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Refresh of California Labor & Employment Laws Effective in 2023

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As has been the case for the last few years, 2023 will bring a variety of employment law changes for California employers. Below, we outline several new laws that require attention from California employers for the new year: (1) pay scale disclosure requirements, (2) pay data and recordkeeping requirements, (3) expanded leave protections, (4) expanded anti-discrimination and retaliation laws, (5) minimum wage increases, and (6) local and industry specific changes. California employers should review their policies and practices to evaluate whether any updates need to be made.

I. Pay Scale Disclosure Requirements

As of January 1, 2023, employers of 15 or more employees (with at least one in California) are now required to publish pay scales for open positions in any job postings, regardless of whether such postings appear on an internal or external job site.[1] The statute does not specify who qualifies as an employee for purposes of meeting the "15 or more employees" threshold, but the California Labor Commissioner interprets this requirement to mean at least one employee currently located in California.[2] Further, the pay scale must be included in the job posting "if the position may ever be filled in California, either in-person or remotely."[3]

Additionally, all employers, regardless of their size, must provide the pay scale for an employee's current position upon request, and must also provide a pay scale for the position to which an applicant has applied "upon *reasonable* request."[4]

For additional details on these measures, and the potential penalties for failing to abide by them, see Gibson Dunn's October 11, 2022, client alert.

II. Pay Data Report and Recordkeeping Requirements

Beginning on May 10, 2023, all employers with 100 or more employees (with at least one in California) must submit an annual pay data report to the California Civil Rights Department (previously known as the Department of Fair Employment and Housing) that is based on a "snapshot" of W-2 earnings during a single pay period from October through December of the previous calendar year.[5] Although the Department has not yet published guidance interpreting the new law, the Department's guidance for the law's prior iteration provides that employers are covered if they have 100 or more employees total with at least one employee in California.[6] The guidance also directs employers to include remote employees in pay data reports if the employees are assigned to a California establishment, regardless of whether they reside in California, or if the employees reside in California but are assigned to an establishment in another state.[7]

Previously, pay data reports were only required from employers with 100 or more employees who were covered by annual EEO-1 Employer Information Report requirements. These employers were permitted to submit their annual EEO-1 report to satisfy California's pay data reporting obligations, if desired. The revised California law creates an independent obligation for employers with 100 or more employees to provide a pay data report regardless of their federal EEO-1 reporting status, and removes the option

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to submit an EEO-1 report in lieu of the California pay data report.[8] Practically this means that, absent an applicable exception, almost all employers of 100 or more employees with at least one employee in California will be required to create and provide both an annual EEO-1 report and a California pay data report on a yearly basis.

Employers who are required to submit a pay data report must break out the number of employees by race, ethnicity, and sex in a series of job categories, and must report the number of employees by race, ethnicity, and sex whose earnings fall within each of the pay bands prescribed in the Bureau of Labor Statistics' Occupational Employment Statistics survey.[9] Note for employers who have previously been complying with this reporting requirement, there is a new mandate that employers identify the median and mean hourly pay rate for each combination of race, ethnicity and sex (inter-sectionally) for each job category.[10]

In addition, employers with multiple establishments must continue to submit a separate report for each establishment.[11] Employers will no longer be required to submit a consolidated report that includes all employees across establishments as the existing law required.[12]

For additional details on these measures, and the potential penalties for failing to abide by them, see Gibson Dunn's October 11, 2022, client alert.

III. Expanded Leave Protections

A. Leave to Care for "Designated Person"

As of January 1, 2023, qualifying employees are now eligible to take leave under the California Family Rights Act ("CFRA") and sick time under the California Labor Code to care for a "designated person."[13] Under the CFRA, a designated person is "any individual related by blood or whose association with the employee is the equivalent of a family relationship."[14] Under Labor Code section 245.5(c)(8), however, a designated person is any "person identified by the employee at the time the employee requests paid sick days." Under both the CFRA and Labor Code, employers may limit employees to one designated person per 12-month period.[15]

B. Bereavement Leave

As of January 1, 2023, employers with five or more employees must provide eligible employees with at least five days of unpaid bereavement leave upon the death of the employee's family member, defined as a spouse, child, parent, sibling, grandparent, grandchild, domestic partner or partner-in-law.[16] The five days need not be taken consecutively.[17] Eligible employees are those who have been employed for at least 30 days prior to the start of the leave, and the leave must be completed within three months of the death.[18]

IV. Expanded Anti-Discrimination and Retaliation Laws

A. Contraceptive Equity

As of January 1, 2023, the Contraceptive Equity Act prohibits employers from requiring applicants or employees to disclose information relating to reproductive health decision-making, and from discriminating against applicants or employees based on reproductive health decision-making.[19] "Reproductive health decision-making" includes but is not limited to "a decision to use or access a particular drug, device, product, or medical service for reproductive health."[20]

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B. Emergency Conditions

As of January 1, 2023, employers may not take adverse action or threaten adverse action against employees who refuse to report to or leave a workplace due to a "reasonable belief that the workplace or worksite is unsafe" because of an "emergency condition."[21]

An emergency condition includes: "(i) conditions 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," and "(ii) 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."[22] "Health pandemic[s]" are explicitly excluded from the definition of emergency condition.[23] A "reasonable belief that the workplace or worksite is unsafe means that a reasonable person, under the circumstances known to the employee at the time, would conclude there is a real danger of death or serious injury if that person enters or remains on the premises."[24]

