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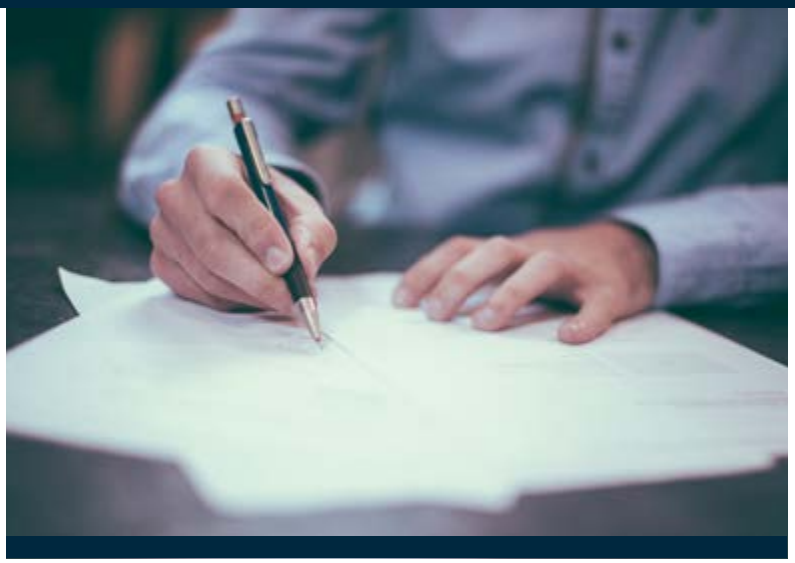
2022 CALIFORNIA LEGISLATIVE UPDATE



October 3, 2022

The 2022 California Legislative session ended on September 30, 2022, when the deadline for Governor Gavin Newsom to sign or veto pending bills expired. Overall, this session resulted in fewer new employment laws of widespread application than in recent years, but there are still some significant changes on the way, including bereavement leave, new pay scale posting requirements, a further extension of COVID-19 Supplemental Paid Sick Leave and application of consumer privacy laws to employee information collected by employers. 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 2022. Unless otherwise noted, these laws will take effect January 1, 2023.

Contents

TOP TEN NEW EMPLOYMENT LAWS

Entitlement to Five Days of Bereavement Leave (AB 1949)

An emerging criticism of the California Family Rights Act (CFRA) and the Family Medical Leave Act is that they provide time off to care for a seriously sick family member but provide no time off to the employee in the event the family member passes away. Accordingly, a number of states (e.g., Oregon, Illinois) and cities have recently enacted laws requiring employers provide bereavement leave, and California has now acted its own version.

Beginning January 1, 2023, covered employers (see below) must provide up to five days of bereavement leave following the death of an employee's "family member" (e.g., spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law). The law applies to private employers with five or more employees and to any state or civil subdivision of the state (e.g., counties and cities), and employees must be employed at least 30 days prior to the commencement of the leave to be eligible. However, it does not apply to employees covered by a collective bargaining agreement that contains specially enumerated provisions, including bereavement leave.

KEY TAKEAWAYS

- Employees entitled to five days of bereavement leave for death of family member.
- Leave may be unpaid.
- Applies to private employers with 5+ employees and states, cities, and counties.
- Employers likely subject to same penalties for discrimination/retaliation available under CFRA/FEHA.

The days of bereavement leave need not be consecutive but must be completed within three months of the date of the person's death. For most employers, this bereavement leave may be unpaid (unless the employer has an existing bereavement leave policy requiring paid time off), but an employee may use otherwise accrued or available vacation, personal leave, or compensatory time off. If an employer has an existing leave policy providing paid bereavement leave for less than five days, the employee is still be entitled to five days of bereavement leave, consisting of the number of days of paid leave under the policy and the remaining days of unpaid bereavement leave under this new law.

For permanent state employees, the first three days of bereavement leave will be paid, and the additional two days will be unpaid, but without the current requirement that these two additional days only apply for out-of-state deaths.

Notably, although this new law is codified in a new section (Government Code section 12945.7) immediately after the statute creating CFRA, bereavement leave will be considered separate and distinct from time off under the CFRA.

If requested by the employer, an employee must provide within 30 days of the first day of the leave documentation of the person's death, including a death certificate or a published obituary or written verification of death, burial, or memorial service from a mortuary, funeral home, burial society, crematorium, religious institution, or government agency. Employers must maintain the confidentiality of employees requesting this leave and to treat any documentation obtained as confidential and not disclose it except where required by law.

Because this new right is at new Government Code section 12945.7, employees who believe they have been discriminated or retaliated against (or denied available time off) will presumably be entitled to the same remedies available for violations of the CFRA and/or the FEHA. However, alleged violations of this new section against smaller employers (i.e., with between five and nineteen employees) will also be subject to the recently created mediation pilot program for CFRA claims against such smaller employers.

Expanded Entitlement under CFRA and Paid Sick Leave for "Designated Persons" (AB 1041)

In 2020, California expanded the CFRA not only to apply to almost all employers (i.e., with five or more employees) but also materially expanded the individuals for whom leave could be taken to provide care (i.e., adding siblings, grandparents, grandchildren and parents-in-law). Concerned that the statutory focus upon "nuclear family" relationships for leave purposes ignores modern realities and so-called "chosen families," this law amends the CFRA again to expand when the time-off provisions could be used. In this regard, it follows the lead of several states (Oregon, Connecticut, New Jersey, and Colorado) and at least eight localities (including Los Angeles) that allow paid sick time or paid family and medical leave to cover "designated persons."

KEY TAKEAWAYS

- CFRA leave and Paid Sick Leave available to care for "designated person."
- Employee can identify "designated person" at the time they request leave.
- Employer may limit to only one "designated person" per employee per year.

Specifically, this law amends CFRA's definition of family care and medical leave to include a "designated person," defined as "an individual related by blood or whose association with the employee is the equivalent of a family relationship." An employee may designate this individual at the time the employee requests family care and medical leave, but the employer may limit the employee to one designated person per 12-month period of family care and medical leave.

The law similarly amends the definition of "family member" in California's Paid Sick Leave law (Labor Code section 245.5(c)) to include a "designated person." As with the CFRA changes discussed above, an employee could designate that person at the time they request to use paid sick days, while the employer could limit the employee to one designated person per 12-month period of paid sick.

Changes Regarding Pay Scale Postings and Annual Pay Data Reporting (SB 1162)

Pay equity concerns have been a major recent focus for the California Legislature, including the enactment of new laws precluding the usage of prior salary history for purposes of setting salary, requiring employers provide pay scale information to applicants and mandating larger employers submit annual pay data reports. While the so-called "pay gap" has narrowed in California, the Legislature has expressed concerns these earlier requirements did not go far enough to ensure both applicants and current employees had sufficient information about the relevant pay scales for the position sought, and that the pay data reports were omitting crucial information. Accordingly, SB 1162 updates these recently enacted laws regarding pay scales and pay data reporting.

Pay Scale Posting

Presently, Labor Code section 432.3 requires an employer, upon reasonable request, to provide the pay scale for a position to an applicant after the applicant has completed an initial interview with the employer, but it does not require pay scales be provided to a current employee.

SB 1162 expands these obligations in different ways for smaller and larger employers.

