

California Labor & Employment Law Review

Official Publication of the California Lawyers Association Labor and Employment Law Section

LABOR AND
EMPLOYMENT
&
LAW

CALIFORNIA
LAWYERS
ASSOCIATION

AUTHORS*



Beth W. Mora



Leticia "Tia"
Butler

MCLE SELF-STUDY:

NEW CALIFORNIA EMPLOYMENT LAWS FOR 2023

The 2022 California legislative session was a productive year with the Governor signing 997 bills into law and vetoing 169, of which 90 employment bills were signed while 27 were vetoed. Workplaces will experience notable changes in the new year—including leave, pay, and retaliation—noteworthy legislation discussed here.

ENTITLEMENT TO FIVE DAYS OF BEREAVEMENT LEAVE (A.B. 1949, LOW, 2022 CAL. STAT. 767)

Beginning January 1, 2023, covered employers must provide five days of bereavement leave following the death of an employee's "family member."

The law applies to private employers with five or more employees and to any state or civil subdivision of the state. It does not apply to employees covered by

INSIDE THIS ISSUE

NEW CALIFORNIA EMPLOYMENT LAWS FOR 2023
PAGE 1

THE TOP CASES OF 2022
PAGE 8

CALIFORNIA EMPLOYMENT LAW NOTES
PAGE 15

WAGE AND HOUR CASE NOTES
PAGE 18

NLRA CASE NOTES
PAGE 23

PUBLIC SECTOR CASE NOTES
PAGE 27

CASES PENDING BEFORE THE CALIFORNIA
SUPREME COURT
PAGE 31

NEW EXECUTIVE COMMITTEE MEMBERS
PAGE 34

MESSAGE FROM THE CHAIR
PAGE 36

a collective bargaining agreement that contains certain provisions, including bereavement leave.

Employees must be employed 30 days to be eligible. The days of leave need not be consecutive but must be completed within three months. The leave may be unpaid.

Employers must maintain the confidentiality of employees requesting this leave, including any documentation that the employer may request.

Bereavement leave is separate from California Family Rights Act (CFRA) leave. Employees who believe they have been discriminated or retaliated against will be entitled to the same remedies available for violations of the CFRA and/or the FEHA.

EXPANDED ENTITLEMENT UNDER CFRA AND PAID SICK LEAVE FOR “DESIGNATED PERSONS” (A.B. 1041, WICKS, 2022 CAL. STAT. 748)

California recently expanded the CFRA, adding siblings, grandparents, grandchildren and parents-in-law as “family members” for whom employees can take leave to provide care. This law further amends the CFRA to include a “designated person,” defined as “an individual related by blood or whose association with the employee is the equivalent of a family relationship.”

An employee may designate this individual at the time the employee requests leave, but the employer may limit the employee to one designated person per 12-month period.

The law similarly amends the definition of “family member” in California’s Paid Sick Leave law (CAL. LAB. CODE § 245.5(c)) to include a “designated person.” As with the CFRA changes, an employee could designate that person at the time they request to use paid sick days and the employer may limit the employee to one designated person per 12-month period.

CHANGES REGARDING PAY SCALE POSTINGS AND ANNUAL PAY DATA REPORTING (S.B. 1162, LIMÓN, 2022 CAL. STAT. 559)

In line with the California Legislature’s continued focus on pay equity, S.B. 1162 attempts to close some gaps in previously enacted pay scale and data reporting laws.

PAY SCALE POSTING

CAL. LAB. CODE § 432.3 requires an employer to provide the pay scale for a position to an applicant but does not require pay scales be provided to a current employee.

S.B. 1162 expands these obligations as follows:

- All employers must provide “pay scale” (i.e., salary or hourly wage range) information to current employees.
- Employers with 15 or more employees must post the pay scale in job postings. Employers with fewer than 15 employees must provide the pay scale to an applicant upon request.
- All employers must maintain job title and wage history records for employees for the duration of employment plus three years.

