

THE SONG REMAINS THE SAME: CALIFORNIA ENACTS EVEN MORE STRINGENT EMPLOYMENT LAWS

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SUMMARY

The California State Legislature recently passed a series of new employment laws that will impact employers beginning January 1, 2023, or in the near future. Three of the most significant new laws concern wage transparency, off-duty cannabis use, and the creation of a civilian law making council for the fast-food industry. These new laws and their implications for employers are summarized below.

REQUIRED PAY SCALE INFORMATION IN JOB POSTINGS AND DATA RETENTION REQUIREMENTS (SENATE BILL 1162)

California law already requires employers to provide the pay scale for positions upon reasonable request by an applicant in certain circumstances, including after the initial interview with the employer. However, California has now joined a growing list of states, including Colorado, Washington, New York City, to require even more wage transparency. What does this mean for employers?

1. Does it apply to me?

- This new law applies to California employers and outside employers with California employees.

2. What do I have to do?

- An employer with 15 or more employees must include the hourly or salary wage range for a position in any job posting. This includes an employer's use of a third party to announce, post, publish, or otherwise make known a job posting.
- Upon reasonable request, employers with 15 or more employees must also provide the pay scale for a position to an applicant applying for employment.

- Upon request, all employers must provide the pay scale to currently employees for the position in which the employee is currently employed.
- All employers must also maintain records of job title and wage rate history for each employee for the duration of the employment plus 3 years after the end of the employment. These records must be open to inspection by the Labor Commissioner. A failure to maintain such records creates a rebuttable presumption in favor of the applicant or employee against the employer.

3. When do I have to do it?

- SB 1162 takes effect January 1, 2023.

With these new requirements, employers must start establishing and maintaining pay scales for each position. Now may also be a good time to conduct a pay audit to ensure legal and compliant pay practices. Failure to comply with these requirements could lead to a civil penalty between \$100 and \$10,000 per violation. However, there is no penalty for a first violation if the employer can demonstrate that all job postings for open positions have been updated to include the pay scale, as required by SB 1162.

PROTECTION OF EMPLOYEE OFF-DUTY CANNABIS USE (ASSEMBLY BILL 2188)

California has joined a number of other states that have enacted workplace protections for off-duty use of marijuana away from the workplace. Starting January 1, 2024, the California Fair Employment and Housing Act will expand to protect employees and applicants who use marijuana outside of work. Here is what California employers need to know:

1. Does it apply to me?

- AB 2188 covers employees in California, with the exception of employees in the building and construction trades, or applicants or employees hired for positions that require a federal government background investigation or security clearance. AB 2188 also does not preempt state or federal laws that require testing applicants or employees for controlled substances.

2. What do I have to do?

- Employers are prohibited from discriminating against a person in hiring, termination, or any term or condition of employment based on the person's use of cannabis off the job and away from the workplace.
- Employers are also prohibited from discriminating against applicants based on an employer-required drug screening test that detects the presence of non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids. This is what most drug tests for marijuana detect.

3. When do I have to do it?

- AB 2188 takes effect January 1, 2024.

Employers should begin planning now for a California in which off-duty use of marijuana is legally protected and the standard drug tests for marijuana can no longer be used.

LAW-MAKING COUNCIL FOR FAST FOOD EMPLOYERS (ASSEMBLY BILL 257)

AB 257 establishes a “Fast Food Council” within the Department of Industrial Relations with authority to create sector-wide minimum standards concerning the “working conditions” for employees in fast food chains that have 100 or more locations nationwide. “Working conditions” includes, but is not limited to, wages, employee health and safety, workplace security, prevention of discrimination and harassment, and employees’ right to take time off for certain protected purposes. The regulations passed by the council will automatically become law unless the California Legislature votes to invalidate the regulations.

The council will consist of ten persons appointed by the Governor and the Legislature as follows:

- one representative from the California Department of Industrial Relations;
- two representatives of fast food franchisees;
- two representatives of fast food restaurant franchisors;
- two representatives of advocates for fast food restaurant employees;
- two representatives of fast food restaurant employees; and,
- one representative from the governor’s Office of Business and Economic Development.

AB 257 also authorizes any county or city with a population greater than 200,000 to establish their own Local Fast Food Council to provide recommendations to the council.

1. Does it apply to me?

- AB 257 covers fast-food establishments consisting of 100 or more locations nationally that: (1) share a common brand or that are characterized by standardized options for decor, marketing, packaging, products, and services; and (2) provide food or beverage for immediate consumption on or off premises to customers who order select items and pay for food before eating, with items prepared in advance or with items prepared or heated quickly, and with limited or no table service.
- This means that in addition to applying to large corporate restaurant chains, AB 257 will also apply to individual franchise owners of a single franchised outlet within a franchised

restaurant chain with over 100+ restaurants across the nation.

- Bakeries that sell bread (as defined by federal law) as a stand-alone item are exempt.
- Restaurants located within a grocery establishment are also exempt as long as the individuals who work in the restaurant are employed by the grocery store.

2. What do I have to do?

- Employers should monitor the council's activity and be prepared to seek advice and counsel to ensure compliance with regulations promulgated by the council.

3. When do I have to do it?

- AB 257 goes into effect January 1, 2023, and the council is empowered to raise the minimum wage for fast food employees to \$22.00 per hour in 2023.
- Covered employers will be required to comply with the council's regulations beginning October 15, 2023.

AB 257's broad reach is likely to have a significant impact on California's fast food industry, including significantly increased operational costs. For example, a rise in enforcement actions seems inevitable given that the bill creates a cause of action and right to reinstatement, treble damages and attorney's fees for employees alleging violations. AB 257 also creates a rebuttable presumption of unlawful discrimination and retaliation for any employee discharged or subjected to an adverse action within 90 days of engaging in protected activity. Covered employers will benefit from proactively seeking compliance strategies for any new laws emerging from the council.

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