

## Updates

October 20, 2023

2023 California Labor, Employment, and Independent Contractor Legislative Update



With the 2023 California legislative year closed, it is once again time to summarize the new legislation that will affect businesses operating within the state and highlight relevant action items related to these bills.

Below are the key labor and employment topics from the 2023 legislative session.

### **Discrimination and Retaliation**

#### **Employment Discrimination: Cannabis Use: [SB 700](#) and [AB 2188](#).**

- *Effective Date:* January 1, 2024.
- In 2022, [pursuant to AB 2188](#), Government Code Section 12954 was added to the Fair Employment and Housing Act (FEHA) to prohibit discrimination against any person in hiring, termination, or any term or condition of employment or otherwise penalize a person based on the individual's use of cannabis off the job and away from the workplace, with an effective date of January 1, 2024. SB 700 further amends Section 12954 to prohibit employers from requesting information from an applicant for employment relating to the applicant's prior use of cannabis. However, even as amended, Section 12954 specifically states that it neither preempts existing laws that require applicants or employees to be tested for controlled substances nor permits on-the-job cannabis use. Further, Section 12954 does not apply to employees in the building and construction trades.
- *Action Item:* Employers should update policies and practices to ensure their application, preemployment drug screening, and employment procedures do not violate these requirements.

#### **Protected Employee Conduct: [SB 497](#).**

- *Effective Date:* January 1, 2024.

- SB 497 amends multiple provisions of the California Labor Code prohibiting retaliation against employees who engage in specified protected conduct and creates a rebuttable presumption of retaliation if an employer engages in prohibited conduct within 90 days of specified protected activity. SB 497 amends Labor Code Section 1102.5 to expand the civil penalty of up to \$10,000 to apply to all categories of employers and clarifies that the civil penalty is paid to the employee who was retaliated against (rather than, for example, to the state). In addition, SB 497 adds subsection 1102.5(f)(2), which sets forth new factors the Labor Commissioner shall consider in assessing this civil penalty.
- *Action Item:* Employers should review their policies and practices to avoid claims of retaliation.

## Reproductive Loss Leave

### Reproductive Loss Leave: [SB 848](#).

- *Effective Date:* January 1, 2024.
- SB 848 expands FEHA's protections by adding Section 12945.6 to the Government Code, making it an "unlawful employment practice for an employer to refuse to grant a request by any employee to take up to five days of reproductive loss leave following a reproductive loss event." Under the law, a "reproductive loss event" is broadly defined as a failed adoption, failed surrogacy, miscarriage, stillbirth, or an unsuccessful assisted reproduction. The leave applies to persons who would have been a parent of the child had the event not occurred. An employee has three months from the date of the event entitling the employee to leave to complete the reproductive loss leave, and the days the employee utilizes for reproductive loss leave need not be consecutive. If an employee experiences more than one reproductive loss event within a 12-month period, the employer is not required to provide leave time in excess of 20 days within the 12-month period. The leave may be unpaid except that an employee may use vacation, personal leave, accrued and available sick leave, or compensatory time off that is otherwise available to the employee.
- *Action Item:* Employers should review their company policies and procedures, including any employee handbooks, to ensure their leave policies are in compliance with the new law.

## Sick Leave

### Paid Sick Leave: [SB 616](#).

- *Effective Date:* January 1, 2024.
- As previously described [here](#), SB 616 increases the minimum amount of sick leave that covered employers must provide employees per year from 24 hours (or three days) to 40 hours (or five days). The accrual rate remains the same at one hour of sick leave for every 30 hours worked, although employers can satisfy the requirements for accrual using another method if "an employee has no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment . . . and no less than 40 hours of accrued sick leave or paid time off by the 200th calendar day of employment . . ." The new law also allows employers to cap usage at 40 hours (or five days) each year. The new law will increase the permissible maximum cap on accrual of paid sick leave from 48 hours (or six days) to 80 hours (or 10 days). SB 616 also amends the schedule for in-home supportive service providers (as defined in the law) to increase paid sick leave to 40 hours (or five days). Notably, SB 616 adds an exclusion for employees covered by the Federal Railroad Unemployment Insurance Act. Finally, SB 616 adds to Labor Code Sections 246 and 246.5 a provision that expressly preempts local ordinances with respect to specified sections in Labor Code 246 addressing: (1) that no sick pay needs to be paid at termination; (2) that an employer may lend paid sick days in advance of accrual; (3) that an employer provide written notice as described with the amount of paid sick leave available; (4) the

calculation of paid sick leave; (5) the provision on reasonable advance notification; and (6) the timing of providing a payment for sick leave taken by an employee. Many California local jurisdictions have their own independent sick leave laws that California employers will need to consider, unless such local ordinances provide lesser rights or are subject to preemption by the state law.

