GIBSON DUNN

California Labor and Employment Changes after the 2023 Legislative Session

Client Alert | October 31, 2023

In the past month, Governor Gavin Newsom signed into law a variety of employment law changes for California employers. Below, we discuss eleven areas that may require attention from California employers.

1. Expanded Restrictions on Non-Compete Agreements

As detailed in our previous client alert, beginning on January 1, 2024, employers may not enter into or enforce employment agreements, "no matter how narrowly tailored," that restrict an employee from "engaging in a lawful profession, trade, or business of any kind."[1] This restriction applies "regardless of where and when" such agreements are presented or were originally executed.[2] Current, former, and prospective employees presented or threatened with such agreements may seek immediate injunctive relief or damages in California courts, as well as "reasonable attorney's fees and costs."[3] In addition, by February 14, 2024, California employers and non-California employers with California employees must notify current and former employees (defined as those employed after January 1, 2022) in writing that previously executed agreements covered by the new law are now void.[4]

Failure to comply with these new laws, including the notification requirement, may result in civil penalties for "unfair competition" under Business and Professions Code section 17206, which are capped at $2,500 per violation.[5] While neither statute addresses how civil penalties will be calculated—*i.e.* whether per employee, per non-compliant agreement, or per overall failure to notify an employee population, California courts are "afforded broad discretion" when determining the amount of civil penalties to impose under section 17206.[6]

The three limited statutory exceptions allowing restrictive covenants in the sale or dissolution of corporations, partnerships, and limited liability corporations remain in effect.[7]

2. Workplace Violence Prevention

A. Written Prevention Plans

By July 1, 2024, most California employers must create, adopt, and implement a written Workplace Violence Prevention Plan.[8] Generally, the plan must include "effective" procedures to: (1) investigate and respond to reports of workplace violence; (2) prohibit retaliation against reporters; (3) communicate with employees regarding workplace violence; (4) identify and evaluate workplace violence hazards; and (5) revise and review the plan as needed.[9] "Workplace violence" is broadly defined as "any act of violence or threat of violence that occurs in a place of employment."[10]

The new law also requires annual employee training on various topics related to workplace

Related People

Jason C. Schwartz

Katherine V.A. Smith

Tiffany Phan

Brandon J. Stoker

Lauren M. Fischer

violence and the employer's plan, such as how to report workplace violence, potential corrective measures, and how to avoid physical harm.[11] Additional training will be required whenever an employer changes its plan or identifies a previously unrecognized workplace violence hazard.[12] The law does not specify how long each training must be. Employers must maintain training records and records of each workplace violence hazard or incident (including how they were identified, investigated, and corrected, as applicable) for five years.[13] "Violent incident" logs must include specific information, such as a description of the violence, involvement of law enforcement or security, and any protective action taken on the employee's behalf.[14] Employees are entitled to view and copy the violent incident log, with certain medical information omitted, within 15 calendar days of a request.[15]

The new law does not apply to: (1) employers already covered Cal/OSHA's Violence Prevention in Health Care requirements; (2) employees who telework from a location of their own choice outside of the employer's control; (3) locations not accessible to the public with fewer than 10 employees at one time; (4) the Department of Corrections and Rehabilitation; and (5) law enforcement agencies.[16]

B. Temporary Restraining Orders

While not on the immediate horizon, as of January 1, 2025, employers may seek restraining orders on behalf of employees who have suffered harassment, and not just those with a "credible threat of violence."[17] Under the new law, "harassment" is defined as "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person," "that serves no legitimate purpose," that "would cause a reasonable person to suffer substantial emotional distress," and actually does "cause substantial emotional distress" to the employee at issue.[18] The employee need not be named in the temporary restraining order.[19]