Additionally, employers are prohibited from preventing "any employee from accessing the employee's mobile device or other communications device for seeking emergency assistance, assessing the safety of the situation, or communicating with a person to verify their safety."[25]

V. Minimum Wage Increases

As of January 1, 2023, all California employers must offer a minimum wage of at least $15.50.[26] As a reminder, several localities, cities, and counties have higher minimum wages than the state's rate, including, at present: Alameda, Belmont, Berkeley, Burlingame, Cupertino, Daly City, East Palo Alto, El Cerrito, Emeryville, Foster City, Fremont, Half Moon Bay, Hayward, Los Altos, Los Angeles (city and unincorporated county), Malibu, Menlo Park, Milpitas, Mountain View, Novato, Oakland, Palo Alto, Pasadena, Petaluma, Redwood City, Richmond, San Carlos, San Diego, San Francisco, San Jose, San Leandro, San Mateo, Santa Clara, Santa Monica, Santa Rose, Sonoma, South San Francisco, Sunnyvale, and West Hollywood.[27]

VI. Local and Industry-Specific Changes

California employers should also double check whether there are any new ordinances effective in localities in which they operate or whether there are any new, industry-specific laws. For example, while the below does not cover all of the 2023 local and industry-specific changes, retailers operating in the City of Los Angeles should be aware that there are new rules for scheduling retail workers, and agricultural employers throughout the state will be required to comply with new union certification rules and overtime requirements.

A. Predictive Scheduling for City of Los Angeles Retail Workers

Effective April 1, 2023, retail employers in the City of Los Angeles must provide retail workers with their schedules at least two weeks in advance under the Fair Work Week Ordinance.[28] Among other requirements, employers must also provide a good faith estimate of a schedule within 10 days of an employee's request, and must allow employees to decline any changes made to their schedule following the 14 day advance notice period.[29]

B. Unionization and Overtime Changes for Agricultural Workers

Under Assembly Bill 2183, agricultural workers now have the right to vote for or against union representation either by mail or by completing ballot cards to be dropped off by the

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union at the state Agricultural Labor Relations Board ("ALRB").[30] Previously, secret ballot elections were exclusively held at a polling place selected by the ALRB. Under the new law, agricultural workers may also receive assistance filling out their ballots.[31] The new law is set to expire in five years on January 1, 2028.[32]

As of January 1, 2023, agricultural employers who employ 25 or fewer employees in California must compensate employees who work over 50 hours per week, or nine hours per day, with overtime (which is 1.5 times their regular rate of pay).[33] The amount of hours that triggers overtime pay requirements for agricultural employers with 25 or fewer employees in California will continue to decrease until 2025, at which point such employees will be entitled to overtime for work over 40 hours per week or eight hours per day.[34] This change comes a year after California began requiring agricultural employers with 26 or more employees in California to provide overtime to workers who work over 40 hours per week or eight hours per day.[35]

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[1] Cal. Lab. Code § 432.3(c)(3), (5).

[2] *See California Equal Pay Act: Frequently Asked Questions*, Department of Industrial Relations, https://www.dir.ca.gov/dlse/california_equal_pay_act.htm.

[3] *Id*.

[4] *Id*. § 432.3(c)(1), (2).

[5] Cal. Gov. Code § 12999.

[6] *See California Pay Data Reporting: Frequently Asked Questions*, Civil Rights Department, available at https://calcivilrights.ca.gov/paydatareporting/faqs/.

[7] *Id*.

[8] *See* Legislative Counsel's Digest, SB 1162.

[9] *Id*.

[10] *Id*. § 12999(b)(3).

[11] *See* Legislative Counsel's Digest, SB 1162.

[12] *Id*.

[13] Cal. Lab. Code § 12945.2(b)(5)(B).

[14] *Id*. § 12945.2(b)(2).

[15] *Id*. § 12945.2(b)(2); *see also* Lab. Code § 245.5(c)(8).

[16] Cal. Gov. Code § 12945.7(b).

[17] *Id.* § 12945.7(c).

[18] *Id.* § 12945.7(a)(1)(A), (d).

[19] Cal. Gov. Code §§ 12921(a); 12940(a), (c).

[20] Cal. Gov. Code § 12926(y).

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[21] Cal. Lab. Code § 1139(b)(1).

[22] *Id.* § 1139(a)(1)(A).

[23] *Id*. § 1139(a)(1)(B).

[24] *Id.* § 1139(a)(2).

[25] *Id.* § 1139(b)(2)(A).

[26] Cal. Lab. Code § 1182.12(b).

[27] *See*, e.g., Inventory of US City and County Minimum Wage Ordinances, UC Berkeley Labor Center, available at https://laborcenter.berkeley.edu/inventory-of-us-city-and-county-minimum-wage-ordinances/#s-2.

[28] *See generally,* Fair Work Week Ordinance, available at https://clkrep.lacity.org/onlinedocs/2019/19-0229_ord_draft_06-23-22.pdf.

[29] *Id.*

[30] Cal. Lab. Code §§ 1156.35, 1156.36.

[31] Cal. Lab. Code § 1156.36(b)(3)(C)(vi).

[32] Cal. Lab. Code §§ 1156.35(i), 1156.36(n).

[33] Cal. Lab. Code § 860(b)(2).

[34] *Id*. §§ 860(c)(2), (d)(2).

[35] *Id*. § 860(d)(1).

Gibson Dunn's lawyers are available to assist in addressing any questions you may have about these developments. Please contact the lawyer with whom you usually work in the firm's Labor and Employment practice group, the authors, or the practice group leaders.

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