- *All* employers must, upon reasonable request, provide "pay scale" information to current employees for the position in which the employee is currently employed. (Previously, the employer was only required to provide this pay scale to an applicant). For purposes of section 432.3, the definition of "pay scale" has been slightly modified to mean "the salary or hourly wage range that the employer reasonably expects to pay for the position."
- Employers with 15 or more employees must post the "pay scale" within any job posting and provide the "pay scale" to any third party engaged to announce, post, or publish a job posting for inclusion in any such job posting. Employers with fewer than 15 employees are still required to provide the pay scale to an applicant upon reasonable request.
- All employers must maintain records of a job title and wage rate history for each employee for the duration of employment plus three years after the end of employment. The Labor Commissioner is entitled to inspect these records.

Employers face new liability risk in connection with these requirements. The law allows aggrieved individuals to file a civil action or a written complaint with the Labor Commissioner, establishes a civil penalty of $100 to $10,000 per violation and creates a rebuttable presumption in favor of an employee's claim if an employer fails to keep required records. There is a narrow safe harbor provision -- no penalty shall be assessed for a first violation of the requirement to provide pay scale to applicants if the employer demonstrates that all job postings for open positions have been updated to include the pay scale as required by this section.

Annual Pay Data Reporting

In 2020, California enacted SB 973 requiring private employers with 100 or more employees that are required to file an annual Employer Information Report (EEO-1) pursuant to federal law to annually submit a pay data report to the DFEH, including the number of employees by race, ethnicity, and sex in specified job categories. SB 973 allowed employers to comply with this new reporting requirement by submitting an EEO-1 to DFEH containing the same or substantially similar pay data information. However, the California Legislature has expressed concerns that these EEO-1 reports did not identify all the information needed to be measured, particularly since the EEO-1 reports (and SB 973's requirements) did not include information about workers hired or staffed via third party labor contractors.

SB 1162 amends and expands these reporting requirements in several respects:

- While SB 973 previously applied only to employers with 100 or more employees who were required to submit an EEO-1 report, SB 1162 removes the EEO-1 requirement such that any employer with 100 or more employees must annually submit a "pay data report" (as defined in Government Code section 12999) to the DFEH.
- Employers with 100 or more employees hired through labor contractors (i.e., staffing agencies) must also submit a separate pay data report to the DFEH covering the employees hired through labor contractors in the prior calendar year (with the labor contractor being required to provide all necessary pay data to the employer). These separate reports must also disclose the ownership names of all labor contractors used to supply employees. For purposes of this new law, a "labor contractor" means an individual or entity that supplies, either with or without contract, workers to perform labor within the client employer's usual course of business.

KEY TAKEAWAYS

- → Employers with 15+ employees must include pay scale in job postings.
- → Employers must provide pay scale to current employees upon request.
- → New recordkeeping requirements re: pay and job titles.
- → Employers with 100+ employees must submit pay data reports, not simply an EEO-1, and containing new information broken down by race/ethnicity/sex.
- → Employers with 100+ labor contractors must also submit pay data report, including regarding entity providing the contractors

- These pay data reports – whether for the employees hired by the employer, or for the new labor contractor-related reports – are also now required to include median and mean hourly rates for each combination of race, ethnicity, and sex within each job category.
- Employers are no longer permitted to submit an EEO-1 in lieu of a pay data report.
- SB 1162 imposes new civil penalties of $100 per employee on an employer who fails to file the required report for a first offense, and $200 per employee for subsequent violations, but allows for apportionment of penalties if an employer is unable to submit a complete and accurate report because a labor contractor has not provided necessary pay data.
- While these pay data reports were previously due by March 31st of each year, these reports will now be due by the second Wednesday of May 2023, and then annually thereafter by the second Wednesday of each May.

COVID-19 Supplemental Paid Sick Leave Extended to December 31, 2022, and New Grants to Small Businesses or Nonprofits (AB 152)

In February 2022, California enacted SB 95 reinstating California's COVID-19 Supplemental Paid Sick Leave (SPSL) for the period January 1, 2022, through September 30, 2022. The 2022 COVID-19 SPSL law applies to all California employers who employ more than 25 employees and to all employees who are "unable to work or telework" for any of the specified qualifying reasons. Full-time employees are entitled to a maximum of 80 hours of COVID-19 SPSL leave. For more information regarding the original 2022 COVID-19 SPSL law, please see WTK's Special Alert here or the California Department of Industrial Relations "Frequently Asked Questions" here.

KEY TAKEAWAYS

- → Employees can take COVID-19 SPSL through December 31, 2022.
- → No additional entitlement to leave beyond maximum 80 hours already required.
- → Employer may require third diagnostic test from infected employees.
- → Limited grant program to cover costs for small businesses and nonprofits.

AB 152 makes several changes to this law. First, and most importantly, it extends the 2022 COVID-19 SPSL provisions from September 30, 2022 to December 31, 2022.

Second, it makes some changes related to testing. Presently, if an employee is receiving additional COVID-19 SPSL, then an employer may require the employee to submit to a second diagnostic test on or after the fifth day after the first positive test that entitled the employee to the additional COVID-19 SPSL and provide documentation of those results. This law further authorizes the employer to require an employee to submit to a third diagnostic test within no less than 24 hours if the second diagnostic test for COVID-19 is also positive, and requires the employer to provide the second and third diagnostic tests at no cost to the employee. Finally, while the employer presently has no obligation to provide COVID-19 SPSL to an employee who refuses to submit documentation of test results confirming COVID-19 infection, law also authorizes the employer to deny COVID-19 SPSL to an employee who refuses to submit to these tests.

The law also establishes a grant program to provide reimbursement for COVID-19 SPSL costs incurred in 2022 (up to a maximum of $50,000) for specified small businesses and nonprofit organizations that have 26 to 49 employees and meet other defined requirements.

Employer COVID-19 Exposure Notice Requirements Extended Through 2023 (AB 2693)

In 2020, California enacted new mandatory employer notification requirements related to potential COVID-19 exposures in the workplace. (AB 685, codified at Labor Code section 6409.6 and 6325.) Specifically, if an employer or a representative of the employer receives a "notice of potential exposure to COVID-19," the employer must provide statutorily enumerated notices within one business day of the notice of potential exposure, and potentially may also have to provide separate notice to local public health agencies within 48 hours. Cal-OSHA also can prohibit employer access to and usage of portions of the worksite that may constitute an imminent hazard to employees due to potential COVID-19 exposure. These requirements had been set to expire on January 1, 2023.

KEY TAKEAWAYS

- → Employers must continue to provide notice of COVID-19 exposure in the workplace through January 1, 2024.
- → Can provide notice via posting, rather than individual employee communications.
- → No requirement to notify local public health agency of "outbreaks."

The new law extends some of these requirements through January 1, 2024, but reduces the notification requirements and provides an alternative option to post a notice in the workplace. The law allows employers who receive notice of potential exposure to place a notice in all place where notices of workplace rules are customarily posted stating: (1) the dates on which an employee with a confirmed case of COVID-19 was on the worksite premises within the infectious period; (2) the location of the exposure, including the department, floor, building, or other area; (3) contact information for employees to receive information regarding COVID-19-related benefits; and (4) contact information for employees to receive the CDC cleaning and disinfection plan and Cal-OSHA COVID-19 prevention program. The notice must be posted within one business day from when the employer receives notice of potential exposure and remain posted for not less than 15 calendar days. If the employer posts other workplace notices on an existing employee portal, the notice shall be posted on the portal. Alternatively, the employer may provide written notice to all employees who were on the premises at the same time as the confirmed case of COVID-19 (as was required under the prior version of the statue), but need not provide to all employees who were on the premises information about COVID-19-related

benefits, the cleaning and disinfection plan, or the prevention plan. Employers are required to keep a log of all the dates the notice was posted.