3. Expanded Leave Protections

A. Reproductive Loss Leave

As of January 1, 2024, employees are entitled to five days of protected time off for a "reproductive loss event."[20] The new law applies to private employers with five or more employees, and any California employee employed for at least 30 days prior to the commencement of leave, even if a portion of that time was spent working outside of California.[21] The term "reproductive loss event" is broadly defined to include a failed adoption, failed surrogacy, miscarriage, stillbirth, or unsuccessful assisted reproduction.[22] Unlike California's bereavement leave law, this new law does not contain a provision allowing employers to request documentation to confirm the reproductive loss event. In addition, employers must keep confidential an employee's request, as well as any other information provided, from "internal personnel or counsel" unless necessary or otherwise required by law.[23]

Employers' existing leave policies will determine whether the reproductive loss leave is paid or unpaid; however, employees must be allowed to use paid time off, paid vacation, paid personal leave, accrued paid sick leave, or other compensatory time off in lieu of taking the five days unpaid.[24] The five days must be taken within three months' of the reproductive loss event, but need not be taken consecutively.[25] Employees who experience more than one reproductive loss event in a 12 month period need only be provided with a maximum of 20 days of leave.[26]

B. Increased Sick Leave

As of January 1, 2024, California employees must be provided with at least five days or 40 hours of paid sick leave under the Healthy Workplaces, Healthy Families Act, increased from the three days or 24 hours previously required.[27] Local ordinances may require higher amounts of paid sick leave.

Employers using the accrual method may still provide paid sick leave at an accrual rate of one hour for every 30 hours worked.[28] However, employees must now accrue at least three days of paid sick leave by their 90th calendar day of employment, and five days of paid sick leave by their 200th calendar day of employment.[29] Further, employees must be allowed to carry-over at least 10 days (or 80 hours) of paid sick leave to the following calendar year.[30]

Alternatively, employers may provide the full five days or 40 hours of paid sick leave upfront in a lump-sum each calendar year or 12-month period.[31] Employers using the upfront, lump-sum method do not have to accrue any sick leave or allow carryover to the following year; however, all sick leave provided must be available for use during the same calendar year in which the employer provides it.[32]

Employers may still require employees to work for 90 calendar days before using sick leave.[33] Accrued but unused sick time provided separate and apart from a vacation or omnibus paid time off policy still does not need to be paid out upon termination.[34]

4. Discretionary Stays Pending Appeals of Arbitrability

As of January 1, 2024, the California Code of Civil Procedure will no longer provide for automatic stays of trial court proceedings pending appeal of "order[s] dismissing or denying a petition to compel arbitration[.]"[35] Instead, trial courts will have discretion to deny a stay pending appeals of arbitrability.[36] Because S.B. 365 creates a procedural change, it is possible that courts will apply the discretionary standard to pending and future litigation. Given its marked departure from the U.S. Supreme Court's recent decision in *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 737 (2023), which held that the FAA requires "a district court [to] stay its proceedings while the interlocutory appeal on arbitrability is ongoing," S.B. 365 will likely face preemption challenges on the ground that it disfavors arbitration. *See Kindred Nursing Centers Ltd. P'ship v. Clark*, 581 U.S. 246 (2017) (a state law that "discriminate[s] on its face against arbitration" or "singles out arbitration agreements for disfavored treatment … violates the FAA").

5. Expanded Public Prosecution Rights

Beginning January 1, 2024, district attorneys, city attorneys, and county counsel (collectively, "public prosecutors") will be able to prosecute or independently enforce violations of the Labor Code (except those related to agricultural labor relations, apprenticeships, or a Private Attorneys General Act action).[37] Essentially, public prosecutors will be able to step into the shoes of the Labor Commissioner for their geographic jurisdictions. Public prosecutors will be able to seek injunctive relief and seek the same attorney's fees and costs the Labor Commissioner would be entitled to under Section 98.3 of the Labor Code.[38]

Importantly, the amended law also provides that any agreement between a worker and a putative employer limiting representative actions or mandating arbitration "shall have no effect on the authority of [a] public prosecutor or the Labor Commissioner to enforce the [Labor] [C]ode."[39] Further, the law states that an "appeal of the denial of any motion … to impose such restrictions on a public prosecutor or the Labor Commissioner shall not stay the trial court proceedings."[40] Because A.B. 594 entirely *prohibits* stays pending appeals of arbitrability in cases brought by public prosecutors or the Labor Commissioner, the anti-stay provision will likely be challenged on preemption grounds.