Employers face new liability risk, including civil penalties of \$100 to \$10,000 per violation in connection with these requirements.

ANNUAL PAY DATA REPORTING

Under existing law (CAL. GOV’T CODE § 12999), private employers with 100 or more employees that are required to file an annual Employer Information Report (EEO-1) must also submit a pay data report to the Civil Rights Department (CDR) (formerly known as the Department of Fair Employment and Housing or DFEH). Employers could comply with this requirement by submitting an EEO-1 to CRD.

S.B. 1162 expands these reporting requirements.

- Any employer with 100 or more employees (not only those required to submit an EEO-1) must annually submit a “pay data report” (See, Government Code section 12999) to the CRD.
- Employers with 100 or more employees hired through labor contractors must submit a separate pay data report.
- These reports must include median and mean hourly rates for each combination of race, ethnicity, and sex within each job category.
- Employers may not submit an EEO-1 in lieu of a pay data report.
- S.B. 1162 imposes new civil penalties for failure to comply.

EMPLOYER COVID-19 EXPOSURE NOTICE REQUIREMENTS EXTENDED THROUGH 2023 (A.B. 2693, REYES, 2022 CAL. STAT. 799)

In 2020, California previously enacted A.B. 685 (CAL. LAB. CODE §§ 6325, 6409.6 & 6432), governing COVID-19 exposure notice requirements. This new law extends some of these requirements through January 1, 2024, but reduces the burden.

Employers who receive notice of potential exposure may now place a notice where workplace notices are customarily posted. The notice must state the dates and location of the exposure, as well as contact information for employees to receive information regarding COVID-19 benefits, CDC cleaning and disinfection plan and Cal-OSHA COVID-19 prevention program. The notice must be posted within one business day and remain posted for 15 calendar days.

Alternatively, the employer may provide written notice to all employees who were on the premises at the same time as the confirmed case of COVID-19, but need not provide information about COVID-19-related benefits, the cleaning and disinfection plan, or the prevention plan. Employers must keep a log of all the dates the notice was posted.

The law removes the requirements to notify local public health agency in the case of an “outbreak” and for the State Department of Public Health to make publicly available information about COVID-19 outbreaks.

PROTECTIONS FOR NON-WORK-RELATED MARIJUANA USAGE AND TESTING LIMITATIONS (A.B. 2188, QUIRK, 2022 CAL. STAT. 392)

This law amends the Fair Employment and Housing Act (FEHA) to make it unlawful for an employer to discriminate against an employee or applicant based upon: (a) the person’s use of cannabis off the job and away from the workplace; or (b) an employer-required drug screening test that has found the person to have non-psychoactive cannabis metabolites (which do not indicate actual/present impairment) in that person’s hair, blood, urine, or other bodily fluids.

This law does not permit employees to possess, be impaired by or to use cannabis at work. There are also several exceptions, including employees in the building and construction trades or applicants/employees in positions that require a federal background investigation or security clearance.

RETALIATION PROTECTIONS RELATED TO EMERGENCY CONDITIONS (S.B. 1044, DURAZO, 2022 CAL. STAT. 829)

S.B. 1044 precludes employers from taking or threatening adverse action against employees (subject to the statutorily enumerated exceptions) who refuse to report to or who leave a workplace because the employee reasonably believed the worksite was unsafe due to an “emergency condition.” “Emergency condition” means: (1) 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; or (2) an order to evacuate a workplace, a worker’s home, or the school of a worker’s child due to natural disaster or a criminal act.

Emergency condition, however, does not include a health pandemic. A broader provision prohibits all employers, in the event of an emergency condition, from preventing employee access to their mobile or other communications devices.

The law provides that employers shall have the right to cure alleged violations that could be brought pursuant to PAGA.