The law removes the requirement to notify the local public health agency in the case of a COVID-10 "outbreak" and removes the requirement for the State Department of Public Health to make publicly available information about COVID-19 outbreaks. The new law does still require the employer to provide written notice to any exclusive representative of confirmed cases of COVID-19 and of employees who had close contact with the confirmed cases within one business day.

Protections for Non-Work-Related Marijuana Usage and Testing Limitations (AB 2188)

This law addresses concerns that some employer drug testing had focused on the presence of so-called "nonpsychoactive cannabis metabolites" that do not indicate actual impairment at work as opposed to simply revealing an employee may have smoked marijuana at some point and away from the workplace. It is also intended to encourage employers to rely more on testing for tetrahydrocannabinol (THC), which measures active impairment or psychoactive effects.

KEY TAKEAWAYS

- No employer discrimination based on cannabis use off the job/away from the workplace.
- No employer discrimination based on positive test for nonpsychoactive cannabis metabolites.
- Employees still cannot possess, use, or be impaired by cannabis at work.
- Numerous industry- and job-specific exceptions.

Accordingly, it amends the Fair Employment and Housing Act (FEHA) to preclude discrimination against an employee or applicant based upon (a) the person's use of cannabis off the job and away from the workplace (but does not prohibit "scientifically valid" pre-employment drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites); or (b) an employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids. Given the law's purpose, while it limits testing for nonpsychoactive cannabis metabolites, it does not limit THC testing.

To address employer concern, this law does not permit employees to possess, be impaired by or to use cannabis at work, nor does it affect an employer's rights or obligations to maintain a drug and alcohol-free workplace, as specified under Health and Safety Code section 11362.45 or any other rights or obligations of an employer specified by federal law or regulation. It also does not apply to employees in the building and construction trades or applicants or employees in positions that require a federal background investigation or security clearance. Additionally, it does not preempt state or federal laws requiring applicant or employee testing for controlled substances, or how this testing occurs, including laws and regulations requiring applicant or employee testing as a condition of receiving federal funding or federal licensing-related benefits.

These new rules will become operative on January 1, 2024.

Retaliation Protections Related to Emergency Conditions (SB 1044)

This law responds to media reports of employees killed or injured during recent natural disasters (e.g., warehouse employees affected the December 2021 tornado outbreak, or domestic workers forced to work during California's fire outbreaks), or during "active shooter" situations. Accordingly, it precludes employers from taking or threatening adverse action against employees who refuse to report to or who leave a workplace within the affected area because the employee reasonably believed the worksite was unsafe due to an "emergency condition" (as defined below) This particular provision does not apply to various statutorily enumerated employers and employees, including first responders, disaster service workers, health care workers, employees working on a military base or in the defense industrial base sector, utility workers, licensed residential care facilities and certain "depository institutions" (as defined).

KEY TAKEAWAYS

- Employers cannot retaliate against employees who refuse to work during "emergency conditions."
- Employees also permitted to use electronic devices to research safety information during "emergency conditions."

A broader provision prohibits all employers, in the event of an emergency condition, from preventing employee access to their mobile devices or other communications devices for seeking emergency assistance, assessing the safety of the situation, or communicating with a person to verify their safety (except in very narrow specifically enumerated occupations).

For purposes of this law, an "emergency condition" means the existence of either (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; or (2) an order to evacuate a workplace, a worker's home, or the school of a worker's child due to natural disaster or a criminal act. Emergency condition, however, does not include a health pandemic.

A "reasonable belief that the workplace or worksite is unsafe" is defined to mean "that a reasonable person, under the circumstances known to the employee at the time, would conclude that there is a real danger of death or serious injury if that person enters or remains on the premises." For these purposes, the existence of any health and safety regulations specific to the emergency condition and an employer's compliance or noncompliance with those regulations is

a relevant factor if this information is known to the employee at the time of the emergency condition or the employee received training on the health and safety regulations mandated by law specific to the emergency condition.

As in other time-off contexts, an employee is required, when feasible, to notify the employer of the state of emergency or emergency condition requiring the employee to miss or leave work. If such notice is not feasible, the employee shall notify the employer of these conditions as soon as possible afterwards.

The law specifies it is not intended to apply when the emergency conditions that pose an imminent and ongoing risk of harm to the workplace, the worksite, the worker, or the worker's home have ceased.

Lastly, it provides that employers shall have the right to cure alleged violations that could be brought pursuant to PAGA.

Creation of Fast Food Industry Council re: Pay and Working Conditions (AB 257)

Touted by its proponents as a step toward sectoral bargaining, in which workers and employers negotiate compensation and working conditions on an industrywide basis, this first-in-the-nation law – the Fast Food Accountability and Standards (Fast) Recovery Act – establishes 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.

KEY TAKEAWAYS

- Council with employer, employee, and state representatives will make new rules for fast food industry.
- May adopt fast food minimum wage up to $22/hour for 2023.
- New protections against retaliation for fast food workers.

The law applies to fast food restaurants, defined as establishments that are part of a chain of 100 or more establishments *nationally* 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. The 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 Council will have ten members comprised of representatives of fast-food restaurant franchisors, franchisees, employees, advocates for employees, and the government, all to be appointed by the Governor, the Speaker of the Assembly, and the Senate Rules Committee. The Council is authorized to establish minimum standards for fast-food workers, including setting minimum wages and establishing standards for working hours and other conditions related to health, safety and welfare. (The Council will not be allowed to make any rules until the DIR receives a petition approving the creation of the council signed by at least 10,000 California fast food restaurant employees.) Decisions by the Council shall be made by a vote of at least six of the Council members, meaning decisions could be made over the objection of the two representatives of fast-food franchisors and the two representatives of fast-food franchisees. The legislature has the ability to pass legislation to prevent a standard, repeal or amendment proposed to be adopted by the Council.

The law specifies that the council shall not establish a minimum wage greater than $22 per hour for 2023, and that the minimum wage shall not increase in later years by more than 3.5% or the rate of change of the non-seasonably adjusted Consumer Price Index for Urban Wage Earners and Clerical Workers. The law states that even after the Council ceases to be operative on January 1, 2029, the minimum wage for fast food restaurant employees would continue to increase by the lesser of these amounts every year. The Council will not be permitted to promulgate new paid time off benefits or regulations regarding predictable scheduling. 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.

The law also makes it unlawful for a fast food restaurant operator to discharge or discriminate or retaliate against any employee because the employee made a complaint or disclosed information (or the restaurant operator believes the employee disclosed or may disclose information) regarding employee or public health and safety; the employee instituted, testified in, or participated in a proceeding relating to employee or public health or safety or any Council proceeding; or the employee refused to perform work in a fast food restaurant because the employee had reasonable cause to believe the practices or premises of the fast food restaurant would violate any specified worker and public health and safety laws, regulations or orders, or would pose a substantial risk to the health and safety of the employee, other employees, or the public. The law creates a private right of action for violation of this provision and allows treble damages for lost wages and work benefits, along with attorney's fees and costs and reinstatement of employment. There is a rebuttable presumption of unlawful discrimination or retaliation if a fast-food restaurant operator discharges or takes any other adverse action against one of its employees within 90 days following the date the operator had knowledge of the employee's protected action.

Data Privacy Law Exemption for Businesses with California Workers Will Expire December 31, 2022

The California legislature ended this year's session without extending employers' partial exemption from certain requirements under the California Consumer Privacy Act of 2018 (CCPA) and California Privacy Rights Act of 2020 (CPRA), California's consumer privacy law. Therefore, the exemption will expire December 31, 2022, and the laws will become applicable to information about employees, applicants, independent contractors, and other workers ("Workforce Members").

