Legislative Update: 2024 Employment Laws for California Employers

In 2023, Governor Newsom signed into law several bills that will affect California employers starting January 1, 2024. Below is a brief summary of those laws:

Reproductive Leave Loss (SB 848)

Employers will be required to provide eligible employees with up to five days of unpaid leave following a "reproductive loss event." A "reproductive loss event" is defined as the day or, for a multiple-day event, the final day of a failed adoption, failed surrogacy, miscarriage, stillbirth, or an unsuccessful assisted reproduction through an artificial insemination or an embryo transfer.

Employees may take a maximum of 20 days within a 12-month period due to multiple reproductive loss events. The leave must be completed within three months of the reproductive loss event. Both parents, including the non-birthing parent, are eligible for this leave.

Off-Duty Cannabis Use and Drug Testing (AB 2188, SB 700)

California has two new laws related to employee cannabis use and drug testing. The first, AB 2188, creates a new protected classification under the Fair Employment and Housing Act (FEHA) and makes it unlawful for an employer to discriminate against applicants' and employees' off-duty, off-premises cannabis use. Further, employers cannot discriminate against applicants and employees based upon testing results that reveal non-psychoactive cannabis metabolites in hair, blood, urine, or other bodily fluids.

AB 2188 does not permit employees to use marijuana on the job, nor does it interfere with an employer's right to maintain a drug-free and alcohol-free workplace. An employer may still refuse to hire an applicant based on drug testing that does not test for non-psychoactive cannabis metabolites. There are also exceptions to AB 2188 for federal contractors and employees in the building and construction trades.

SB 700 prohibits employers from requesting information from an applicant relating to their prior use of cannabis. However, employers are not prohibited from inquiring about an applicant's criminal history if otherwise permitted by law. Under this new law, information about

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an applicant's prior cannabis use obtained from their criminal history is permitted if the employer is otherwise permitted to consider or inquire about the information under the FEHA or other state or federal law.

In addition, SB 700 does not preempt state or federal laws, including Department of Transportation regulations, requiring applicants or employees to be tested for controlled substances and the manner in which they are tested.

Temporary Public Employee Collective Bargaining (AB 1484)

AB 1484 applies to temporary public employees who perform the same or similar type of work as permanent represented employees. Upon the request of the union or employee association of similar permanent represented employees, temporary employees shall be automatically included in the same bargaining unit as permanent employees. The parties shall engage in collective bargaining for temporary employees to be an addendum to the current memorandum of understanding ("MOU") with the ability to request a future single MOU for both temporary and permanent employees. There is no obligation to establish the same terms and conditions of employment for permanent and temporary employees.

The scope of bargaining for temporary employees will include: (1) "[w]hether a temporary employee who subsequently obtains permanent employment receives seniority or other credit or benefit for their time spent in temporary employment shall be a matter within the scope of representation in bargaining units that include permanent employees"; and (2) "[w]hether a temporary employee receives a hiring preference over external candidates for permanent positions shall be a matter within the scope of representation in bargaining units that include temporary employees."

Public employers are required to provide a job description, wage rates, eligibility for benefits, the anticipated length of employment, and the procedures to apply for open permanent positions to temporary employees upon hire and to the union or employee association within five business days of any new hire. Employee information must also be provided to the union or employee association. Under Government Code § 3558, when providing the employee organization with the employee information required by Section 3558, the public employer shall include the anticipated end date of employment for each temporary employee or actual end date if the temporary employee has been released from service since the last list was provided.

Cal/OSHA COVID-19 Prevention Non-Emergency Regulations

The Cal/OSHA COVID-19 Prevention Non-Emergency Regulations are effective February 3, 2023 through February 3, 2025. The regulations

provide for flexibility based on changes in the California Department of Public Health orders. The regulations can be found here: https://www.dir.ca.gov/dosh/coronavirus/Non_EmergencyRegulations/.

Labor Code § 6409.6 (which was 2020's AB 685, 2021's AB 654, and 2022's AB 2693) mandated notice requirements for COVID-19 cases in the workplace. Labor Code § 6409.6 will sunset on January 1, 2024 and notice will no longer be required pursuant to that law. However, the notice requirement is still active under the Cal/OSHA COVID-19 Prevention Non-Emergency Regulations, and requires employers to provide certain notices to close contact employees and COVID-19 cases.

Minimum Wage for Health Care Employees (SB 525)

SB 525 will phase in minimum wage requirements for health care employees. Beginning June 1, 2024, depending on the specific criteria of each hospital or health care facility, a new minimum wage of either $18.00 per hour, $21.00 per hour, or $23.00 per hour will apply with a phase-in up to $25.00 per hour. However, county-owned, -affiliated, or -operated health care facilities have until January 1, 2025 before the new minimum wage requirements apply.

Temporary Restraining Orders for Employee Harassment (SB 428 – Effective January 1, 2025)

Current law allows employers to seek a temporary restraining order (TRO) and an injunction against an individual on behalf of employees who have suffered unlawful violence or a credible threat of violence that can reasonably be construed to be carried out or to have been carried out within the workplace.

SB 428 authorizes employers to seek a temporary restraining order and an injunction against any individual who has "harassed" its employees. Under SB 428, employees can decline to be named in the TRO before the employer files the petition. However, this law prohibits a court from issuing such a TRO if it would prohibit protected speech or activities under the National Labor Relations Act (NLRA) or other law.

Whistleblower Protection (SB 497)

Current law prohibits an employer from discriminating, retaliating, or taking adverse action against any employee or applicant for engaging in protected activity. "Protected activity" includes invoking the provisions of the Equal Pay Act, and opposing pay practices that compensate employees of the opposite sex, or of another race or ethnicity, at lesser wage rates, for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions. An employer can defeat

an Equal Pay Act claim by proving that the difference in pay for substantially similar work is due to factors such as seniority, merit, a system that measures production, and/or a "bona fide factor other than sex, race, or ethnicity."

