

## **California Enacts Rehire Rights for Employees in Certain Industries Laid Off Due to COVID-19 Impacts (SB 93)**

On April 16, 2021, California Governor Gavin Newsom signed a new statewide law creating rehire rights for employees in the hospitality and business service industries who had been laid off for reasons related to the COVID-19 pandemic. Because this law was enacted through the budget process, it is immediately effective, and although presumably related to the COVID-19 pandemic, it will remain in effect until it automatically expires on December 31, 2024. The key provisions of this new law are discussed below.

### ***What Employers and Industries does it apply to?***

This law applies to an “enterprise,” which is specifically defined to mean hotels, private clubs, event centers, airport hospitality operations, airport service providers, or those who provide building services to office, retail, or other commercial buildings. Each of these terms is further defined in SB 93 depending on the size of operations or other enumerated requirements so these identified entities in the hospitality and business service industries are encouraged to consult the law’s exact language. As just a couple initial examples, covered “hotels” are those containing 50 or more guest rooms, while “event center” includes public or privately-owned structures of more than 50,000 feet or 1,000 seats that is used for public performances.

Please note, many of these “enterprises” are defined broadly (and beyond what the reader might initially assume considering the stated purpose of the law), and also include any contracted, leased or sublet premises connected to the “enterprise’s” purpose.

### ***What Employees are Covered?***

This law applies to “laid off employees” which is defined as an employee who had worked for the employer six months or more in the 12 months preceding January 1, 2020 and whose recent separation from active service was due to the COVID-19 pandemic. “Employee” is further defined to include an individual who in a particular week perform at least two hours of work for an employer. Qualifying COVID-19-related impacts include public health directives, government shut-down orders, lack of business, a reduction in force, or other economic, non-disciplinary reasons due to the COVID-19 pandemic.

### ***What do these Rehire Obligations include?***

Broadly speaking, as covered employers begin creating or filling prior positions, they must notify laid-off employees about positions for which those employees would be qualified. Specifically, within five days of establishing a position, the employer must offer its laid off employees in writing all positions that become available for which the employee is qualified. These written notices must be by either hand delivery or sent to the employee’s last known physical address, and by email and text message to the extent the employer possesses such information. An employee is deemed

qualified if they held the same or similar position at the employer at the time of the employee's most recent lay-off.

The employer will need to offer positions to laid-off employees in an order of preference corresponding to the law's qualification guidelines. If more than one employee is entitled to preference for the position, the employer must offer the position to the laid-off employee with the greatest length of service based on the employee's date of hire.

The laid-off employee will be entitled to five business days (i.e., any day except Saturday, Sunday, or any official state holiday) to accept or decline the position. Employers may make simultaneous, conditional offers of employment to laid off employees, with a final offer conditioned upon application of the law's preference system.

An employer that declines to rehire a laid-off employee on the grounds of lack of qualifications and instead hires someone other than a laid-off employee will need to provide the laid-off employee written notice explaining the reason for the decision and the length of service of the person hired instead. This written explanation must be provided within 30 days of the decision.

### ***Record Retention Obligations***

Employers are required to retain records for at least three years from the date of the written layoff notice for each employee. The records to be maintained are identified as follows:

- The employee's full legal name.
- The employee's job classification at the time of separation from employment.
- The employee's date of hire.
- The employee's last known address of residence.
- The employee's last known email address.
- The employee's last known telephone number.
- Copies of the written notice regarding the layoff; and
- All records of communication between the employee and the employer concerning offers of employment made to the employee pursuant to this new law.

### ***Other Circumstances when these Recall/Rehire rights apply?***

In addition to the broad definition of "enterprise," and the broad definitions of each term within that term, SB 93 also specifically applies to other instances. For instance, it applies to any of the following:

- The ownership of the employer changed after the separation from employment of a laid-off employee, but the enterprise is conducting the same or similar operations as before the COVID-19 state of emergency.
- The form of organization of the employer changed after the COVID-19 state of emergency.

- Substantially all the employer's assets were acquired by another entity which conducts the same or similar operations using substantially the same assets; or
- The employer relocates the operations at which a laid-off employee was employed before the state of emergency to a different location.

### ***Retaliation Protections***

As with almost all California employment laws, SB 93 precludes any discrimination or retaliation against laid-off employees seeking to enforce their rights, participate in proceedings or otherwise asserting their rehire rights. These protections also apply to any employee or laid-off employee who mistakenly, but in good faith, alleges noncompliance with this new law.

### ***How will these rights be enforced?***

The California Division of Labor Standards Enforcement (DLSE) has exclusive jurisdiction to enforce this new law. In response to an employee complaint filed with the DLSE, the agency may award any or all of the following: (a) hiring and reinstatement consistent with this new law; (b) front pay or back pay for each day a violation continues (calculated at the highest of three different enumerated options); or (c) the value of benefits the employee would have received under the employer's benefit plan.

While no criminal penalties are authorized, this law also enumerates statutory penalties to be imposed against the employer or its agents. These civil penalties include \$100 for each employee whose rights are violated, and \$500 in liquidated damages per employee per day for each violation until it is cured. These penalties will be deposited into the Labor and Workforce Development Fund and paid to the employee as compensatory damages.

The DLSE is also tasked with promulgating rules and regulations to implement this new law.

### ***What about similar local ordinances?***

California employers have already been attempting to comply with recall or retention ordinances enacted by various municipalities (e.g., Los Angeles, San Diego, Long Beach, Oakland, San Francisco, and Santa Clara). Unfortunately, and as with California's patchwork of municipal level paid sick leave laws, these recall/retention ordinances often vary, thus creating compliance challenges for statewide employers. Unfortunately, also, SB 93 specifically provides that it does not preclude local government agencies from enacting ordinances imposing greater standards or that establish additional enforcement provisions. It also provides that it does not preclude discharged or eligible employees from bringing a common law claim for wrongful termination.

However, and perhaps reflecting the influence of organized labor who supported SB 93, it also provides that these new rehire rights may be waived in a valid collective bargaining agreement that explicitly waives these protections in clear and unambiguous terms.