The CCPA applies to businesses that satisfy all three of the following criteria:

1. The company does business in California; *and*
2. The company is a for-profit business; *and*
3. The company meets *any* of the following thresholds (effective January 1, 2023):
    a. Has gross annual revenues over $25 million; or
    b. Buys, receives, or shares the personally-identifiable information of 100,000 or more consumers or households; or
    c. Derives 50% or more of its annual revenue from selling or sharing consumers' personal information.

The CCPA regulates collection and use of "personal information," which is defined as information that directly or indirectly identifies, relates to, or describes a particular person. In the employment context, the law is likely to be broadly applied to cover IP addresses, background search results, and resumes from online applicants; Covid 19 vaccination, temperature, or exemption status of employees and vendors on premise; and more traditional data such as employee files and non-public home contact information, among many other types of information.

KEY TAKEAWAYS

- Employer partial exemption from California Consumer Privacy Act and California Privacy Rights Act *expires December 31, 2022.*
- Covered businesses have extensive new obligations re:
    - Disclosures before collection of personal information from employees, applicants, independent contractors, etc.
    - Response to requests for disclosure, deletion, and correction of personal information
    - Limitation on use of personal information
    - Non-Retaliation/Discrimination in connection with privacy rights.

Even before January 1, 2023, covered businesses were required to provide collection notices to their Workforce Members before collecting personal information and were required to adequately protect collected personal information. The collection notices must contain the categories of personal information the business collects and the intended use purposes for the categories of personal information. The CPRA expands these pre-collection disclosure obligations. As of January 1, 2023, covered businesses will also need to include disclosures regarding sensitive personal information, information about whether any personal information is sold or shared, and the retention period for each category of personal information or sensitive personal information or the criteria used to determine the relevant retention period.

Additionally, as of January 1, 2023, Workforce Members will have *new rights* with respect to their personal information, including the rights to:

- Know what personal information the business collected, sold, shared or disclosed about them, including specific pieces of personal information held;
- Require the business to correct inaccurate personal information;
- Require the business to delete their personal information (with some exceptions);
- Opt-out of the sale or sharing of their personal information by their employer and employer's vendors;
- Restrict the use and disclosure of their sensitive personal information; and
- Not be retaliated against for exercising these rights.

Covered businesses will have commensurate new obligations in connection with Workforce Members' personal information, including obligations to:

- Provide extensive privacy notices;
- Respond to data rights requests;
- Limit uses and disclosures of personal information;
- Obtain specific contractual commitments from third parties receiving personal information; and
- Refrain from discriminating or retaliating against Workforce Members for exercising their privacy rights.

The applicable laws and regulations are complex and include nuanced rules and exceptions that exceed the scope of this brief overview. Moreover, applicable regulations are still being prepared. For additional information, please see our Special Alert.

Statewide Minimum Wage Increases to $15.50 on January 1, 2023

Enacted in 2016, SB 3 implemented a series of annual increases to the statewide minimum wage until reaching $15.00 per hour. Presently, the statewide minimum wage is $15.00 per hour for employers with 26 or more employees, and $14.00 per hour for employers with 25 or fewer employees (with the minimum wage for these smaller employers scheduled to increase to $15.00 per hour on January 1, 2023).

However, SB 3 also contains provisions requiring further minimum wage increases if the Consumer Price Index exceeds certain enumerated levels, which it has over the last year. Accordingly, the statewide minimum wage will increase to $15.50 per hour for all employers, regardless of the number of employees, on January 1, 2023. The minimum salary threshold necessary to maintain an employee's exempt status will also increase to $64,480 annually and to $5,373.33 per month on January 1, 2023.

On July 1, 2022, 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, 2023. A complete list of these city and county-level minimum wage increases in California is available **HERE**.

KEY TAKEAWAYS

- Statewide minimum wage of $15.50 for all employers.
- Minimum salary for exempt status $64,480 per year and $5,373.33 per month.
- Applicable January 1, 2023.
- Be aware of local increases.

ADDITIONAL NEW CALIFORNIA LAWS

HUMAN RESOURCES/WORKPLACE POLICIES

New Requirements Regarding Employee Parking (AB 2206)

To combat air pollution and promote alternative transportation, Health and Safety Code section 43845 presently requires that in certain "air basins designated as a nonattainment area," employers with 50 or more employees that provide a parking subsidy to employees must also offer a "parking cash out program" to employees that do not use this parking. However, employers have expressed difficulty calculating and paying out this subsidy since many commercial leases simply bundle parking with other lease services rather than separately designating the cost of parking spots. This commercial practice has also made it difficult for the state agencies to enforce the law's requirements.

To address these problems and to further publicize a somewhat unknown law, this law revises the definitions of "parking cash-out program," "parking subsidy" and "the market rate cost of parking," and imposes two new record retention requirements upon employers.

Simply summarized, "parking cash out program" means an employer-funded program under which the employer provides a cash allowance to eligible employees that is equal to or greater than the "parking subsidy" the employer would otherwise pay to provide the employee with a parking spot. In turn, "parking subsidy" is defined as "the difference between the price charged to the employee for the use of a parking space not owned by the employer and made available to that employee and the 'market rate cost of parking.'"

The definition of "market rate cost of parking" is quite detailed but broadly speaking is an amount no less than if the parking were obtained by an individual unaffiliated with the property on which the parking is provided or by the employer through a transaction for the closest publicly available parking within one quarter mile of the employee's workplace. If the market rate cost of parking cannot be established using this formula, then it is alternatively defined as an amount that is the monthly or daily price for use of a parking space located within one-quarter mile of the place of employment, as evidenced by a public offer such as a printed or public advertisement, or a listing price such as on a smartphone app, available to the public for that parking spot within the previous six months.

Notably, employers are now required to maintain for at least four years appropriate evidence of efforts to establish the marking rate cost of parking or relevant parking offers used to determine market rate costs.

Where the "market rate cost of parking" can be determined, the market value for parking subsidy purposes is capped at $350 per month. If the market value of a parking space cannot be established, the value shall be assumed to be the greater of the lowest-priced transit serving the site or $50 per month.

If the employer provides a parking subsidy to an employee, the employer is also now required to maintain a record of its communications informing that employee of their right to receive the cash equivalent of the parking subsidy.

As before, the parking cash-out program may require the employee certify they will comply with the employer's guidelines to avoid neighborhood parking problems, and that failure to comply will disqualify the employee from the parking cash-out program.

Public Access to Employee Restrooms (AB 1632)

Since 2005, 17 states have passed laws requiring businesses to allow members of the public experiencing a medical emergency to use employee-only restrooms. AB 1632 enacts a similar requirement in California.

Places of business open to the public for the sale of goods and that have a toilet facility for their employees must permit certain individuals who are lawfully on the business' premises to use that toilet facility during business hours, even if the business does not normally allow public usage of the employee restrooms. Such access must be provided if all of the following conditions are met: (1) the individual requesting access has an "eligible medical condition" or uses an ostomy bag; (2) three or more employees are working onsite when the employee requests access; (3) the employee toilet facility is not located in an employee changing area or an area where access would create an obvious health/safety risk to the requesting individual or an obvious security risk to the place of business; (4) use of the employee toilet facility would not create an obvious risk or safety risk to the requesting individual; and (5) a public restroom is not otherwise immediately accessible.