- *Action Item:* Employers should review their sick pay policies to ensure compliance with this new law, including as to the interplay between local requirements and state preemption.

## **Noncompete Agreements**

### **California Law Addresses Noncompete Agreements: [SB 699](#).**

- *Effective Date:* January 1, 2024.
- As discussed in more detail [here](#), SB 699 prevents employers from enforcing contracts that are void under California Business and Professions Code (BPC) Section 16600, regardless of whether the contracts were signed or employment was maintained outside of California. The legislation explains, "California has a strong interest in protecting the freedom of movement of persons whom California-based employers wish to employ to provide services in California, regardless of the person's state of residence. This freedom of employment is paramount to competitive business interests."
- *Action Item:* Companies should review their employment-related agreements, including any restrictive covenants, to determine whether this provision will affect enforceability.

### **Noncompete Clauses in Employment Contracts and Employer Notification: [AB 1076](#).**

- *Effective Date:* January 1, 2024.
- AB 1076 codifies existing case law, *Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937 (2008), by prohibiting employers from including a noncompete clause in an employment contract that does not satisfy an exception to BPC Section 16000. In addition, AB 1076 adds BPC Section 16600.1, which requires employers to notify, by **February 14, 2024**, current and former employees (who were employed after January 1, 2022) whose contracts include a noncompete clause, or who were required to enter a noncompete agreement not covered by an exception, that the noncompete clause is void. In addition, the new Section 16600.1 provides that a violation of this law constitutes an act of unfair competition, which means employees may sue under BPC Section 17200 for restitution and/or injunctive relief.
- *Action Item:* Employers should review their employment contracts with current and former employees and consult with experienced counsel to assess next steps.

## **Workplace Safety**

### **Workplace Violence Prevention Plan: [SB 553](#).**

- *Effective Date:* July 1, 2024.
- SB 553 requires employers to establish a workplace violence prevention plan, similar to current requirements for injury prevention plans, by July 1, 2024. The bill also includes training and recordkeeping requirements for workplace violence prevention plans. The bill exempts healthcare facilities, teleworkers, and small employers with fewer than 10 employees, as defined in the legislation, from the workplace violence prevention plan requirement.
- *Action Item:* Employers should create or amend their workplace violence prevention plans to comply with these requirements.

### **Workplace Violence Restraining Orders: [SB 428](#).**

- *Effective Date:* January 1, 2025.
- Existing law allows employers to seek temporary restraining orders (TROs) on behalf of employees and their immediate family members against individuals who have engaged in or threatened workplace violence. SB 428 expands the employer's abilities to also allow them to seek TROs against individuals who have harassed employees. In this context, 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. The course of conduct must be that which would cause a reasonable person to suffer substantial emotional distress." Actual threats of violence or acts of violence are not required. Note that the law does not permit employers to seek TROs for behavior that is protected by any other provision of law, such as freedom of speech or the right to engage in concerted activity under the National Labor Relations Act (NLRA).
- *Action Item:* Employers should be aware of the changes to their ability to seek temporary restraining orders on behalf of employees.

## **Minimum Wages**

### **Healthcare Workers: [SB 525](#).**

- *Effective Date:* June 1, 2024.
- Certain employers in the healthcare industry will have different minimum wage requirements for covered employees. More details can be found [here](#).
- *Action Item:* Employers in the healthcare industry should review which minimum wage obligations apply to them.

### **Fast Food Workers: [AB 1228](#).**

- *Effective Date:* April 1, 2024.
- As initially described [here](#), fast food workers at national fast food chains (defined as a set of limited-service restaurants consisting of more than 60 establishments nationally) must be paid a minimum of \$20 per hour, effective April 1, 2024. The bill also creates a new Fast Food Council that will determine minimum standards on wages, working hours, and other working conditions. The Fast Food Council will institute minimum wages for these employees on an annual basis. Bakeries that produce for sale on the establishment's premises bread and sell bread as a stand-alone menu item are not covered by the law. Restaurants in grocery establishments where the grocery establishment directly employs the staff of an on-premises restaurant are not considered fast food restaurants.
- *Action Item:* Employers in this industry should be prepared to comply with this new minimum wage.

### **Industrial Welfare Commission Revived: [AB 102](#).**

- *Effective Date:* by January 1, 2024.
- As described [here](#), the California Industrial Welfare Commission (IWC) has been funded and will convene by January 1, 2024, to make recommendations for wages, hours, and working conditions in new wage orders to be adopted by October 31, 2024.
- *Action Item:* Employers should monitor developments from the IWC, including through its [website](#), where it will share public meeting information.