6. Increased Penalties for Independent Contractor Misclassification

Section 226.8 of the Labor Code will require courts and the Labor and Workforce Development Agency to impose $5,000 to $15,000 in civil penalties per violation starting on January 1, 2024 for: (1) willful misclassification, and/or (2) charging a willfully misclassified person a fee or "making any deductions from compensation" for any purpose "arising from [their] employment" that would otherwise be illegal if they were not

misclassified (i.e. charges for necessary uniforms, tools, etc.).[41] The penalties can be increased to $10,000-$25,000 per violation where there is, or has been, a pattern or practice of violations.[42] These penalties are in addition to any other available penalties or fines.[43] A violator will be required to prominently display a notice on their website, for one year, stating that they have engaged in willful misclassification and have made business changes to avoid further violations, along with other information.[44]

The Labor Commissioner will have the power to enforce these rules, in accordance with existing Labor Code Sections 98, 98.1, 98.2, 98.3, 98.7, 98.74, or 1197.1, and can do the following: (1) determine that a person or employer has committed violations, (2) investigate alleged violations, (3) order appropriate temporary relief pending the completion of an investigation or hearing, (4) issue citations, and (5) file civil actions.[45] As for employees suing to enforce these rights, they can either recover damages or enforce a civil penalty under PAGA, but not both.[46]

7. Re-Hiring Rights for Laid-Off Hospitality Employees

Employers in the hospitality industry should be aware that as of January 1, 2024, California Labor Code Section 2810.8 will be expanded to cover more employees and extend the sunset period to December 31, 2025.[47] California Labor Code Section 2810.8 will require covered employers to provide "laid-off employee[s]" with information about available job positions for which they are qualified, and to offer positions to said employees based on a preference system and in accordance with a specified timeline.[48] Under the new law, "laid-off employee" means anyone employed "6 months or more and whose most recent separation from active employment by the employer occurred on or after March 4, 2020, and was due to a reason related to the COVID-19 pandemic, including a public health directive, government shutdown order, lack of business, reduction in force, or other economic non-disciplinary reason due to the COVID-19 pandemic."[49] The law previously defined "laid off employee" as anyone "employed by the employer for 6 months or more in the 12 months preceding January 1, 2020, and whose most recent separation from active service was due to a reason related to the COVID-19 pandemic[.]"[50] Critically, the revised law presumes "that a separation due to a lack of business, reduction in force, or other economic, non-disciplinary reason is due to a reason related to the COVID-19 pandemic, unless the employer establishes otherwise by a preponderance of the evidence."[51]

As with the original version of the law, covered employers include hotels with fifty or more guest rooms, airport hospitality operations and service providers, certain event centers, and employers that provide "janitorial, building maintenance, or security services" to office, retail, or other commercial buildings.[52]

8. Prior Marijuana Usage

Starting January 1, 2024, employers may not request information about an applicant or employee's prior use of marijuana.[53] Employers also cannot discriminate against current or prospective employees on the basis of criminal history specifically related to prior marijuana use unless otherwise allowable by law.[54]

9. Labor Code's New Rebuttable Presumption of Retaliation

A new rebuttable presumption of retaliation will be codified starting January 1, 2024. The California Labor Code will include a rebuttable presumption of retaliation if an employer takes adverse action against or disciplines an employee within 90 days of that employee engaging in protected conduct.[55] Protected conduct may include, but is not limited to, discussing, inquiring, or complaining about wages, or encouraging other employees to exercise their own protected conduct rights.[56] Neither the preamble nor the statute itself mentions whether the presumption will have retroactive effect.