"Eligible medical condition" is defined as Chron's disease, ulcerative colitis, other inflammatory bowel disease, irritable bowel syndrome, or another medication condition that requires immediate access to a toilet facility.

Businesses are permitted to require the individual to present reasonable evidence of an eligible medical condition or the use of an ostomy device. Such evidence includes a signed statement issued to the requesting individual by a physician, nurse practitioner or physician assistant on a form to be developed by California's State Department of Public Health. Businesses are not required to make any physical changes to the employee toilet facility to comply with this law, and these employee toilet facilities are not considered "places of public accommodation" for purposes of state disability law.

The Public Health Department is solely responsible for enforcing these provisions (i.e., there is no private civil action allowed), and violations result in civil statutory penalties up to $100 per violation. Places of businesses may only be civilly liable for willful or grossly negligent violations. Employees of a business are not subject to civil liability, nor can they be discharged or subjected to other disciplinary action by their employer for any violations of these new access requirements, unless the employee's actions are contrary to an expressed policy developed by their employer pursuant to this section.

Expansion of Businesses Required to Post Human Trafficking Notice (AB 1661)

Existing law requires specified businesses and other establishments, including, among others, airports, rail stations, certain medical facilities, and hotels, to post a notice, as developed by the Department of Justice, which contains information relating to slavery and human trafficking, and imposes penalties for failing to comply. This new law also requires businesses providing hair, nail, and skin care (as defined) to post the notice.

New CalOSHA Notice Requirements, Including in Multiple Languages (AB 2068)

Under current law, if CalOSHA believes an employer has violated any health and safety standards or regulations, it may issue a citation describing the alleged violations and penalties and require the employer to conspicuously post the notice for three working days or until the problem is corrected, whichever is longer. This new law responds to concerns that COVID deaths disproportionately impacted certain industries and workers, particularly those workers who may not have understood workplace protections or notices due to language barriers. Accordingly, it expands the information that must be included in CalOSHA's citation notices and ensures these citations will be available in additional languages.

First, CalOSHA will develop an employee notification that the employer must also post if they are required to post a citation or special order. This forthcoming CalOSHA employee notification shall contain at least all of the following: (1) notice that CalOSHA investigated the workplace and found one or more workplace safety or health violations; (2) notice that this investigation resulted in one or more citations that the employer is required to post at the place of violation for the longer of three working days or until the unsafe condition is corrected; (3) notice that the employer must communicate any workplace hazards to employees in a language and manner they understand; and (4) CalOSHA's contact information and the internet website where employees can search for citations against their employer.

CalOSHA will also make these employee notifications available in not only English, but also the top seven non-English languages used by limited English-proficient adults in California, as determined by the most recent United States Census Bureau survey. If Punjabi is not included amongst these top seven non-English languages, CalOSHA will nonetheless makes these notifications available in Punjabi.

Employee and Subcontractor Compliance with Workplace Safety Requirements at Live Events (AB 1775)

This law applies to "contracting entities," defined as bodies that contract with an entertainment events vendor to set up, operate, or tear down a live event at a public events venue – including state or county fairgrounds, state parks, the University of California, or California State University. Contracting entities must require an entertainment events vendor to certify for their employees and subcontractors' employees that those individuals have complied with specified training, certification, and workforce requirements, including that employees involved in setting up, tearing down; or the operation of a live event at the venue have completed proscribed OSHA training. The law provides that the new requirements shall be enforced by the issuance of a citation and notice of civil penalty.

Remote Work for Finance Lender Employees (AB 2001)

While California's Financing Law (CFL) presently precludes finance lenders from transacting business at a location other than that identified in its license, this law authorizes licensees under the CFL to designate employees who could work at a "remote location" (as defined) provided certain criteria are met (e.g., prohibiting consumer's personal information from being stored at the remote location unless stored on an encrypted device or encrypted media, as defined). In effect, it codifies the COVID-19 requirements issued by the Department of Financial Protection and Innovation to enable finance lender employees to work remotely during the initial stages of the pandemic.

Establishing "Juneteenth" as a State Holiday (AB 1655)

This law adds June 19, known as "Juneteenth," as a state holiday and authorizes state employees to elect to take time off with pay, with specified exemptions.

Sealing of Criminal Records Regarding Felony Convictions (SB 731)

Like many states, California has recently enacted several laws designed to remove employment barriers related to an applicant's arrest records or criminal convictions. These laws include California's "ban the box" law (AB 1008 [2017]), which generally limited an employer's ability to inquire about conviction history until after a conditional employment offer is made, and its automatic relief law (AB 1076 [2019]), which requires the state Department of Justice (DOJ) to affirmatively review and seal criminal record information related to certain convictions (generally misdemeanors).

This law expands these protections in several regards, with overall goals of sunsetting certain records and allowing automated sealing of other records. First, it expands the court's discretionary power to provide expungement relief to all felonies except those that require registration as a sex offender, where certain conditions are met. Second, it expands automatic arrest record relief – i.e., where the state DOJ reviews and seals records rather than requiring an applicant to petition for such relief – to most felony offenses provided certain criteria are present (e.g., there is no indication criminal proceedings have been initiated, at least three calendar years have elapsed since the arrest date and no conviction occurred, or the arrestee was acquitted of any charges arising from that arrest).

Third, it expands automatic conviction relief – where the state DOJ reviews records and grants relief without requiring a petition for relief – to convictions for non-violent, non-serious felonies that do not require sex offender registration provided certain criteria are present (e.g., completion of all terms of incarceration, probation, mandatory supervision, post-release community supervision, and parole, and a period of four years has elapsed during which the defendant was not convicted of a new felony offense). This form of conviction relief has some limited implications (for example, it does not relieve a person of the obligation to disclose a criminal conviction in an application for employment as a peace officer and does not make a person eligible to provide defined in-home supportive services), and the prosecuting attorney or probation department may petition to prevent the relief based on a showing of a substantial threat to public safety.

In addition, the law specifies that these various forms of conviction relief do not apply to teacher credentialing or employment in public education, except that the law prohibits denial of a credential based on a record of conviction for possession of specified controlled substances that is more than five years old and from which relief was granted.

This law does not necessarily impose new affirmative duties upon employers, except to the extent it further limits the information they can seek out and/or consider during background checks.

Creation of Ultrahigh Heat Standard and Revision of Wildfire Smoke Standard (AB 2243)

The California Occupational Safety and Health Act of 1973 (OSHA) requires employers to comply with certain safety and health standards, including a heat illness standard to prevent heat-related illness in outdoor places of employment and a standard for workplace protection from wildfire smoke. This law requires the Division of Occupational Safety and Health to submit a rulemaking standard to consider revising the heat illness standard to require employers to provide a copy of the Heat Illness Prevention Plan to all new employees upon hire and upon training required by 8 C.C.R. § 3395, but no more than twice per year to each employee. The law also requires a rulemaking proposal to consider revising the wildfire smoke standard regarding farmworkers to reduce the existing air quality index threshold at which respiratory protective equipment becomes mandatory for farmworkers. Finally, the law requires the division to consider developing or revising regulations related to additional protections related to acclimatization to higher temperatures. The law requires the division to submit these rulemaking proposals before December 1, 2025 and requires the standards board to consider adopting revised standards before December 1, 2025.

HARASSMENT/DISCRIMINATION/ RETALIATION

Revival of Sexual Assault and Other Claims (Including Wrongful Termination and Sexual Harassment) Arising Out of the Assault (AB 2777)

Entitled the Sexual Abuse and Cover Up Accountability Act, this law addresses concerns that victims of sexual assault may need additional time to pursue legal claims by modifying the statute of limitations for two types of sexual assault claims.