CREATION OF FAST FOOD INDUSTRY COUNCIL RE: PAY AND WORKING CONDITIONS (A.B. 257, HOLDEN, 2022 CAL. STAT. 246)

This first-in-the-nation law establishes the Fast Food Council within the Department of Industrial Relations (DIR) for the purpose of establishing sector-wide minimum standards on wages, working hours, and other working conditions for fast food workers.

A.B. 257 applies to chain fast food restaurants of 100 or more establishments *nationally* that primarily provide food or beverages for immediate consumption, with limited or no table service. The law exempts bakeries that produce bread for sale as a stand-alone item and restaurants located within “grocery establishments.”

The Council will have ten members, all to be appointed by the Governor, the Speaker of the Assembly, and the Senate Rules Committee. The Council is authorized to establish minimum standards for fast-food workers, including setting minimum wages and establishing standards for working hours and other conditions related to health, safety and welfare.

The law specifies that the Council shall not establish a minimum wage greater than \$22 per hour for 2023, and

that the minimum wage shall not increase in later years by more than 3.5% or the rate of change of the non-seasonally adjusted Consumer Price Index for Urban Wage Earners and Clerical Workers. The standards set by the Council will not supersede those provided for in a collective bargaining agreement if the agreement expressly provides for more favorable standards than those established by the Council.

The law also makes it unlawful for a fast food restaurant operator to discharge or discriminate or retaliate against any employee for specified reasons and creates a private right of action, a right to reinstatement and a presumption of unlawful discrimination and retaliation in certain circumstances.

EMPLOYEE PARKING, PARKING CASH-OUT PROGRAM (A.B. 2206, LEE, 2022 CAL. STAT. 866)

Companies with fifty or more employees, that are located in an area that has not met clean air standards, that offer free parking to their employees, and that lease that parking (employers that own the parking are exempt) are subject to this rule. The amendment requires employers to inform employees they have the right to a cash-out benefit and to document that they have done so. The bill further defines the amount of the cash-out/subsidy as well as requires employers to maintain evidence of efforts in relation thereto for four years.

CONTRACEPTIVE EQUALITY ACT OF 2022 (S.B. 523, LEYVA, 2022 CAL. STAT. 630)

The Contraceptive Equity Act of 2022 revises the Fair Employment and Housing Act to include “reproductive health decisionmaking” as a protected category. “Reproductive health decisionmaking” includes, but is not limited to, a decision to use or access a particular drug, device, product, or medical service for reproductive health. It is now unlawful for an employer to require, as a condition of employment, continued employment, or a benefit of employment, the disclosure of information relating to an applicant’s or employee’s reproductive health decisionmaking or to engage in discriminatory practices based on reproductive health decision. Further, this amendment to FEHA makes various changes to expand coverage of contraceptives by a health care service plan contract, health insurance policy, health benefit plan, and contracts with CalPERS, California State Universities and University of California.

SEXUAL ABUSE AND COVER UP ACCOUNTABILITY ACT (A.B. 2777, WICKS, 2022 CAL. STAT. 472)

The Sexual Abuse and Cover Up Accountability Act revives any claims commenced on or after January 1, 2019, for acts of sexual assault that occurred on or after January 1, 2009, if those claims were barred solely because of the expiration of the statute of limitations. A plaintiff has until December 31, 2026, or three years from the bill’s effective date, to bring such a claim. In addition, the Act creates a one-year revival period for a plaintiff to bring a claim as to employers that would otherwise be barred because the statute of limitations expired if the plaintiff alleges the following: (1) the plaintiff was sexually assaulted; (2) one or more entities are legally responsible for damages arising out of the sexual assault, which can be established through, *inter alia*, negligence, intentional torts, and vicarious liability; and (3) the entities, including their officers, directors, representatives, employees, or agents, engaged in a cover up or attempted cover up of a previous instance or allegation of sexual assault by an alleged perpetrator of such abuse. In this situation, a plaintiff has until December 31, 2023, to bring such a claim. The Act defines a cover up as “a concerted effort to hide evidence relating to a sexual assault that incentivizes individuals to remain silent or prevents information relating to a sexual assault from becoming public or being disclosed to the plaintiff, including, but not limited to, the use of nondisclosure agreements or confidentiality agreements.” Relevant to the #MeToo movement, the bill explicitly revitalizes related claims for wrongful termination and sexual harassment where a plaintiff asserts sexual assault was the foundation for said claims.

