THE ESSENTIALS—CALIFORNIA EMPLOYMENT LAW UPDATE FOR 2024

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US Labor, Employment, and Workplace Safety Alert

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In the November edition of The Essentials, we outline key provisions of many of the new employment laws that will take effect in 2024.

GENERALLY APPLICABLE NEW LAWS

AB 1076 and SB 699: Sweeping Prohibition Against Employment-Related Noncompete Agreements

The California legislature continues to expand its prohibition against noncompete agreements through California Assembly Bill (AB) 1076 and California Senate Bill (SB) 699, which broaden California's already significant restrictions on noncompete agreements or clauses.

AB 1076

Business and Professions Code Section 16600 voids noncompete agreements in California except in cases where narrow exceptions apply. AB 1076 amends Section 16600 to codify *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008), providing that the statutory provision is to be broadly construed to "void the application of any noncompete agreement in an employment context, or any noncompete clause in an employment contract, no matter how narrowly tailored, that does not satisfy an exception in this chapter."

AB 1076 additionally creates Section 16600.1, making it unlawful to include a noncompete that does not satisfy an exception in an employment contract. This section also requires employers to notify current employees and former employees who were employed after 1 January 2022 and who entered into noncompete agreements that fail to satisfy an exception under the section that the clauses are void. The notice must be in writing and delivered by 14 February 2024 to the employee's last known physical and email addresses. Employers who are required to and fail to provide such notice commit a violation of the Unfair Competition Law under section 17200.

SB 699

SB 699 creates a new section of the Business and Professions Code, 16600.5, which goes into effect on 1 January 2024 and substantially expands on Section 16600's noncompete restriction in five key ways:

1. Noncompete agreements are unenforceable regardless of where they were signed or entered into, even if the prior employment occurred in another state and the contract was entered into outside of California.

2. Current or former employers are prohibited from attempting to enforce a noncompete agreement that is void under Section 16600, even where the agreement was signed and the employment took place outside of California.
3. Employers are prohibited from entering into a contract with a noncompete provision that does not satisfy an exception.
4. Any employer who enters into or attempts to enforce a void noncompete agreement in California commits a civil violation.
5. Current, former, and prospective employees can bring a private action seeking injunctive relief or actual damages for violations of Section 16600.5 and are entitled to recover attorneys' fees and costs if they prevail.

The impact of SB 699 is extensive. The law purports to apply extraterritorially to hold unenforceable in California noncompete agreements that were validly entered into in other states. Under SB 699, if an employee and employer validly enter into a noncompete agreement in another state and the employee later obtains work in California in violation of that agreement, the employer cannot enforce the agreement. SB 699 is likely to face many challenges to its enforceability and its attempt to circumvent otherwise valid choice-of-law provisions. The statute, in its expansive scope, may also be inconsistent with the dormant commerce clause.

While the scope and enforceability of SB 699 will be litigated in the months and years to come, California employers should ensure compliance by carefully reviewing and updating employment agreements to remove noncompete clauses that may subject them to liability under the new laws. Employers outside of California should be mindful of these new laws before attempting to enforce noncompete agreements in California, even against employees whose previous work was in another state. Finally, employers should ensure that they comply with AB 1076 notice requirements by the 14 February 2024 date.

AB 636: Wage Theft Notice Amendments

California's Wage Theft Prevention Act, Labor Code Section 2810.5, requires employers to provide new hires a notice containing information regarding their employment, wages, and sick leave.

AB 636 expands the notice requirement to include information regarding any federal or state emergency or disaster declarations that may affect employees' health and safety. In addition, the notice for employees admitted pursuant to the federal H-2A agricultural visa must include detailed information regarding their rights and protections under California law. Certain exceptions apply.

The California Labor Commissioner will create a new notice template by 1 March 2024. Employers should work with their counsel to ensure their notices are legally compliant. Failure to provide legally compliant notices carries risk of Private Attorneys General Act (PAGA) penalties.

