

CHANGES AND DEVELOPMENTS IN CALIFORNIA EMPLOYMENT LAWS FOR 2022

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As 2021 quickly comes to a close, we look back at this year's legislative session, which included several employment-related bills signed by Governor Gavin Newsom, including bills aimed at prohibiting quotas that interfere with employees' ability to take breaks and combatting wage theft and wage/hour violations by garment manufacturers.

We have summarized the new laws that have the most impact on employers across the state. All bills are effective starting January 1, 2022, unless otherwise stated.

Covid-19

Employers in certain industries are required to rehire employees previously laid off due to Covid-19.

On April 16, 2021, Governor Newsom signed **SB 93**. This law, commonly referred to as a "right of recall," requires employers in certain industries—hotels, private clubs, event centers, airport hospitality operations and service providers, and building services such as janitorial, maintenance, or security—to make written job offers to qualified employees laid off due to the Covid-19 pandemic. Qualified employees are defined as (1) employees who were employed by covered employers for six months or more during the 12 months before January 1, 2020, (2) who performed at least two hours of work for the employer, and (3) whose most recent separation from active service was due to the COVID-19 pandemic. Under this law, if an employer intends to fill a position, it must first offer the position to a laid off employee who is qualified for the position. If more than one employee is qualified for a position, the employer must offer the position to the laid off employee with the greatest length of service based on the date of hire. An employer who declines to rehire a laid off employee for the same or similar position the employee held at the time of the Covid-19 lay off due to lack of qualifications and instead hires someone other than a laid-off employee must provide the employee a written notice including the reasons for the decision and other information on those hired. This law will remain in effect until December 31, 2024.

Employers' notice and reporting regarding Covid-19 have been clarified. On October 5, 2021, Governor Newsome signed **AB 654**. The new law clarifies the previous Covid-19 notice and reporting bill, AB 685. This law requires the employer, when giving notice to the local public health agency of a COVID-19 outbreak, to give notice within 48 hours or one business day, whichever is

later. It also expands the employers exempt from the COVID-19 outbreak reporting requirement to various licensed entities, including, but not limited to, community clinics, adult day health centers, community care facilities, and child day care facilities.

California's Department of Public Health and local health officers are required to post Covid-19 related orders on their respective websites. On October 4, 2021, Governor Newsom signed **SB 336**, which takes effect immediately. The new law requires the State Department of Public health and local health officer to publish Covid-19 related order and guidance as well as the date that the order or guidance takes effect on their website. The law also requires the department and local health officer to create an opportunity for individuals and businesses to sign up for an email distribution list to receive changes to Covid-19 orders or guidance. The law ensures that small businesses and employers can keep up with the changing public health orders.

Agricultural workers are added to the definition of essential workers. On September 27, 2021, Governor Newsom signed **AB 73**. The new law expands the definition of essential workers to include agricultural workers. It also expands the definition of health emergencies to include wildfire smoke events.

Discrimination, Harassment, & Retaliation

There are more restrictions to prevent the use of non-disclosure provisions in settlement agreements involving workplace harassment or discrimination. On October 7, 2021, Governor Newsom signed **SB 331**. California law currently prohibits the use of non-disclosure provisions in settlement agreements involving allegations of sexual assault, sexual harassment, or discrimination based on sex. The new law expands the prohibition of confidentiality provisions in cases of alleged workplace harassment or discrimination based on any protected characteristics under the Fair Employment and Housing Act, not just the ones based on sex. This includes allegations of harassment and discrimination based on race, religion, color, national origin, ancestry, disability, medical condition, familial status, sex, gender, gender identity, age, sexual orientation, and other protected characteristics as outlined in Sections 12940 and 12955 of the Government Code. The new law also prohibits the use of non-disparagement agreements as a condition of employment or continued employment (or in a separation agreement) unless the agreement includes specific language that carves out the employee's right to disclose information about acts that the employee has reason to believe are unlawful.

Hospitals and nursing education programs are required to include implicit bias training as part of the program for new nurses. On October 1, 2021, Governor Newsom signed **AB 1407**. The new law requires approved schools of nursing and nursing programs to include one hour of implicit bias training as a graduation requirement. It also requires hospitals that hire and train new nurses to implement an implicit bias program.

Leave and Accommodation

The scope of family care has changed, adding parents-in-law to the list of family members for which an employee can take leave under the California Family Rights Act (“CFRA”). On September 27, 2021, Governor Newsom signed **AB 1033**. The new law adds leave to care for a parent-in-law to the permissible reasons to take family and medical leave under CFRA. The law also modifies and adds more detailed provisions to the CFRA small employer mediation program, which is applicable to employers that have between 5 and 19 employees. Among other changes, the new law requires the Department of Fair Employment and Housing (“DFEH”) to notify an employee who requests an immediate right-to-sue letter alleging CFRA violations of the requirement for mediation prior to filing a civil action. The new law also requires the DFEH to initiate the mediation promptly following a request, prohibits the employee from pursuing a civil action until the mediation is complete, and tolls the statute of limitations for the employee, including for all related claims not subject to mediation (from the date of receipt of a request to participate in mediation until it is complete).

