National Guard who are required to perform inactive duty obligations, other than inactive and active duty training drill periods, be granted an unpaid leave of absence. Such employees could elect to use vacation time or other accumulated compensatory time off for that purpose.

New Wage and Hour Obligations

Cal/WARN Act

AB 1601 amends the California Worker Adjustment and Retraining Act, known as "Cal/WARN Act," which requires written notice in the event of certain mass layoffs, relocations, and terminations. Specifically, the law adds a new provision to Cal/WARN applicable to an employer's relocation of a call center. The Employment Development Department is now required to publish semiannually a list of call center employers operating a call center that provided the required Cal/WARN notice. Call center employers that fail to provide required notice will be ineligible for any direct or indirect state grants or state-guaranteed loans to that call center employer for five years after the date the list is published and will be ineligible to claim a tax credit for five taxable years. Lastly, in addition to a private right of action, the law authorizes the California Labor Commissioner to enforce Cal/WARN Act notice requirements.

Public Works Contracts

AB 1851 updates the definition of "public works" for the purpose of prevailing wage requirements for workers employed on public works projects. "Public works" currently includes construction, alteration, demolition,

installation, or repair work done under contract and paid for using public funds, unless otherwise specified. "Public works" will now include, under certain circumstances, the hauling of refuse from a public works site to an outside disposal location. The bill further expands "public works" to include the on-hauling of materials used for paving, grading, and fill onto a public works site if the individual driver's work is integrated into the flow process of construction.

Payment in Lieu of Paid Parking

AB 2206 will require employers in certain locations to offer a cash-out program where the employer would otherwise provide paid parking for employees. The intent of the bill is for the cash-out requirements to only apply to an employer that can reduce, without penalty, the number of paid parking spaces it maintains for the use of its employees. This bill applies to employers who employ 50 or more employees in California and who provide a parking subsidy to employees. The specific locations covered are as defined within the Health and Safety Code and as determined by the state ambient air quality standard. The bill includes various requirements for determining the amount of the cash-out and maintaining records.

Independent Contractor Exemption for Commercial Fishing

Under current law, specified occupations and business relationships are exempt from the application of the ABC test, which determines whether a worker may be properly classified as an independent contractor. Instead, exempted occupations are governed by the multifactor test adopted in the *Borello* case. AB 2955 extends the exemption from the ABC test for commercial fishers working on an American vessel, as defined, until January 1, 2026.

Workplace Safety

Rulemaking Mandate on Heat Illness and Wildfire Smoke Standards

AB 2243 requires the Division of Occupational Safety and Health (Division), before December 1, 2025, to submit to the California Occupational Safety and Health Standards Board a rulemaking proposal to consider revising the Cal/OSHA Heat Illness Prevention Standard to require that employers distribute a copy of their Heat Illness Prevention Plan to employees upon hire and upon receiving heat illness prevention training, but no less than once per year. This mandate has questionable utility since the Heat Illness Prevention Standard presently requires that the employer's Plan "be made available at the worksite to employees…."

The law also requires the Division to submit a rulemaking proposal to consider revising the Cal/OSHA Wildfire Smoke Standard, *specifically for farmworkers*, to reduce the Air Quality Index (AQI) for PM2.5 at which control by "respiratory protection equipment" becomes mandatory, to an AQI of 301. The Wildfire Smoke Standard presently mandates employee respirator use where the AQI for PM2.5 exceeds 500, which was developed after an extended rulemaking process over years beginning with the emergency rule. According to the Assembly Floor Analysis, the bill is justified by a study in the American Journal of Industrial Medicine finding that agricultural workers are "35 times more at risk for heat-related mortality than other industries." The bill, however, does not provide a rationale for lowering the AQI threshold that triggers a respiratory protection mandate.

Fast Food Council to Set Minimum Workplace Standards

AB 257 establishes a "Fast Food Council" within the California Department of Industrial Relations for the purpose of establishing minimum workplace standards for workers of any fast food restaurant, defined as an establishment providing food or beverage that has 100 or more establishments nationally sharing the same common brand or otherwise standardization. These minimum standards impact, in addition to wages, "the working conditions adequate to ensure and maintain the health, safety and welfare of workers."

The Fast Food Council is tasked with conducting a full review of the adequacy of the minimum fast food restaurant health, safety, and employment standards at least once every three years. The law includes anti-retaliation provisions and, more specifically, the California Labor Commissioner has jurisdiction to investigate employee claims for violation of the minimum workplace standards for fast food restaurant workers.

Significantly, the Council is not authorized to promulgate workplace safety standards but rather may petition the Occupational Safety and Health Standards Board for the adoption, amendment or replacement of any occupational safety and health standard. Thus, the Council could become a force in advocating to the Standards Board for changes in workplace protections specific for fast food restaurant workers.

Willful Cal/OSHA Citation May Result in Disciplinary Action by Contractor Licensing Board

AB 1747 includes the willful or deliberate disregard and violation of safety laws as grounds for disciplinary action by the California Contractor State License Board. Accordingly, a licensed contractor may risk disciplinary action over its licensing if it accepts a Cal/OSHA citation classified as willful.