SB 616: Expanded Paid Sick Leave Law

California's Healthy Workplace, Healthy Families Act of 2014 established statewide requirements relating to paid sick days and paid sick leave. Since that time, several cities have enacted their own local ordinances to provide employees with more than the state-mandated sick leave. Beginning 1 January 2024, SB 616 will expand California's existing paid sick leave law in several ways, and will preempt local ordinances in certain respects, bringing more uniformity to the administration of sick leave in the state. Subject to limited exclusions:

Frontload Amount Increase

Employees are now entitled to five days or 40 hours of paid sick leave per year, up from three days or 24 hours, under the frontload method, and up to 10 days or 80 hours, up from six days or 48 hours, under the accrual method.

Accrual Availability Increase

Employers who use the accrual method must make three days or 24 hours of sick leave available to the employee by the 120th day of employment, and an additional two days or 16 hours available by the 200th calendar day of employment, for a total of five days or 40 hours.

Accrual Method Carry Over Increase

Employees under the accrual method may now carry over 10 days or 80 hours of accrued paid sick leave each year, rather than six days or 48 hours.

Use Cap Increase

Employees' use of accrued paid sick leave may now be capped at 40 hours or five days' paid sick leave, up from 24 hours or three days.

The new law preempts local ordinances with respect to paying out unused paid sick days upon termination (not required under SB 616), lending employees sick days in advance of accrual, written notice of the amount of paid sick leave available, the rate of pay for sick days, notice of the need for sick leave, and the timing of pay for sick leave taken.

California employers should take steps to ensure compliance by 1 January 2024 by determining whether the new law preempts any local paid sick leave provisions, reviewing their current paid sick leave policies and employee handbooks, and revising any necessary accrual processes.

SB 700: Prohibition Against Inquiring About Prior Marijuana Use

During the 2022 legislative session, the governor approved AB 2188, which prohibits most employers from discriminating or retaliating against applicants and employees for off-the-job cannabis use. SB 700 expands on AB 2188 by prohibiting employers from requesting information from an applicant about the applicant's prior cannabis use or using related information obtained through a background check unless otherwise permitted by federal or state law.

AB 2188 and SB 700 both go into effect on 1 January 2024. California employers affected by AB 2188 and SB 700 should take steps to ensure compliance by (1) updating policies relating to drug testing, drug use, and background checks, (2) providing guidance to HR and recruiting, and (3) confirming with drug-testing vendors that they are using a test that can differentiate between THC, which indicates active impairment, and nonpsychoactive cannabis metabolite.

SB 497: 90-Day Rebuttable Presumption of Retaliation

SB 497 establishes a rebuttable presumption of retaliation if an employer takes an adverse action against an employee within 90 days of the employee engaging in certain protected activities, such as complaining about an equal pay violation or an employment practice that the employee reasonably believes is unlawful. Under

California's burden-shifting framework for retaliation claims, an employee bears the initial burden of establishing a prima-facie case of retaliation, which includes (1) engaging in a protected activity, (2) suffering from an adverse employment action, and (3) establishing a causal nexus between the protected activity and adverse employment action. Courts already consider the timing of the employer's adverse action for purposes of evaluating whether the employee has established a causal nexus. The rebuttable presumption, however, makes it easier for employees to satisfy their initial burden when the adverse action occurs within 90 days of specified protected activities. Employers, however, can still defend against retaliation claims by articulating a legitimate, nonretaliatory reason for the employment action.

As part of their risk-mitigation strategy, employers should ensure their approach to performance management includes sufficient consideration of the timing of the proposed employment action and the employee's protected activity, and should train managers accordingly.

SB 497 also allows employees who suffer from retaliation in violation of Labor Code Section 1102.5 to recover the $10,000 civil penalty directly.

SB 848 – Reproductive Loss Leave

Effective 1 January 2024, SB 848 creates a new type of protected leave for California employees who have experienced a reproductive loss event. While existing California law provides for bereavement leave for the death of a family member, it does not address reproductive loss. A reproductive loss event is broadly defined as a miscarriage, stillbirth, failed adoption, failed surrogacy, or an unsuccessful assisted reproduction technology procedure. If a covered employee would have become a parent of a child born absent the reproductive loss event, the employee may take leave under this law.