## **Recall Rights**

### **Revisions to Grocery Workers and Recall Rights: [AB 647](#).**

- *Effective Date:* January 1, 2024.
- Upon a change of control at a grocery establishment, existing law requires an incumbent grocery employer to provide to the successor grocery employer a list of eligible grocery workers within 15 days after execution of the transfer document. AB 647 amends the law to expand the definition of "grocery establishment" to include distribution centers that are owned and operated by "grocery establishments" and used to distribute goods to or from its owned stores, regardless of square footage. AB 647 also requires the incumbent grocer to provide a list of eligible grocery workers to any collective bargaining representative (as opposed to just a successor grocery employer, as set forth in prior law). In addition, AB 647 amends and adds other provisions of the California Labor Code, including but not limited to prohibiting retaliation against employees seeking to enforce their rights under these laws.
- *Action Item:* Employers in the grocery industry should be aware of the procedural requirements set forth by AB 647 in the event there is a change in control.

## **Criminal Background Checks**

### **Fair Chance Act Regulations: [New FEHA Regulations](#).**

- *Effective Date:* October 1, 2023.
- California's Civil Rights Council, a branch of the California Civil Rights Department, issued new FEHA regulations governing an employer's use and consideration of a job applicant's criminal history in employment decisions. Among other things, the regulations require that if an employer intends to deny an applicant the employment position they were conditionally offered based solely or in part on the applicant's conviction history, the employer must first conduct an individualized assessment. Additional information regarding the regulations can be found [here](#).
- *Action Item:* Employers should update their criminal background check processes to comply with the new regulations and ensure their employee notices contain the required information.

## **Wage and Hour Training**

### **Food Handler Training: [SB 476](#).**

- *Effective Date:* January 1, 2024.
- SB 476 requires employers to treat as compensable hours worked the time it takes employees who are required to complete the food handler card training and examination. Employers must also reimburse employees for expenses associated with obtaining the food handler card. Additionally, employers must relieve employees of other work duties while the employee is taking the food handler training course and examination. Employers cannot condition employment on an applicant having a preexisting food handler card.
- *Action Item:* Applicable employers should review and revise their practices regarding hiring requirements and compensation for employees undergoing food handler training and examination.

## **Defamation**

### **Privileged Communications: Incident of Sexual Assault, Harassment, or Discrimination: [AB 933](#).**

- *Effective Date:* January 1, 2024.
- AB 933 amends existing law to allow defendants in a defamation suit to allege a privilege defense for communications made without malice about factual information related to an incident of sexual assault,

harassment, or discrimination experienced by the individual making the communication. This includes but is not limited to: the experience of sexual assault, sexual harassment, workplace harassment or discrimination, and cyber sexual bullying. The law also allows for defendants to recover attorneys' fees, treble damages, and punitive damages if the defendant prevails in the suit.

- *Action Item:* Those intending to bring defamation suits should consider AB 933 before bringing such suit.

## Arbitration

### Stay of Order Dismissing or Denying Petition To Compel Arbitration: [SB 365](#).

- *Effective Date:* January 1, 2024.
- This law allows for the continuation of trial court proceedings pending appeal of an order dismissing or denying a petition to compel arbitration.
- *Action Item:* Companies should review their applicable arbitration agreements with experienced counsel.

## COVID-19

### Extension to Law Giving Rights to Laid-Off Hospitality and Building Services Industries Until December 31, 2025: [SB 723](#).

- *Extends Applicable Law Until:* December 31, 2025.
- As discussed [here](#), in 2021, Governor Newsom signed SB 93 to create Labor Code Section 2810.8. Section 2810.8 requires employers in covered sectors (including hotel, private club, event center, airport hospitality operation, airport service provider, or the provision of building service to office, retail, or other commercial buildings), to offer laid-off employees specified information about job positions that become available for which the laid-off employees are qualified, as well as to offer positions to those laid-off employees based on a preference system, in accordance with specified timelines and procedures. SB 723 (1) extends the sunset date of the section from December 31, 2024, to December 31, 2025; (2) revises the definition of "laid-off employee" to mean an employee who worked for the employer for six months or more and whose most recent separation from active employment by the employer occurred on or after March 4, 2020; and (3) assigns a presumption that "a separation due to a lack of business, reduction in force, or other economic, nondisciplinary reason is due to a reason related to the COVID-19 pandemic, **unless the employer establishes otherwise by a preponderance of the evidence.**"
- *Action Item:* Applicable employers must continue to review their records for laid-off employees and comply with the recall rights established by Labor Code Section 2810.8.