SUPERIOR COURT LACTATION ROOMS (A.B. 1576, COM. ON JUDICIARY, 2022 CAL. STAT. 1576)

A.B. 1576 requires the superior court to provide any court user, including attorney, client, witnesses, court reporter,

THE CONTRACEPTIVE EQUITY ACT OF 2022 REVISES THE FAIR EMPLOYMENT AND HOUSING ACT TO INCLUDE “REPRODUCTIVE HEALTH DECISIONMAKING” AS A PROTECTED CATEGORY.

etc. access to a lactation room in any courthouse in which a lactation room is also provided to court employees. Said lactation room are to be located within an area that is accessible to the public or in any location that is reasonably accessible to the public using the court, with the same requirements upon an employment with respect to providing a lactation room for employees in compliance with CAL. LAB. CODE § 1031. Operative on July 1, 2024.

EVIDENCE OF IMMIGRATION STATUS (S.B. 836, WIENER, 2022 CAL. STAT. 168)

Effective immediately, CAL. EVID. CODE §§ 351.3 and 351.4 prohibit disclosure of a person's immigration status in open court unless the Court deems it admissible in an in-camera hearing. This limitation does not apply in civil cases when immigration status is necessary to prove an element of a claim or an affirmative defense, nor does it prohibit a person or their attorney from voluntarily revealing immigration status.

NAME CHANGE OF DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING (S.B. 189, COM. ON BUDGET AND FISCAL REVIEW, 2022 CAL. STAT. 48)

S.B. 189 changes the name of the Department of Fair Employment and Housing (DFEH) to the Civil Rights Department (CRD). Changes the name of the Fair Employment and Housing Council (FEHC) to the Civil Rights Council (CRC). Specifies that CRD is acting in the public interest in bringing civil actions.

DATA PRIVACY LAW EXEMPTION FOR BUSINESSES WITH CALIFORNIA WORKERS WILL EXPIRE DECEMBER 31, 2022

The California legislature ended this year's session without extending employers' partial exemption from certain requirements under the California Consumer Privacy Act of 2018 (CCPA) and California Privacy Rights Act of 2020 (CPRA), California's consumer privacy law (CAL. CIV. CODE § 1798 *et seq.*). Therefore the laws will become applicable to information about employees, applicants, independent contractors, and other workers (Workforce Members).

The CCPA applies to businesses that satisfy all three of the following criteria:

1. The company does business in California; *and*
2. The company is a for-profit business; *and*

3. The company meets *any* of the following thresholds (effective January 1, 2023):

- a. Has gross annual revenues over \$25 million; *or*
- b. Buys, receives, or shares the personally-identifiable information of 100,000 or more consumers or households; *or*
- c. Derives 50% or more of its annual revenue from selling or sharing consumers' personal information.

The CCPA regulates collection and use of "personal information," which is defined as information that directly or indirectly identifies, relates to, or describes a particular person. In the employment context, the law is likely to be broadly applied to cover IP addresses, background search results, and resumes from online applicants; COVID-19 data, among many other types of information.

The CPRA also expands employer's pre-collection disclosure obligations. As of January 1, 2023, in addition to disclosures regarding categories of personal information the business collects and the intended use purposes for the information, covered businesses will *also* need to include disclosures regarding sensitive personal information, whether any personal information is sold or shared, and retention information.