Up to five days of reproductive loss leave may be taken following a reproductive loss event. If an employee experiences more than one reproductive loss event within 12 months, the employee may take up to 20 days' reproductive loss leave within the 12-month period. Leave must be taken within three months of the loss or other leave the employee takes immediately following the loss, and it need not be taken in consecutive days.

If the employer does not have an existing leave policy that applies, reproductive loss leave may be unpaid, except the employee may use vacation, personal leave, sick leave, or compensatory time off otherwise available.

Unlike when taking bereavement leave, employees do not need to provide documentation to support the need for reproductive loss leave. Employers are required to maintain confidentiality relating to any requests for reproductive loss leave.

Retaliation for requesting or taking reproductive loss leave is prohibited.

The law applies to private employers with five or more employees and public employers of any size; employees must have been employed for at least 30 days to be protected.

California employers should review their existing employee handbook and policies, determine whether reproductive loss pay will be paid pursuant to any existing leave policies, and train human resources and management on how to handle this new leave law.

California and Illinois are the first two states to grant reproductive loss leave for private employees, while several cities, including Boston, Pittsburgh, and Portland, have done the same for government employees. Other states will likely follow their example with similar legislation.

SB 553: Mandatory Workplace Violence-Prevention Programs

SB 553, which amends Section 527.8 of the Code of Civil Procedure, aims to ensure workplace safety by imposing specific obligations on employers to implement a workplace violence-prevention plan. This legislation applies to all employers in the State of California, regardless of size or industry. Beginning on 1 July 2024, SB 553 requires employers to take specific measures to prevent and address incidents of workplace violence, including:

Mandatory Workplace Violence-Prevention Plan

Employers are now required to establish, implement, and maintain a workplace violence-prevention plan that assesses and mitigates the risk of violence at the workplace. This plan should be tailored to the specific circumstances of the employer's operations and should identify the individuals responsible for implementing and maintaining the plan.

Employee Training

Employers must provide workplace violence-prevention training to all employees. This training should cover potential risks, de-escalation techniques, reporting, and emergency response procedures, among other required topics.

Incident Reporting and Response

The bill requires employers to establish procedures for employees to report incidents or threats of violence and prohibits retaliation against employees for making such reports. Employers are obligated to respond to workplace violence concerns in a timely manner.

Support for Victims

The legislation encourages employers to offer support to employees who have experienced workplace violence, which may include providing access to counseling or resources.

Recordkeeping

Employers must maintain records related to workplace violence incidents, prevention plans, and training programs to ensure compliance with the bill's requirements.

Employers who fail to comply with SB 553 can be subject to a citations and civil penalties by the Division of Occupational Safety and Health. Employers should ensure that their workplace violence-prevention plan is up to date, regularly reviewed, and effectively communicated to all employees. It is essential to monitor the implementation of these new obligations and provide the necessary resources to support a safe and violence-free work environment. California employers are encouraged to seek legal counsel and workplace safety experts to assist in the development and implementation of their workplace violence-prevention plans to ensure compliance with SB 553.

SB 428: Harassment Restraining Orders

An employer's ability to seek a restraining order on behalf of employees (including independent contractors and volunteers at the employer's worksite) is governed by Code of Civil Procedure section 527.8. Existing law authorizes employers to seek a restraining order under limited circumstances: if there is a credible threat of violence against an employee or the employee has already suffered from a violent act.

Effective 1 January 2025, SB 428 amends Code of Civil Procedure section 527.8 by authorizing employers to seek a restraining order on behalf of an employee suffering from “harassment,” which is defined as “a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose.” The conduct must have subjectively and objectively caused the employee to suffer from substantial emotional distress but need not constitute violence or a credible threat of violence.