## Wage Notice

### Employees: Required Disclosures and Agricultural Employees: [AB 636](#).

- *Effective Date:* January 1, 2024 (for emergency or disaster declaration requirements); March 15, 2024 (for federal H-2A agricultural visa employees).
- AB 636 amends California Labor Code Section 2810.5 to require employers to provide employees with additional information at the time of hiring, including:
  - 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, and that was issued within 30 days before the employee's first day of employment, that may affect their health and safety during their employment.

- For employees admitted pursuant to the federal H-2A agricultural visa, specific information, in Spanish and English if requested by the employee, about an agricultural employee's rights under California law.

The California Labor Commissioner is required to publish an updated 2810.5 notice template on its website by March 1, 2024.

- *Action Item:* All employers should update their 2810.5 notices to include the additional emergency/disaster information, as well as information related to H-2A employees (if applicable).

## Miscellaneous

### Reporting Obligations for Venture Capital Companies: [SB 54](#).

- *Effective Date:* March 1, 2025.
- SB 54 extends to the venture capital ecosystem pay data reporting requirements similar to [what was enacted in 2022 for large employers](#). It requires "covered entities," defined as venture capital companies that operate, invest, or raise capital in California, to collect and report to the California Civil Rights Department information regarding the race, gender, sexual orientation, sexual identity, and/or disabled veteran status of the founders of the companies in which they invest. The data collected will be aggregated and anonymized, and the state of California will make it available publicly. SB 54 also imposes obligations on covered entities to make and keep records related to such reporting obligations for at least four years. If a covered entity fails to comply with SB 54's requirements, the Civil Rights Department can file an *ex parte* petition with a superior court and seek, among other matters, monetary penalties. In signing SB 54, Governor Newsom recognized that administering these requirements would require additional resources and committed to fully funding this initiative in next year's state budget.
- *Action Item:* Venture capital firms and other investors should work with counsel to determine whether they are "covered entities" under SB 54 and ensure they are prepared to comply with SB 54's reporting requirements, which will commence on March 1, 2025, but will look back to the 2024 calendar year.

### Public Prosecutor: [AB 594](#).

- *Stated Effective Date:* January 1, 2024.
- AB 594 expands the state of California's authority to enforce provisions of the Labor Code by explicitly allowing a "public prosecutor" (meaning the attorney general, a district attorney, a city attorney, a county counsel, or any other city or county prosecutor) to enforce certain violations of the Labor Code in its jurisdiction by prosecuting the violations civilly or criminally, or enforcing the provisions independently. AB 594 also amends Labor Code Section 226.8 to modify enforcement options and remedies. AB 594 amends Section 218 of the Labor Code to provide that "[n]othing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due them under this article" and further adds Labor Code Section 182, which provides, in part, "[i]n any action initiated by a public prosecutor or the Labor Commissioner to enforce this code, any individual agreement between a worker and employer that purports to limit representative actions or to mandate private arbitration shall have no effect on the authority of the public prosecutor or the Labor Commissioner to enforce the code."
- *Action Item:* Employers must continue to review their wage and hour policies and procedures and should work with counsel to limit potential exposure to claims, including by public prosecutors.

### State Employees' Permitted Use of Allotted Personal Holiday: [SB 461](#).

- *Effective Date:* January 1, 2024.
- Before the passage of SB 461, California law gave state employees time off for specified holidays and one personal holiday per fiscal year. SB 461 adds Section 19853.2 to the California Government Code and

provides state employees the option to receive, instead of eight hours of personal holiday credit, eight hours of holiday credit specifically for observance of a holiday or ceremony of the state employee's religion, culture, or heritage. The legislature also provides a nonexhaustive list of 23 holidays or ceremonies that do not traditionally receive state recognition. Section 19853.2 only applies to those bargaining units that have met and conferred with the Department of Human Resources (CalHR) to negotiate the unit's collective bargaining agreement, regardless of if a memorandum of understanding is reached.

- *Action Item:* Applicable state employers should review and revise their policies and practice to ensure their employees can receive the new holiday credit.

## **Payroll Records and Public Works: [AB 587](#).**

- *Effective Date:* January 1, 2024.
- AB 587 mandates that when multiemployer Taft-Hartley trust funds or joint labor-management committees request payroll records, the information provided should either be on forms from the Division of Labor Standards Enforcement or contain equivalent information. Electronic certified payroll records will not be acceptable for these entities.
- *Action Item:* Employers that work as contractors or subcontractors on public work projects should ensure they provide the proper payroll information when the information is requested by a Taft-Hartley trust fund or joint labor-management committee.

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