The first change involves claims of adult sexual assault and addresses concerns that a recent extension of the relevant statute of limitations to 10 years was insufficient to revive otherwise stale claims. For background, in 2019, California enacted AB 1619 extending the statute of limitations for sexual assault from two to ten years. However, AB 1619 did not expressly state that it was intending to revive otherwise time-barred claims. Thus, AB 2777 provides that any sexual assault claim (as defined) based upon conduct that occurred after January 1, 2009 (ten years preceding AB 1619) and commenced after January 1, 2019, which would have been barred solely because of the statute of limitations, is timely if filed by December 31, 2026.

The second change has greater potential applicability to employers and involves damages suffered because of a cover up of sexual assault occurring on or after a victim's 18th birthday, which could include "related claims" including wrongful termination and sexual harassment. For such claims that would otherwise be barred because the statute of limitations expired before January 1, 2023, it allows such claims to be revived if filed between January 1, 2023, and December 31, 2023. This provision theoretically applies to any time-barred covered claim and does not have a limit on the age of the claims that may be revived.

To qualify for this claim revival, a plaintiff must allege all of the following: (a) they were sexually assaulted; (b) one or more entities are legally responsible for damages arising out of this alleged conduct; and (c) the entity or entities (including their agents, officers or employees) engaged in or attempted to engage in a "cover up" of a previous instance of sexual assault by an alleged perpetrator of such abuse.

For purposes of this new law, "cover up" means a concerted effort to hide evidence relating to a sexual assault that incentivizes individuals to remain silent or prevents information relating to this behavior from being public or disclosed to the plaintiff, including the use of non-disclosure or confidentiality agreements.

As noted, if revival occurs, it applies to any "related claims" arising out of the sexual assault, including wrongful termination and sexual harassment, except for claims (a) litigated to finality in a court of competent jurisdiction before January 1, 2023, or (b) that have been compromised by a written settlement agreement between the parties entered into before January 1, 2023.

DFEH to Recognize Businesses that Prevent Customer Harassment (AB 2448)

California's Unruh Civil Rights Act (Civil Code section 51 et seq.) prohibits business establishments from discriminating (i.e., withholding services or denying accommodations) based on specified characteristics, including sex, race, religion, sexual orientation, medical condition, national origin, or immigration status. This law requires the Civil Rights Department within the Department of Fair Employment and Housing to develop a pilot program by January 1, 2025, recognizing businesses that create safe and welcoming environments free from discrimination and harassment of customers. To qualify for such recognition, business will need to meet the department's to-be-determined criteria, but which may include: (1) demonstrating compliance with the Unruh Act generally; (2) offering additional training to educate and inform employees or build skills; (3) informing the public of their right to be free from discrimination and harassment; (4) outlining a code of conduct for the public encouraging respectful and civil behavior; and (5) any other actions designed to prevent and respond to harassment or discrimination, regardless of the perpetrator's identity. This recognition, however, will not establish or be relevant to any defense of potential claims against the employer.

Notably, this law had originally proposed requiring businesses to undertake numerous additional affirmative actions to prevent third-party harassment of customers, including annual training of supervisory and non-supervisory employees. These training requirements were deleted from the final version but may resurface next year.

DFEH Acting in Public Interest (AB 2662)

This law declares that in enforcing the FEHA, the Department of Fair Employment and Housing represents the state and effectuates the declared public policy of California to protect the rights of all persons to be free from unlawful discrimination and other FEHA violations. It is intended to be declarative of existing law and to codify the holding in *Department of Fair Employment and Housing v. Cathy's Creations, Inc.* (2020) 54 Cal.App.5th 404, 410.

COVID-19 RELATED PROPOSALS

Extension of Presumption of Workers' Compensation Coverage for COVID-19 (AB 1751)

On September 17, 2020, California created a rebuttable presumption of workers' compensation coverage for employees who contracted a COVID-19-related illness under certain circumstances, with slightly different rules depending on whether the workplace exposure occurred before or after July 6, 2020. (SB 1159, codified at Labor Code sections 3212.86, 3212.87, and 3212.88.) The original law was set to expire January 1, 2023, but AB 1751 extends these rebuttable presumptions through January 1, 2024.

WAGE AND HOUR

Extension of Meal and Rest Period Requirements to Employees of Public Hospitals (SB 1334)

Existing law requires an employer to provide specified meal and rest periods to employees of private sector hospitals and provides a remedy of one hour of premium pay for missed meal and rest breaks, while excepting employees in the public sector from these requirements. This law applies to employees who

provide direct patient care or support direct patient care in a general acute care hospital, clinic, or public health setting and who are employed by the state, political subdivisions of the state, municipalities, and the Regents of the University of California. Employees are entitled to one unpaid 30-minute meal period on shifts over 5 hours and a second unpaid 30-minute meal period on shifts over 10 hours (with the same waiver and on-duty provisions allowed in Wage Orders 4 and 5), as well as a rest period based on the total hours worked daily at the rate of 10 minutes net rest time per 4 hours worked or major fraction thereof. Employers are required to pay one hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided.

Pay and Benefits for State Employees for National Guard Drills (SB 984)

Presently, state employees who are members of reserve military units and the National Guard are entitled to an unpaid leave of absence to attend scheduled reserve drill periods or to perform other inactive duty reserve obligations. This law recasts those provisions to instead require that employee members of reserve military units and the National Guard required to perform inactive duty obligations, other than inactive and active duty training drills periods (as specified), be granted military leave of absence without pay as provided by federal law. It also allows employee members that attend or perform inactive duty obligations, other than inactive and active duty training drill periods, to elect to use vacation time or accumulated compensatory time off to attend those other obligations.

Government Code section 19775.1 presently provides that an employee who is granted short-term military leave of absence for active military duty, but not for inactive duty, and how for at least a year prior had a continuous state service of at least one year, is entitled to their salary or compensation for the first 30 calendar days of active duty served during the absence. This law also entitles an employee to receive their compensation for short-term military leave of absence for National Guard active duty and inactive duty training drill periods.

Extended Exemption from "ABC Test" for Commercial Fishers (AB 2955)

This law extends from January 1, 2023, to January 1, 2026, the exemption from the so-called "ABC Test" for employee classification purposes for commercial fishers working on an "American vessel" (as defined). During this period, these relationships will continue to be governed by the multifactor Borello test for purposes of determining whether the fisher is an employee or an independent contractor.

PUBLIC SECTOR/LABOR RELATIONS

New Labor Relations Rules for Agricultural Employers, Including "Card Check" Voting (AB 2183)

While agricultural employees previously could unionize via secret ballot elections, this law creates new ways to vote in union elections, including additional options for mail-in ballots and authorization cards (so-called "card check") submitted to the California Agricultural Labor Relations Board (ALRB). Specifically, it permits certification of an exclusive bargaining representative either a "labor peace election" or a "non-labor peace election," depending on whether an employer enrolls and agrees to a labor peace election.

Every agricultural employer has the option to indicate whether they agree to a labor peace compact each year. A "labor peace compact" is defined as an agreement to make no statements for or against union representatives, to voluntarily allow labor organization access, not to engage in any captive audience messaging, not to disparage the union, and not to express any preference for one union over another. A labor peace compact does not prohibit an employer from communicating truthful statements to employees about workplace policies or benefits, provided that such communications make no reference to any union or protected concerted activity.