Additionally, the standard differs from that under the Fair Employment and Housing Act (FEHA), California's primary employment-related antidiscrimination, harassment, and retaliation statute. Employers can seek a restraining order even if the harassment is not tied to a category protected by the FEHA (e.g., sex, race, age, etc.) and does not meet the “severe or pervasive” standard. SB 428 also protects the identity of affected employee(s) by requiring employers to provide them with an opportunity to decline to be named in the petition for restraining order before filing it on their behalf.

AB 594: State Prosecution for Labor Code Violations

AB 594 empowers city, district, and county attorneys to prosecute civil and criminal violations of the California Labor Code through 1 January 2029. The bill also provides that any individual agreement requiring a worker to arbitrate disputes with their employer, or that otherwise restricts representative actions, shall have no effect on the prosecutor's authority to enforce the Labor Code. Money recovered in such actions will be distributed first to workers who are due payment, and any civil penalties would be paid to the state's general fund.

The practical effect of this law is uncertain. California employers can already be held criminally liable for Labor Code violations, but criminal prosecutions against employers are rare. Moreover, it remains to be seen, given the myriad ways in which employers may already be prosecuted for unlawful wage-and-hour conduct (i.e., civil litigation, Labor & Workforce Development Agency investigations, Department of Labor prosecutions, PAGA lawsuits, etc.) how much time and resources public lawyers can and will divert from the prosecution of the criminal matters they already oversee. The arbitration provision in AB 594 will also likely be challenged on Federal Arbitration Act preemption grounds.

SB 365: Revocation of Automatic Stay Pending Appeal of Order Denying Motion to Compel Arbitration

SB 365 provides that, notwithstanding the general rule to stay proceedings pending an appeal, trial court proceedings will not be automatically stayed pending the appeal of an order dismissing or denying a motion to compel arbitration.

SB 365 arrives at a peculiar time, given that the United States Supreme Court recently issued a contradictory ruling in Coinbase v. Bielski. There, the United States Supreme Court held that appeals under Section 16 of the Federal Arbitration Act (FAA) appealing an order denying arbitration automatically stay district court proceedings. SB 365 will likely be challenged as preempted by the FAA. While the FAA does not prohibit states from creating rules governing the procedure of arbitration in their state, SB 365 could still be viewed as having a chilling effect on arbitration. Until there is further clarity on the validity of SB 365, employers should review their arbitration agreements for language expressly invoking the FAA's procedural rules, as arbitration agreements that are governed by the California Arbitration Act will be subject to SB 365.

INDUSTRY-SPECIFIC NEW LAWS

AB 1228: Fast Food Act Update

In 2022, Governor Gavin Newsom signed AB 257 into law. AB 257 created a Fast Food Council within the Department of Industrial Relations. The council was provided with broad authority to impose sector-wide minimum standards on wages, working hours, and other work-related conditions concerning health, safety, and the overall welfare of fast food workers. Different industry groups in California opposed AB 257 and qualified to have AB 257 included in the 2024 ballot via referendum, which halted the enactment of AB 257.

Fast forward a year: California and industry groups were able to come to an alternative agreement regarding regulation in the fast food industry. AB 1228 was devised after a series of industry group meetings facilitated by Governor Newsom and goes into effect starting in 2024. The key provisions of AB 1228:

- Establish a minimum wage of $20 per hour for most fast food employees effective 1 April 2024;
- Authorize the Fast Food Council to establish annual increases to the minimum wage for fast food employees through the end of 2029;
- Prohibit fast food restaurants from discriminating or retaliating against employees who participate in a proceeding before the Fast Food Council; and
- Place limitations on the Fast Food Council's broad authority by precluding it from creating new paid time off benefits and regulations regarding predictable scheduling, and by requiring standards, results, and regulations developed by the Fast Food Council to go through the rulemaking process set forth in the Administrative Procedure Act.

AB 1228 will have far-reaching implications for California's fast food industry employers. The statewide minimum wage is set to increase to $16, which is $4 less than the $20 fast food minimum wage. Employers outside of the fast food industry may find it difficult to retain minimum-wage workers who will earn 25% more if they work for a fast food employer. Employers looking to compete for and retain minimum-wage employees by raising their hourly pay above the statewide minimum wage will face increased operational costs.