10. Increased Minimum Wage for Fast Food Workers

As of April 1, 2024, fast-food workers at “national fast food chains” in California must receive at least $20 per hour in minimum wage.[57] “National fast food chains” is defined as “limited-service restaurants consisting of more than 60 establishments nationally that share a common brand, or that are characterized by standardized options for decor, marketing, packaging, products, and services, and which are primarily engaged in providing food and beverages for immediate consumption on or off premises where patrons generally order or select items and pay before consuming, with limited or no table service.”[58]

California Labor Code Section 1475 also creates the “Fast Food Council” within the Department of Industrial Relations. The Council must have its first meeting by March 15, 2024, and will ultimately be responsible for establishing minimum standards for wages, hours, and other working conditions “to ensure and maintain the health, safety, and welfare” of fast-food workers.[59]

Beginning on January 1, 2025, the Council will have the authority to increase minimum wages for fast-food workers on an annual basis through 2029, provided the increases meet certain criteria.[60]

11. Diversity Reporting for Venture Capital Firms

Venture capital firms should be aware that starting March 1, 2025, they will likely be required to annually report various demographic data about the companies in which they invest to the California Civil Rights Department (“CRD”).[61] Covered venture capital firms include any with portfolio companies based in or with significant operations in California, as well as any that solicit or receive funds from California residents.[62] The annual report must contain information about the gender identity, race, ethnicity, disability status and veteran status of the founders who receive their investments.[63] Founders may opt out of reporting without penalty, but venture capital firms who fail to provide any data they do receive will be subject to undisclosed fines.[64] Any data submitted will then appear in an online searchable database available to the public, and CRD may also use it “in furtherance of its statutory duties, including, but not limited to, using the information in a civil action” under the new law or other law.[65]

It should be noted though that Governor Newsom issued a contemporaneous statement with his signing of the law. He identified several concerns with the law, including “unrealistic timelines” and various questions regarding its funding. The specific requirements of the law are likely to change prior to its effective date.

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[1] 2023 Cal. S.B. No. 699 (2023-2024 Regular Session).

[2] *Id*. § 2 (Cal. Bus. & Prof. Code § 16600.5(b)).

[3] *Id*. § 2 (Cal. Bus. & Prof. Code §§ 16600.5(d), (e)).

[4] 2023 Cal. A.B. No. 1076 (2023-2024 Regular Session).

[5] *Id*. § 2 (Cal. Bus. & Prof. Code §§ 16600, 16600.1(c)).

[6] See *Nationwide Biweekly Administration, Inc. v. Superior Court* (2020) 9 Cal.5th 279, 326.

[7] Cal. Bus. & Prof. Code §§ 16601, 16602, 16602.5.

[8] 2023 Cal. S.B. No. 553 (2023-2024 Regular Session).

[9] *Id*. § 3 (Cal. Lab. Code § 6401.9(c)).

[10] *Id*. § 3 (Cal. Lab. Code § 6401.9(a)(6)(A)).

[11] *Id*. § 3 (Cal. Lab. Code § 6401.9(e)).

[12] *Ibid*.

[13] *Id*. § 3 (Cal. Lab. Code § 6401.9(f)).

[14] *Id*. § 3 (Cal. Lab. Code § 6401.9(d)).

[15] *Id*. § 3 (Cal. Lab. Code § 6401.9(f)(6)).

[16] *Id*. § 3 (Cal. Lab. Code § 6401.9(b)(2)).

[17] 2023 Cal. S.B. No. 428 (2023-2024 Regular Session).

[18] *Id*. § 1 (Cal. Lab. Code § 527.8(b)(4)).

[19] *Id*. § 1 (Cal. Lab. Code § 527.8(e)).

[20] 2023 Cal. S.B. No. 848 (2023-2024 Regular Session).

[21] *Id*. § 1 (Cal. Gov. Code §§ 12945.6(a)(3), (a)(2)).

[22] *Id*. § 1 (Cal. Gov. Code § 12945.6(a)(7)).

[23] *Id*. § 1 (Cal. Gov. Code § 12945.6(e)).

[24] *Id*. § 1 (Cal. Gov. Code § 12945.6(b)(4)).