Additionally, as of January 1, 2023, Workforce Members will have *new rights* with respect to their personal information, including the right to: know what personal information the business collected, sold, shared or disclosed about them. The CPRA will require the business to correct inaccurate personal information; and require the business to delete their personal information. Covered businesses will have new obligations in connection with Workforce Members' personal information, including obligations to: provide extensive privacy notices; respond to data rights requests; and limit uses and disclosures of personal information.

The applicable laws and regulations are complex and include nuanced rules and exceptions that exceed the scope of this brief overview. Moreover, applicable regulations are still being prepared.

STATEWIDE MINIMUM WAGE INCREASES TO \$15.50 ON JANUARY 1, 2023

Enacted in 2016, S.B. 3 (2016 Cal. Stat. 4) implemented a series of annual increases to the minimum wage until reaching \$15.00 per hour, with further increases if the

Consumer Price Index exceeds certain enumerated levels, which it has. Accordingly, statewide minimum wage will increase to \$15.50 for all employers, regardless of size, on January 1, 2023. The minimum salary threshold necessary to maintain an employee's exempt status will also increase to \$64,480 annually and to \$5,373.33 per month.

A number of California cities or counties (including Los Angeles, San Francisco, and Berkeley) increased their minimum wage more than the statewide minimum. A complete list of these city and county-level increases in California is available at <https://www.govdocs.com/california-minimum-wage/> (last visited Dec. 9, 2022).

NEW STATE HOLIDAYS

- **Lunar New Year Holiday (AB 2596, Low, 2022 Cal. Stat. 792)** The date corresponding with the second new moon following the winter solstice, or the third new moon following the winter solstice should an intercalary month intervene, known as "Lunar New Year"
- **Juneteenth (AB 1655, Jones-Sawyer, 2022 Cal. Stat. 753)** added Juneteenth, June 19, to the list of state holidays
- **Day of Remembrance of Armenian Genocide (Governor Proclamation)** Proclaimed April 24, 2022 as Day of Remembrance of Armenian Genocide
- CAL GOV'T CODE § 6700(a) provides a full list of state holidays

HONORABLE MENTION: ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021, HR 4445 (BUTROS), 117TH CONGRESS (2021-2022) P.L. 117-90.

On March 3, 2022, President Biden signed into law H.R. 4445, which allows a person alleging conduct constituting sexual harassment or sexual assault to elect to invalidate a pre-dispute arbitration agreement or joint-action waiver with respect to their case. The Act explicitly provides that it applies to any dispute or claim that arises or accrues on or after the date of the enactment, but not to existing cases already in arbitration or ones where the conduct occurred before. Any dispute regarding the applicability of the Act to an arbitration agreement must be decided by a court, not an arbitrator. Parties may voluntarily enter into enforceable arbitration agreements or class-action waivers after such claims arise.

This article is available as an
ONLINE SELF-STUDY TEST.

Visit: cla.inreachce.com
for more information.

* Beth W. Mora of Mora Employment Law is dedicated to representing victimized employees. She is a passionate and accomplished advocate for those facing a wide range of employment law issues. Ms. Mora's commitment to social justice and volunteerism is deeply rooted in her personal values. Due to her advocacy, Mr. Mora is often invited to speak, has published numerous articles as well as has been quoted in legal journals, including Bloomberg Law, Daily Journal, and Law 360 on issues impacting employees and the legal community. From the courthouse to the boardroom, Ms. Mora is a committed advocate for her clients and community. She can be reached at bmora@moraelaw.com.

Leticia "Tia" Butler is a member of the Wilson Turner Kosmo LLP business and employment litigation groups handling individual, class, representative and collective actions. Ms. Butler has represented individual and entity clients in a wide array of business sectors and is experienced in all stages of litigation, including jury and bench trials, as well as arbitration. Since 2010, the focus of her practice has been on the defense of business and employment disputes and employment counseling. Ms. Butler has served on various committees for the San Diego County Bar Association (SDCBA), including as Chair of its New Lawyer Division Board of Directors. She can be reached at lbutler@WilsonTurnerKosmo.com.