SB 525: US$25 per Hour Minimum Wage for Covered Health Care Workers

SB 525 establishes a statewide US$25 minimum wage for covered health care employees, including physicians, nurses, and even some janitors and laundry workers. The health care worker minimum wage will replace the current state minimum wage of US$15.50 per hour. The pay increase to US$25 per hour is incremental and depends on the nature of the employer. For example, the minimum wage will increase to US$25 per hour in 2026 for larger health facilities, whereas it will increase to US$25 per hour in 2028 for licensed skilled nursing facilities. SB 525 also mandates that exempt, salaried employees must be paid no less than 150% of the health care worker minimum wage. The bill does not affect health care employees who are outside salespersons. Notably, SB 525 prohibits any ordinance, regulation, or administrative action related to wages or compensation for covered health care employees. Employers in the health care sector, such as hospitals, clinics, and urgent care centers, should consult counsel to determine when, and at what rate, the minimum wage increases for its covered employees.

SB 723: COVID-19 Right of Recall Extended for Covered Hospitality and Business Services Employees

California Labor Code Section 2810.8 requires covered employers in the hospitality and business services industry (including, but not limited to, hotels, event centers, and employers that provide maintenance services) to make written job offers for positions that become available to qualified employees who (1) worked for the employer for six months or more in the 12 months preceding 1 January 2020 and (2) were laid off "due to a reason related to the COVID-19 pandemic." Such employers are also prohibited from retaliating or taking adverse action against a laid-off employee for seeking to enforce their rights under these provisions. Section 2810.8 was originally set to expire on 31 December 2024.

SB 723 broadens the pool of covered employees to whom employers must offer recall rights. Covered employees are redefined as (1) any employee who was employed by the employer for six months or more, (2) whose most recent separation from active employment by the employer occurred on or after 4 March 2020, and (3) whose separation was due to a reason related to the COVID-19 pandemic.

SB 723 creates a presumption that a separation due to a lack of business, reduction in force, or other economic, nondisciplinary reason is related to the COVID-19 pandemic unless the employer establishes otherwise by a preponderance of the evidence. Additionally, SB 723 extends the 31 December 2024 repeal date to 31 December 2025.

Covered hospitality and business services employers should keep careful records of any laid-off employees to ensure that they are able to properly identify any employees entitled to recall as they open new positions.

AB 647: Expanded Protections for Grocery Workers

Under existing law, an incumbent grocery employer that transfers a qualifying large retail store to another grocery employer is required to provide the successor with a preferential hiring list of eligible workers within 15 days after the change in control document (e.g., purchase agreement) is executed, and the successor is required to hire from that list for up to 90 days after the store opens and retain them for at least 90 days unless the successor has cause to discharge the worker. Grocery employers are not required to comply for transfers of retail stores that have ceased operations for at least six months.

AB 647 amends existing Labor Code sections and adds new ones that expand protections afforded to grocery workers in eight key ways:

- Requiring grocery employers to comply with preferential hiring rules when transferring qualifying distribution centers;
- Narrowing the exclusion to retail stores that have ceased operations for at least 12 months;
- Expanding the required information in the preferential hiring list to include known cellphone and email addresses for each eligible worker;
- Requiring incumbent grocery employers to provide the preferential hiring list to collective bargaining representatives, if any, and authorizing the successor to obtain the information from the collective bargaining representative;
- Prohibiting employers from retaliating against an employee for attempting to enforce these rights or opposing prohibited practices;

- Requiring any collective bargaining agreement superseding these requirements to clearly and unambiguously state that these protections are superseded by the collective bargaining agreement;
- Providing employees with a private right of action to enforce these rights and permitting prevailing employees to obtain injunctive relief (hiring or reinstatement) and recover civil penalties, compensatory damages, punitive damages, attorneys' fees, and costs; and
- Authorizing the labor commissioner to issue citations and recover on behalf of employees.

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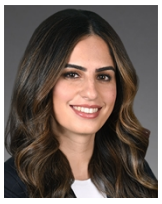

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