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Labor & Employment Alert

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California employment laws — What's new in 2023?

By Hillary Baca and Seth L. Neulight

Employers in California should prepare now to comply with new laws that will take effect on January 1, 2023.

What's the Impact?

- The most significant requirements for employers involve pay transparency, employee leave and benefits, and off-duty cannabis use
- Employers should act now to understand their obligations and ensure compliance

The recent session of the California Legislature produced a flurry of new laws that employers in the Golden State will have to comply with in 2023 or later. Here we offer a summary of the most significant compliance obligations raised by these laws, which will take effect on January 1, 2023, unless otherwise noted.

Senate Bill 1162—Pay Transparency

California law currently prohibits employers from asking job applicants about their salary history and requires employers to provide job applicants with pay scale information upon request. California law also currently requires employers with 100 or more employees to file an annual pay data report with the California Civil Rights Department ("CRD") that contains information about the race, ethnicity, and sex of their workforce in various job categories—a requirement that overlaps with the federal EEO-1 report filing requirement.

SB 1162 creates new employee-facing pay transparency obligations, and creates a new CRD pay data reporting obligation. The law has three main components: (1) employers with 15 or more employees will now be required to include a pay scale in all job postings; (2) all employers will be required to disclose to their existing employees, upon request, a pay scale for their positions; and (3) employers with 100 or more employees will be required to comply with new pay data reporting requirements and submit those reports to the CRD, separate and apart from an employer's filing of the EEO-1 Report.

For more detailed information on SB 1162, see our alert, "California Enacts Pay Transparency Bill."

Assembly Bill 1949—Bereavement Leave

This bill amends the California Family Rights Act (CFRA) to require that covered employers provide employees with up to five days of bereavement leave for the death of a qualifying family member. This obligation is separate and apart from the 12 weeks of leave employees are eligible to take under the CFRA for their own serious health condition or that of a family member. To be eligible for bereavement leave, an employee must have been employed for at least 30 days. Leave may be taken for the death of an employee's spouse, domestic partner, parent, parent-in-law, grandparent, grandchild, child, or sibling. The leave must be taken within three months of the family member's death, and can be taken all at once or intermittently. Employers may require that employees take this leave pursuant to any existing bereavement leave policy. If the employer does not have an existing policy, the leave may be unpaid; however, employees may elect to use accrued vacation, personal leave, sick leave, or other compensatory time off.

Assembly Bill 1041—Leave Permitted for a "Designated Person"

This bill expands the class of people for whom an employee may take caregiver leave under the California Family Rights Act to include a "designated person." The law defines this term to include any individual related by blood or whose association with the employee is the equivalent of a family relationship. An employee can identify a designated person at the time the employee requests CFRA leave.

Separately, AB 1041 allows an employee to take paid sick leave to care for a "designated person" under the California Health Workplaces, Healthy Families Act of 2014.

Assembly Bill 2188—No Discrimination for Off Duty Cannabis Use

The California Legislature has decided that while an employee should not arrive at a worksite under the influence of marijuana, the results of most available tests for cannabis only identify the presence of non-psychoactive cannabis metabolites, which have no correlation to actual impairment. With recent scientific improvements, and the availability of tests that measure impairment, the legislature reasoned that employers now have the tools to determine if an employee's use of cannabis is actually impairing his or her ability to work. Therefore, starting on January 1, **2024**, through an amendment to the California Fair Employment and Housing Act, AB 2188 will make it unlawful for an employer to discriminate against an employee in hiring, termination, or any term or condition of employment, or otherwise penalize an employee, if the

adverse action taken is based upon the employee's use of cannabis off-duty and away from the workplace.

Importantly, the law does not prohibit an employer from taking adverse action against an employee for cannabis use based on scientifically valid pre-employment drug screenings conducted through methods that *do not* screen for non-psychoactive cannabis metabolites. Conversely, no employee may be penalized as a result of a drug test imposed by the employer that finds the employee to have non-psychoactive cannabis metabolites in his or her hair, blood, urine, or other bodily fluids.

Employees and applicants in the building and construction trades, and those who are subject to mandatory federal background checks, are exempt from the protections of AB 2188. The law also does not preempt state or federal laws requiring applicants or employees to be tested for controlled substances as a condition of: employment, receiving federal funding or federal licensing-related benefits, or entering into a federal contract.

Senate Bill 523—No Discrimination Based on "Reproductive Health Decision Making"

This bill amends the California Fair Employment and Housing Act by adding "reproductive health decision making" as a new protected classification. The term is defined to include, but is not limited to, a decision to use or access a particular drug, device, product, or medical service for reproductive health, such as contraceptives or an abortion procedure. The law also prohibits an employer from requiring an employee or applicant to disclose information relating to the person's reproductive health decision making.

Senate Bill 951—Increases Wage Replacement Rates Under Paid Family Leave Program

Existing California law allows employees to apply for Paid Family Leave (PFL) and State Disability Insurance (SDI), both of which provide partial wage replacement benefits when employees take time off of work for various reasons under the California Family Rights Act. Starting in **2025**, low-wage earners (those who earn up to 70 percent of the state average quarterly wage) will be eligible for a higher percentage of their regular wages under the state's PFL and SDI benefit programs. The increase in benefits paid under the two programs may result in more employees taking advantage of job-protected leaves.

Assembly Bill 257—Law-Making Council for Fast Food Employers

This bill creates a council of ten civilian appointees (the "Council") with authority to create new employment laws for workers in fast food chains that have 100 or more locations nationwide. The Council is empowered to make laws concerning working conditions for these employees, including wages, health and safety, workplace security, leaves of absence, and protections against workplace discrimination and harassment.

AB 257 will apply not only to corporate fast food chains, but also to independent restaurant owners whose locations are part of a franchised brand. Specifically, the law will apply to "any set of restaurants consisting of 100 or more establishments nationally that share a common brand, or that are characterized by standardized options for decor, marketing, packaging, products, and services." This means that mom-and-pop franchise owners of a single outlet within a franchised restaurant chain will be subject to the same standards regarding working conditions that are imposed on companies that own 100 or more restaurants.

For more detailed information on AB 257, see our alert, "California's AB 257 greenlights civilian law-making council for large fast food employers and franchised brands."

Senate Bill 1044—No Adverse Action During State of Emergency

This bill prohibits an employer, in the event of a state of emergency or an emergency condition, from taking or threatening adverse action against any employee for refusing to report to, or leaving, a workplace or worksite within the affected area because the employee has a reasonable belief that the workplace or worksite is unsafe. An "emergency condition" is defined to mean (1) a condition 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 worksite, a worker's home, or the school of a worker's child due to natural disaster or a criminal act. Notably, an "emergency condition" *does not* include a health pandemic.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

Hillary Baca
415.984.8393
hbaca@nixonpeabody.com

Seth L. Neulight
415.984.8377
sneulight@nixonpeabody.com