A labor peace election would allow employees to make a choice regarding union representation through a mail ballot election, with specific rules set forth in the law. If an employer does not agree to a labor peace compact, a labor organization could become the exclusive representatives for agricultural employees via a petition alleging that a majority of the employees in the bargaining unit wish to be represented by the organization, with specific requirements set forth in the law.

The law creates civil penalties for employers who commit unfair labor practices of up to $10,000. It also requires an employer who appeals or petitions for writ of review of any order of the board involving make-whole, backpay or other monetary awards to employees to post an appeal bond in the amount of the entire economic value of the order.

Governor Newsom states he signed this law conditioned upon a supplemental agreement (likely to be codified in 2023) regarding the number of card-check petitions that would be permitted and allowing the ALRB to safeguard worker confidentiality.

Penalties and Potential Liability for Discouraging Union Membership (SB 931)

Government Code section 3550 currently prohibits a public employer from deterring or discouraging employees or applicants from becoming members of an employee organization, authorizing representation by an employee organization, or authorizing dues or fees to an employee organization. This law authorizes

an employee organization to bring a claim before the Public Employment Relations Board alleging violation of these rules and establishes a civil penalty up to $1000 for each affected employee, not to exceed $100,000 in total, to be deposited in the General Fund. The Board must consider the employer's annual budget, the severity of the violation, and any prior history of violations in assessing the penalty. The law instructs the Board to award attorney's fees and costs to a prevailing employee organization unless the Board finds the claim was frivolous, unreasonable, or groundless when brought, or the employee organization continued to litigate after it clearly became so.

Expanded Access to Health Benefits While on Strike (AB 2530)

Under the federal Affordable Care Act, qualified individuals can receive financial assistance and cost-sharing reductions for health insurance purchased on a state exchange if they meet certain eligibility requirements, including a qualifying income level. Under current law, there is no requirement for an employer to continue employee health insurance coverage for unionized employees while they are out on strike. This law will, upon appropriation by the legislature, require California's state based health insurance exchange to administer a financial assistance program to help workers obtain health benefits through the Exchange if the individual loses employer health care coverage as a result of a strike, lockout, or other labor dispute. The law goes into effect July 1, 2023. Eligible individuals would receive the same premium assistance and cost-sharing reductions as an individual with a household income of 138.1% of the federal poverty level, and would not be subject to a deductible for any covered benefit. According to the bill's author, this law will provide workers who lose health benefits due to a labor dispute a slightly improved version of the most affordable coverage package offered by the California exchange.

STATE PROVIDED BENEFITS

Increase Paid Family Leave Benefits (SB 951)

To address concerns the current Paid Family Leave benefits paid by the state Disability Fund are insufficient to enable many lower wage workers to take family leave, this law increases the weekly benefits from 60% to up to 70% of an employee's wages or 90% of an employee's wages, depending on their wage rate (subject to certain caps). These increased benefits begin January 1, 2025. The law also removes a limitation on workers' contributions to the Unemployment Compensation Disability Fund on January 1, 2024.

Electronic Application for Work Sharing Program Extended (AB 1854)

Existing unemployment compensation law deems an employee unemployed in any week if the employee works less than their usual weekly hours of work because of the employer's participation in a work sharing plan that meets specified requirements, pursuant to which the employer, in lieu of a layoff, reduces employment and stabilizes the workforce. This new law extends indefinitely an alternative process adopted during the COVID pandemic, allowing these work sharing plans to be submitted and approved electronically.

Changes to Workers' Compensation Liability Presumptions, Coverage, and Penalties (SB 1127)

Existing law provides that if an employer does not reject liability within 90 days after receiving an injured employee's claim form, an injury is presumed compensable under the workers' compensation system. This law reduces that period to 75 days for certain injuries for law enforcement or first responders. In addition, the law increases the number of compensable weeks for specified firefighters and peace officers for illness or injury related to cancer from 104 weeks to 240 weeks. Finally, the law increases the penalty for unreasonably rejecting specified claims for law enforcement or first responders from the current amount (25% of the unreasonably delayed or refused claim or a minimum of $10,000) to five times the amount of the benefits unreasonably delayed, up to a maximum of $50,000.

Treatment by Licensed Clinical Social Workers under Workers' Compensation (SB 1002)

Existing workers' compensation law requires employers to provide medical services reasonably required to cure or relieve an injured worker from the effects of covered injuries. This law expands the meaning of medical treatment to include the services of a licensed clinical social worker (LCSW) and authorizes an employer to provide an employee with access to an LCSW. The law authorizes medical provider networks to add LCSWs to the physician providers listing and prohibits an LCSW form determining disability, as specified. A licensed clinical social worker is authorized to treat or evaluate an injured worker only upon referral from a physician.

MISCELLANEOUS

Cal/WARN Changes, Including as Applied to Call Center Relocations (AB 1601)

As with many other federal statutes, California has its own version of the federal Worker Adjustment and Retraining Act (Cal/WARN Act [Labor Code section 1400, et seq.]) with both similarities to and differences from its federal counterpart. This law amends the Cal/WARN Act to authorize certain notice requirements concerning a mass layoff, relocation or termination of employees, including "call center" employees. It also grants the Labor Commissioner the authority to investigate an alleged violation, order appropriate temporary relief to mitigate a violation pending completion of a full investigation or hearing, and issue a citation in accordance with certain procedures.

The law prohibits a call center employer from ordering a relocation of its call center, or one or more of its facilities or operating units within a call center unless it complies with CalWARN-type notice requirements (e.g., notice to the affected employees, the EDD, the local workforce investment board, and the chief

elected official of each city and county government within which the relocation/mass layoff occurs). It also establishes remedies if a call center employer fails to provide such notices. Call center employers who appear on the EDD's relocation list that fail to provide such notices will be ineligible for state grants, state-guaranteed loans, or tax benefits for five years after the date that the list is published. Such call center employers would also be ineligible to claim a tax credit for five taxable years beginning on and after the date the EDD's list is published.

Creation of Advisory Committees Re: Extreme Heat and Humidity (AB 1643)

This law requires the Labor and Workforce Development Agency to establish an advisory committee to study the effects of heat on California's workers and to recommend the scope of a study that addresses prescribed topics related to data collection, certain economic losses, injuries and illnesses, and methods of minimizing the effect of heat on workers. The law authorizes the advisory committee to contract with academic institutions or other researchers to issue a report no later than January 1, 2026.

LOCAL ORDINANCES

San Francisco Amends Family Friendly Workplace Ordinance

In 2014, the Family Friendly Workplace Ordinance became operative in San Francisco. It gave certain employees the right to request flexible or predictable work arrangements to assist with caregiving responsibilities. On March 14, 2022, the City of San Francisco amended its Family Friendly Workplace Ordinance. The amendments went into effect July 12, 2022, and affect any employer with 20 or more employees (in any location) which has workers either *working in or telecommuting out* of San Francisco. Pursuant to the amendment, the ordinance applies to employers whose employees telecommute out of San Francisco if the employer maintains an office or worksite within the city of San Francisco at which the employee may work, or prior to the COVID-19 pandemic was permitted to work.

The ordinance covers employees who are employed in San Francisco, have been employed for six months or more by their current employer, and work at least eight hours per week in San Francisco on a regular basis.