Workplace Safety

The scope of Cal/OSHA’s enforcement power has expanded. On September 27, 2021, Governor Newsom signed **SB 606**. This new law creates two new categories of Cal/OSHA violations – “enterprise-wide” violations and “egregious” violations. This law creates a rebuttable presumption that a violation committed by an employer with multiple worksites is “enterprise-wide” if: (1) the employer has a written policy or procedure that violates certain safety rules; or (2) Cal/OSHA has evidence of a pattern or practice of the violations committed by the employer involving more than one of the employer’s worksites. Enterprise-wide citations will carry the same penalties as repeated or willful citations, up to \$134,334 per violation. The new law also gives authority to Cal/OSHA to issue a citation for an “egregious violation” if the division believes that an employer has willfully and egregiously violated an occupational safety or health standard, order, special order, or regulation. Each instance of an employee exposed to that violation will be considered a separate violation for purposes of the issuance of fines and penalties. Cal/OSHA may find that an “egregious violation” was committed for any of the following:

- The employer, intentionally, through conscious, voluntary action or inaction, made no reasonable effort to eliminate the known violation;
- The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses;
- The violations resulted in persistently high rates of worker injuries or illnesses;
- The employer has an extensive history of prior violations;
- The employer has intentionally disregarded their health and safety responsibilities;
- The employer’s conduct, taken as a whole, amounts to clear bad faith in the performance of their duties; or

- The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that may be in place.

Cal/OSHA is directed to create an advisory committee to recommend state policies to protect the health and safety of household domestic service employees and develop occupational health and safety guidance to educate employers and employees. On September 27, 2021, Governor Newsome signed **SB 321**. The new law directs the Chief of the Division of Occupational Safety and Health to assemble an advisory committee to create voluntary guidance and recommendations to the Department of Industrial Relations and the Legislature on policies the state may adopt to protect the health and safety of privately funded household domestic service employees.

Wage and Hour

Warehouse distribution centers are required to disclose quotas and pace-of-work standards to employees. On September 22, 2021, Governor Newsom signed **AB 701**. The new law prevents warehouse distribution centers like Amazon from imposing quotas that interfere with an employee's ability to use the restroom or take meal breaks. The new law requires covered employers to provide to each nonexempt employee who works at a warehouse distribution center, upon hire, or within 30 days of the effective date of the law, a written description of each quota to which the employee is subject, including the quantified number of tasks to be performed, or materials to be produced or handled, within the defined time period, and any potential adverse employment action that could result from failure to meet the quota. The new law also provides that an employee shall not be required to meet a quota that prevents compliance with meal or rest periods, use of bathroom facilities, or occupational health and safety laws.

Employers face criminal liability for intentional wage theft. On September 27, 2021, Governor Newsom signed **AB 1003**. This new law amends the Penal Code to make an employer's intentional theft of wages, payments, or gratuities over \$950 from one employee or \$2,350 from two or more employees, within a 12-month period, to be punishable as grand theft. Grand theft carries a prison sentence of up to three years depending on the facts and circumstances of the case. For purposes of this law, independent contractors are included within the meaning of "employee," and hiring entities of independent contractors are included within the meaning of "employer."

Businesses within the garment industry supply chain can be held jointly and severally liable for wage and hour violations. On September 27, 2021, Governor Newsom signed **SB 62**. The new law provides that a garment manufacturer, contractor, or brand guarantor shares joint and several liability for wage and hour violations with any manufacturer and contractor for the full amount of unpaid wages and other compensation, as well as interest, attorney fees and civil penalties, that are due to employees who performed manufacturing operations. In other words, clothing brands, holding companies, and potentially retailers may be jointly liable with the contractors from whom they purchase clothing for the contractor's wage and hour violations. The new law also eliminates piece rate compensation in the garment industry. It imposes compensatory damages of \$200 per

employee against a garment manufacturer or contractor, payable to the employee, for each pay period in which each employee is paid by the piece rate.

The Labor Commissioner is permitted to create a lien on real property. On September 27, 2021, Governor Newsom signed **SB 572**. The new law authorizes the Labor Commissioner to create, as an alternative to a judgment lien, a lien on real property to secure amounts due to the commissioner under any final citation, findings, or decision.

Unionized janitorial employees are precluded from bringing PAGA claims. On September 27, 2021, Governor Newsom signed **SB 646**. The Private Attorneys General Act (“PAGA”) authorizes aggrieved employees to file a lawsuit to recover civil penalties on behalf of themselves and other employees for wage and hour violations. This new law, however, creates an exception for janitorial employees covered by a valid collective bargaining agreement in effect before July 1, 2018. This law authorizes the exception until the collective bargaining agreement expires or until July 1, 2028, whichever is earlier.

Chain community pharmacies are prohibited from establishing a quota related to certain duties that pharmacists and pharmacy technicians are required to perform. On September 27, 2021, Governor Newsome signed **SB 362**. The new law prohibits chain community pharmacies from establishing a quota, defined as a fixed number or formula related to the duties for which a pharmacist or pharmacy technician is required to perform (*i.e.*, prescriptions filled, services rendered to patients, programs offered to patients, etc.) while on duty.

RELATED PRACTICE AREAS

- Employment & Labor

MEET THE TEAM



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