[25] *Id*. § 1 (Cal. Gov. Code § 12945.6(b)(3)).

[26] *Id*. § 1 (Cal. Gov. Code § 12945.6(b)(1)).

[27] 2023 Cal. S.B. No. 616 (2023-2024 Regular Session).

[28] *Id.* § 2 (Cal. Lab. Code § 246(b)).

[29] *Ibid*.

[30] *Id*. § 1 (Cal. Lab. Code § 246(j)).

[31] *Id*. § 1 (Cal. Lab. Code § 246(d)).

[32] *Ibid*.

[33] *Id*. § 1 (Cal. Lab. Code § 246(c)).

[34] *Id*. § 1 (Cal. Lab. Code § 246(g)).

[35] 2023 Cal. S.B. No. 365 (2023-2024 Regular Session).

[36] *Id.* § 1 (Cal. Code. Civ. Proc. § 1294(a)).

[37] 2023 Cal. A.B. No. 594 (2023-2024 Regular Session).

[38] *Id*. § 4 (Cal. Lab. Code § 226.8(g)).

[39] *Id*. § 2 (Cal. Lab. Code § 182).

[40] *Ibid*.

[41] *Id.* § 4 (Cal. Lab. Code § 226.8).

[42] *Id.* § 4 (Cal. Lab. Code §§ 226.8(b), (c)).

[43] *Ibid.*

[44] *Id*. § 4 (Cal. Lab. Code § 226.8(e)).

[45] *Id*. § 4 (Cal. Lab. Code § 226.8(g)).

[46] *Ibid*.

[47] 2023 Cal. S.B. No. 723 (2023-2024 Regular Session).

[48] *Id*. § 1 (Cal. Lab. Code §§ 2810.8(a), (i)).

[49] *Id*. § 1 (Cal. Lab. Code § 2810.8(a)(10)).

[50] *Ibid*.

[51] *Ibid*.

[52] *Id*. § 1 (Cal. Lab. Code §§ 2810.8(a)(1)–(13)).

[53] 2023 Cal. S.B. No. 700 (2023-2024 Regular Session).

[54] *Id*. § 1 (Cal. Gov. Code § 12954(c)).

[55] 2023 Cal. S.B. No. 497 (2023-2024 Regular Session).

[56] *Id.* §§ 1, 3 (Cal. Lab. Code §§ 98.6(b); 1197.5(k)).

[57] 2023 Cal. A.B. No. 1228 (2023-2024 Regular Session).

[58] *Id*. § 3 (Cal. Lab. Code § 1474(a)).

[59] *Id*. § 3 (Cal. Lab. Code § 1474(b)).

[60] *Id*. § 3 (Cal. Lab. Code § 1474(d)(2)).

[61] 2023 Cal. S.B. No. 54 (2023-2024 Regular Session).

[62] *Id*. § 1 (Cal. Bus. & Prof. Code § 22949.85(a)).

[63] *Id*. § 1 (Cal. Bus. & Prof. Code § 22949.85(b)).

[64] *Id*. § 1 (Cal. Bus. & Prof. Code §§ 22949.85(b)(2), (g)).

[65] *Id*. §1 (Cal. Bus. & Prof. Code §§ 22949.85(d)(1)–(3)).

The following Gibson Dunn attorneys assisted in preparing this client update: Jason C. Schwartz, Katherine V.A. Smith, Tiffany Phan, Brandon Stoker, and Lauren Fischer.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or the following authors and practice leaders:

Tiffany Phan – Partner, Los Angeles (+1 213-229-7522, tphan@gibsondunn.com)

Brandon J. Stoker – Of Counsel, Los Angeles (+1 213-229-7574, bstoker@gibsondunn.com)

Jason C. Schwartz – Co-Chair, Labor & Employment Group, Washington, D.C. (+1 202-955-8242, jschwartz@gibsondunn.com)

Katherine V.A. Smith – Co-Chair, Labor & Employment Group, Los Angeles (+1 213-229-7107, ksmith@gibsondunn.com)

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