Sexual Violence and Human Trafficking

Penalties Applicable to the Hospitality Industry

AB 1788 authorizes a civil penalty to be assessed against a hotel if a supervisor knew of or acted with reckless disregard of activity constituting sex trafficking within the hotel and failed to inform law enforcement. It also authorizes such penalties if the supervisor was acting within the scope of employment and benefited from participating in a venture that the employee knew or should have known constituted sex trafficking.

The penalties may range from $1,000 to $10,000, depending on the number of violations in a calendar year.

Training for EMTs

AB 2130 requires that, beginning July 1, 2024, newly-licensed emergency medical technicians (EMTs) and paramedics complete at least 20 minutes of training on issues related to human trafficking. The law does not require existing EMTs or paramedics to complete the training.

Expanded Protections under the Safe at Home Program

The Safe at Home Program offers victims of domestic violence, stalking, sexual assault, human trafficking and elder and dependent abuse, as well as reproductive health care workers, a substitute mailing address to receive first class, certified, and registered mail. Currently, businesses are prohibited from soliciting, selling, or trading on the internet the home address, home telephone number, or image of a participant in the Safe at Home Program for various reasons specified in the statute. AB 1726 expands this prohibition to apply to all public spaces,

including but not limited to, the internet.

Training on Sexual Violation at Educational Institutions

AB 2683 requires independent institutions of higher education and private postsecondary educational institutions to post educational and preventative information on sexual violence on their campus internet sites. It would also require that, beginning September 1, 2024, these institutions provide annual training to students on sexual violence and sexual harassment.

Required Notice for Barbering and Cosmetology Businesses

AB 1661 adds barbering and cosmetology businesses to those required to post a notice containing information relating to slavery and human trafficking. Failure to comply can result in civil penalties ranging from $500 to $1,000.

Unfair Competition Law Enforcement

The Unfair Competition Law (UCL) generally prohibits false advertising and other unfair business practices. Previously, the Attorney General and a district attorney could bring actions to enforce the UCL. AB 2766 represents an expansion of this power by granting, in limited circumstances, a city attorney or county counsel the same investigatory power granted to the Attorney General in investigating a potential violation of the UCL.

Electronic Monitoring Devices in Vehicles

AB 984 builds on well-established privacy rights in California, now enhancing employee privacy in an employer's vehicle. This law prohibits an employer from using an alternative device to monitor employees except during work hours, and only if "strictly necessary" for the employee to perform their duties. The bill does not define the meaning of "strictly necessary."

If an employer installs such a device, the employer must provide notice to employees prior to starting any monitoring. The notice must include the following:

- A description of the specific activities that will be monitored.
- A description of the worker data that will be collected as a part of the monitoring.
- A notification of whether the data gathered through monitoring will be used to make or inform any employment-related decisions, including, but not limited to, disciplinary and termination decisions, and, if so, how, including any associated benchmarks.
- A description of the vendors or other third parties, if any, to which information collected through monitoring will be disclosed or transferred. The description shall include the name of the vendor or third party and the purpose for the data transfer.
- A description of the organizational positions that are authorized to access the data gathered through the alternative device.
- A description of the dates, times, and frequency that the monitoring will occur.
- A description of where the data will be stored and the length of time it will be retained.
- A notification of the employee's right to disable monitoring, including vehicle location technology, outside of

work hours.

Employers that use monitoring devices for safety or performance reasons should ensure that the required notice is required.

Farmworker Labor Relations

Previously, farmworkers could only unionize through secret ballot elections at polling places designated by the California Agricultural Labor Relations Board. AB 2183 changes the law to allow farmworkers to unionize through representation ballot cards. Advocates of this bill claimed this change was necessary to eliminate employees being intimidated when voting to unionize. This bill had previously been vetoed by multiple governors, including Gavin Newsom. Governor Newsom negotiated a watered-down version of the bill prior to signing it.

CalSavers Program to Cover Most Employers

The existing CalSavers Retirement Savings Program is designed to promote greater retirement savings for California private employees. Existing law requires eligible employers to offer a payroll deposit retirement savings arrangement so that eligible employees may contribute a portion of their salary or wages to a retirement savings program account within the Program. SB 1126 expands the definition of "eligible employer" to include a person or entity that has at least one eligible employee and that satisfies certain requirements. By December 31, 2025, eligible employer with one to four eligible employees must come into compliance. The definition of employer excludes sole proprietorships, self-employed individuals or other business entities that do not employ any individuals other than the owners of the business.

Takeaways for Employers

As a result of these legislative developments, we recommend that California employers promptly take the following steps:

- Modify pay data reports in accordance with the pay equity law and ensure pay scales are included in job postings and provided to recruiters as required.
- Update leave policies to expand the CFRA and military leave entitlement and provide for emergency leave.
- Develop a plan for compliance with wage and hour changes and human trafficking avoidance mandates as applicable.
- Ensure employee retirement plans are established in accordance with CalSavers.

Please contact us with any questions about this update.

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