While the prior ordinance simply gave employees the right to request flexible or predictable work arrangements, the amendment requires employers to provide predictable or flexible working arrangements for qualifying caregiving responsibilities upon request by the employee except where it would create an undue hardship, as defined. The amendment also *requires* employers to engage in a good-faith interactive process to find predictable or flexible arrangements. There are specific requirements for responding to an employee request, including that the employer must respond to a request in writing within 21 days, must explain the basis for any denial, and – if a request is denied – must engage in a good faith interactive process to determine an alternate flexible or predictable working arrangement that is acceptable to the employee and employer. An employer may deny a flexible or predictable working arrangement only if granting such an arrangement would cause the employer undue hardship by causing the employer significant expense or operational difficulty when considered in relation to the size, financial resources, nature, or structure of the employer's business.

The ordinance, as amended, protects caregiving for a child/children under the age of 18, a person/persons with a serious health condition in a family relationship with the employee, or any person age 65 or older who is in a family relationship with the employee. "Family relationship" is defined as a relationship in which a caregiver is related by blood, legal custody, marriage, or domestic partnership to another person as a spouse, domestic partner, child, parent, sibling, grandchild, or grandparent.

The San Francisco Office of Labor Standards and Employment has released Rules to implement the FFWO amendments. More information is available at the city's website.

San Francisco Public Health Emergency Leave

In June, San Francisco voters passed Proposition G, creating a new Public Health Emergency Leave Ordinance, which will be operative on October 1, 2022. The new ordinance applies to employers with more than 100 employees worldwide. It covers employees who perform work within the City and County of San Francisco for those employers. The ordinance provides up to 80 hours of **paid** leave per year (with the actual leave calculation differing for employees who are full or part time and on a fixed or variable schedule) if a covered employee is unable to work or telework for one of five specified reasons. The Public Health Emergency Leave is in addition to any paid time off, including paid sick leave under the San Francisco Paid Sick Leave Ordinance. The leave is available only during a public health emergency, defined as a local or statewide health emergency related to any contagious, infectious or communicable disease, declared by the City's local health officer or the state health officer or an Air Quality Emergency (a day when the Bay Area Air Quality Management District issues a "Spare the Air Alert").

Employers of health care providers and emergency responders may limit the leave as specified in the Ordinance. The Ordinance specifies that employees who assert their rights to receive Public Health Emergency Leave are protected from retaliation. Covered employers will be required to post a notice, which you can access here. There are detailed requirements for the implementation of this leave, which you can review here.

NEW STATE REGULATIONS

Changes to Definition of "Close Contact" for COVID-19 Purposes

CalOSHA updated its Emergency Temporary Standards and corresponding FAQs in late June 2022. Notably, there are several revised definitions that will be applied in connection with the California Department of Public Health's recommendations regarding isolation and quarantine periods:

1. "Close Contact" is now defined as someone sharing the same indoor airspace (e.g., home, clinic waiting room, airplane etc.) for a cumulative total of 15 minutes or more over a 24-hour period (for example, three individual 5-minute exposures for a total of 15 minutes) during an infected person's infectious period.
2. "Infectious Period" is now defined as:
    a. For symptomatic infected persons, 2 days before the infected person had any symptoms through Day 10 after symptoms first appeared (or through Days 5-10 if testing negative on Day 5 or later), and 24 hours have passed with no fever, without the use of fever-reducing medications, and symptoms have improved, OR
    b. For asymptomatic infected persons, 2 days before the positive specimen collection date through Day 10 after positive specimen collection date (or through Days 5-10 if testing negative on Day 5 or later) after specimen collection date for their first positive COVID-19 test.

For the purposes of identifying close contacts and exposures, infected persons who test negative on or after Day 5 and end isolation are no longer considered to be within their infectious period.

For the most up-to-date information regarding current notification, isolation, and testing guidelines, please check the state website here.

Guidance on Monkeypox for Employers Covered by the Aerosol Transmissible Diseases Standard

The Department of Industrial Relations Division of Occupational Safety and Health issued new guidance in September 2022 on protecting workers from monkeypox for employers and workers covered by the Aerosol Transmissible Diseases (ATD) Standard. The full guidance is available here. The ATD Standard already contains mandatory requirements certain employers must follow to protect their employees. Covered employers include hospitals, skilled nursing facilities, medical clinics, police services, correctional facilities, and laboratories, among others. The guidance specifies that the existing ATD regulations require covered employers to implement a written program to prevent or reduce transmission of aerosol transmissible diseases, including monkeypox; provide and ensure the use of respiratory protection; ensure that personal protective equipment is provided and used by employees exposed to persons with or suspected to have monkeypox, or to linens or surfaces that may contain the virus; implement written procedures for exposure incidents; and report exposure to the local health officer.

NEW FEDERAL LAWS

Limitations on Mandatory Arbitration of Sexual Assault and Sexual Harassment Claims (HR 4445)

On March 3, 2022, President Biden signed into law HR 4445, which allows a claimant to void an arbitration agreement or collective action waiver in connection with a sexual assault dispute or a sexual harassment dispute. The new law defines "sexual assault dispute" as "a dispute involving a nonconsensual sexual act or sexual contact" and "sexual harassment dispute" as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." Regardless of whether an arbitration agreement or collective action waiver is otherwise enforceable, a claimant can choose to void the agreement in connection with a covered dispute and pursue the claim in state or federal court. The law further provides that the validity or enforceability of an arbitration agreement or collective action waiver will be determined by a court rather than an arbitrator, despite the existence of a contractual term to the contrary. This law applies to any dispute or claim that arises or accrues on or after the enactment date of the law (March 3, 2022). Thus, the law may be invoked to invalidate arbitration agreements or collective action waivers that were signed before the new law came into effect, but it should not be used to avoid arbitration of disputes that are already pending in an arbitral forum. For more information, see WKT's Special Alert here.

NEW FEDERAL REGULATIONS

IRS Increases Mileage Reimbursement Rate for Remainder of 2022

Although the Internal Revenue Service usually announces updated mileage reimbursement rates at the end of the calendar year, on June 9, 2022, it announced a mid-year increase in response to historically high gas prices. Accordingly, effective July 1, 2022, and through the remainder of 2022, the optional standard mileage rate will increase to 62.5 cents per mile, up four cents from the 58.5 cents rate that took effect January 1, 2022.

Proposed Rule Regarding I-9 Document Verification

Employers have an obligation to verify an employee's identity and authorization to work in the United States and must complete a federal Form I-9 to document that verification. Prior to the COVID-19 pandemic, employers were required to physically examine the documentation presented by new employees as part of this verification process. Starting on March 20, 2020, Immigration and Customs Enforcement (ICE) announced that employers who were operating remotely could instead inspect the Form I-9 documents remotely and then obtain copies of the documents within three business days but would have to physically examine the documents once normal in-person operations resumed. This guidance was periodically extended as the COVID-19 national emergency continued, and in April 2021, ICE updated the guidance to state that employer only needed to conduct in-person examination of documentation for employees who physically reported to work on a regular basis, and that workers who worked exclusively in a remote setting due to COVD-19 were exempted from physical examination of their documents until they undertook non-remote work on a regular basis. These flexibilities have been extended to October 31, 2022.

On August 18, 2022, ICE published a proposed rule that would create a framework under which DHS could pilot various options, respond to emergencies similar to the COVID-19 pandemic, or implement permanent flexibilities. The proposed rule would not directly authorize remote document examination, but ICE indicated it is exploring alternative options, including the possibility of making permanent some of the current COVID-related flexibilities. ICE also proposes making changes to the Form I-9 to add a box that the employer would check to indicate if alternative procedures were used.

ICE is soliciting public comments on this proposed rule, which may be submitted up to October 17, 2022. You can access the proposed rule and more information here.