Under SB 497, referred to as the Equal Pay and Anti-Retaliation Protection Act, a rebuttable presumption of retaliation exists that if an employee if disciplined or discharged within 90 days of engaging in protected activity under the Labor Code or Equal Pay Act. When faced with the rebuttable presumption, an employer must articulate a legitimate, nonretaliatory reason for the alleged retaliation. If the employer does so, the burden shifts back to the employee to demonstrate that, despite the nonretaliatory reason offered by the employer, the adverse action was nonetheless retaliatory.

Workplace Violence Prevention Plan (SB 553 – Effective July 1, 2024)

Effective July 1, 2024, SB 553 requires that employers establish, implement, and maintain, at all times in all work areas, an effective workplace violence prevention plan containing specified information. Employers must also record information in a violent incident log for every workplace violence incident, provide effective training to employees on the workplace violence prevention plan, and provide additional training when a new or previously unrecognized workplace violence hazard has been identified and when changes are made to the plan.

SB 553 also require records of workplace violence hazard identification, evaluation, correction and training, violent incident logs and workplace incident investigations to be maintained, and certain records to be made available to the division, employees, and employee representatives.

Paid Sick Leave (SB 616)

Effective January 1, 2024, SB 616 expands paid sick leave entitlements for California employees.

- **Frontloading Method**. Beginning January 1, 2024, employees are now entitled to **40 hours** or **5 days** of sick leave annually (no carryover or accrual required). *(Previously, employees were entitled to 24 hours of sick leave annually.)*
- **Accrual Method**. Beginning January 1, 2024, employees may now accrue one hour of sick leave for every 30 hours worked OR at a rate other than one hour of sick leave for every 30 hours worked, provided the accrual is regular and results in the accrual of no less than 24 hours or 3 days of sick leave by the 120th day of employment and **no less than 40 hours or 5**

days of sick leave by the 200th day of employment.

- **Annual Usage Cap.** Beginning January 1, 2024, employers may limit an employee's annual use of paid sick leave to **40 hours**. (*Previously, employers could limit an employee's annual use of paid sick leave to 24 hours.*)
- **Accrual Cap.** Beginning January 1, 2024, employers may cap an employee's paid sick leave accrual at **80 hours** or **10 days**. *(Previously, employers could cap an employee's paid sick leave accrual at 48 hours or 6 days.)*

Labor Code Enforcement (AB 594)

AB 594 will authorize a public prosecutor to prosecute a civil or criminal action for a violation of specified provisions of the Labor Code or to enforce those provisions independently, until January 1, 2029. This bill provides that, in any action initiated by a public prosecutor or the Labor Commissioner to enforce the Labor Code, any individual agreement between a worker and employer that purports to limit representative actions or to mandate private arbitration shall have no effect on the authority of the public prosecutor or the Labor Commissioner to enforce the Labor Code.

Non-Compete Agreements (AB 1076 and SB 699)

AB 1076 codifies *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937 by specifying that California's prohibition on non-compete contracts is to be broadly construed to void the application of any non-compete agreement in an employment context, or any non-compete clause in an employment contract, no matter how narrowly tailored, that does not satisfy specified exceptions. California's Unfair Competition Law ("UCL") makes various practices unlawful and makes a person who engages in unfair competition liable for a civil penalty. AB 1076 states that these provisions are applicable to contracts where the person being restrained is not a party to the contract.

AB 1076 also makes it unlawful to require an employee to enter a non-compete agreement that does not satisfy specified exceptions. AB 1076 requires employers to notify current and former employees (employed after January 1, 2022) in writing by February 14, 2024, that the non-compete clause or agreement is void. This bill would make a violation of these provisions an act of unfair competition pursuant to the UCL.

On a related note, SB 699 establishes that any contract that is void under California's non-compete prohibition is unenforceable regardless of where and when the contract was signed. SB 699 prohibits employers from entering into or attempting to enforce non-compete agreements with employees. The bill prohibits an employer or former employer from attempting to enforce a contract

that is void regardless of whether the contract was signed, and the employment was maintained, outside of California.

Arbitration Agreement Enforcement (SB 365)

This bill provides that trial court proceedings will not be automatically stayed during the pendency of an appeal of an order dismissing or denying a petition to compel arbitration.

Currently, trial court proceedings are stayed until an appeal has been fully briefed and is ready to be heard by the appellate court (i.e., until the appeal is "perfected"). There are limited exceptions to this rule. SB 365 amends California's Code of Civil Procedure to state that: "the perfecting of such an appeal shall not automatically stay any proceedings in the trial court during the pendency of the appeal."

Employers will see this new law come into play when a court denies a petition to compel arbitration and the employer appeals that decision. SB 365 will allow litigation to continue during such an appeal.

Public Safety – Peace Officer Determination of Bias (AB 443) and Hate Crimes Policy (AB 449)

Pursuant to AB 443, effective January 1, 2026, the Commission on Peace Officer Standards and Training (POST) is required to establish a definition of "biased conduct" to be used in investigations of complaints or incidents involving possible indication of peace officer bias or for screening peace officer applicants.

AB 449 will also affect law enforcement agencies and peace officers. By July 1, 2024, law enforcement agencies must implement a hate crimes policy and provide training to peace officers on the application of the policy.

What Employers Should Do Next

California employers should evaluate their current policies and practices to ensure compliance with these new laws. Next steps should include the following:

1. Review and update employee handbooks or stand-alone policies.
2. Train and educate management on these new laws.
3. Consider partnering with outside counsel for a policy and practice compliance review.