

Morgan Lewis

WEBINAR SERIES

CALIFORNIA EMPLOYMENT LAW YEAR IN REVIEW

NEW CALIFORNIA EMPLOYMENT LEGISLATION

Kathryn McGuigan, Michael Weil, and Karen Cho
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Presenters



Kathryn McGuigan



Michael Weil



Karen Cho

Morgan Lewis



SB 1162: Pay Transparency in Job Postings

- Under SB 1162, effective January 1, 2023, employers with 15 or more employees must include a pay scale for a position with every job posting that they post directly or through a third party.
- The pay scale should include the salary or hourly range that the employer reasonably expects to pay for the position.
- This is in addition to pay disclosure obligations that are already in place.

SB 1162: Pay Transparency in Job Postings, *Cont'd.*

- Potential Penalties:
 - The Labor Commissioner may order the employer to pay a civil penalty of \$100 to \$10,000 per violation. No penalty applies on the first violation of the law provided that the employer demonstrates that they have updated their job postings to include a pay scale as required.
 - Individuals may file civil actions for injunctive relief and “other relief the court deems appropriate.”

SB 1162: Pay Data Reporting Requirements

- SB 1162 also expands employer reporting requirements under Government Code Section 12999. By May 2023, employers with 100+ employees are required to include yearly reports analyses of the median and mean hourly pay rates, within various job categories, for each race, ethnicity, and sex.
 - Reports are due the second Wednesday of May each year.
 - Includes private employers with 100+ employees hired through labor contractors.
 - Includes potential civil penalties of \$100-\$200 per employee for failure to file the report.

SB 1162: Further Guidance Anticipated

- Many questions left unanswered
 - Do previously published job postings need to be updated?
 - Do the job posting requirements apply to remote positions? Do the employee thresholds apply to employees just in that state or anywhere?
 - Do these laws apply to promotional opportunities?
 - Does the salary range need to reflect the full scale of current employees in the position? Can you offer someone a salary outside the posted range?
 - Does the posted salary information need to include incentive compensation, bonuses or commissions?
 - Are recruit job advertisements covered? What about phone calls?
 - Do these laws apply to independent contractor positions?
 - How should you deal with the “labor contractor” language in the statute?
 - Are companies required to advertise for new jobs publicly?
 - For jobs where there is a collective bargaining agreement, can you reference the contract instead?
 - Is there a chance that PAGA can come into play here?

AB 1041: Expands California Family Rights Act (CFRA) & Paid Sick Leave

- AB 1041 expands employee CFRA and paid sick leave rights to allow an employee to take such leave to care for a “designated person,” in addition to other family members previously specified by law.
 - Under CFRA, “designated person” is defined as “any individual related by blood or whose association with the employee is the equivalent of a family relationship.”
 - Under California Paid Sick Leave law, “designated person” is defined as “a person identified by the employee at the time the employee requests paid sick days.”
 - Note: This broadens the scope of who qualifies as a designated person.
- Under both CFRA and CA Paid Sick Leave, an employer may limit an employee to one designated person per 12-month period.

AB 1949: Bereavement Leave

- AB 1949 amends the California Family Rights Act (CFRA) to require covered employers (employers with five or more employees) to provide eligible employees (employees who have been employed for at least 30 days prior to requested leave) **with up to five days of bereavement leave** for the death of a qualifying family member (spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law).
- Bereavement leave is unpaid unless the employer has an existing bereavement policy that provides for paid leave or the employee elects to use another source of accrued paid leave.
- Employers can request documentation (e.g., a death certificate).
- Going forward employers should review their existing bereavement leave policies to ensure compliance with AB 1949.

COVID-19 Related Employment Laws

- AB 2693 extends previous COVID-19 reporting obligations until January 1, 2024, with some notable changes:
 - Employers can now satisfy potential exposure notice requirements by either (1) providing written notice, as was previously required, or (2) displaying a worksite notice in an area where notices to employees are customarily posted.
 - Employers are no longer required to report COVID-19 outbreaks to local public health agencies.
- AB 152 extends California's COVID-19 Supplemental Paid Sick Leave law through December 31, 2022.
 - The bill also creates a program to reimburse qualifying small businesses and nonprofits for costs incurred providing employees with COVID-19 supplemental paid sick leave.

COVID-19 Related Employment Laws, *Cont'd.*

- Cal-OSHA Emergency Temporary Standards (ETS):
 - Current ETS are scheduled to expire on December 31, 2022.
 - Cal-OSHA published and is expected to enact a proposed, semi-permanent standard that will likely replace the current ETS on January 1, 2023. If enacted, the new “permanent” standard will expire after two years. Notable changes in the most recent draft include:
 - incorporation and reference to the California Department of Public Health’s definitions for terms like “close contacts,”
 - elimination of exclusion pay, and
 - new recordkeeping requirements.
 - Going forward employers should expect ongoing COVID-19 compliance obligations.

SB 1044: Retaliation to Work in Emergency Conditions

- SB 1044 prohibits employers from taking or threatening adverse action against any employee for refusing to report to, or leaving, a worksite because the employee has a reasonable belief that the workplace is unsafe due to an emergency condition.
 - “Emergency condition” defined as:
 - 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
 - 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
 - Does not include a health pandemic
- SB 1044 also prohibits employers from preventing an employee from accessing their mobile device or other communications device during an emergency.
- Going forward employers should review existing cell phone policies and safety procedures to ensure compliance with SB 1044.

SB 523: No Discrimination in Reproductive Health Decision-Making

- The Contraceptive Equity Act of 2022 makes it an unlawful employment practice to discriminate against an applicant or an employee based on reproductive health decision-making. It also prohibits an employer from requiring applicants or employees to disclose information relating to reproductive health decision-making as a condition of employment.
 - “Reproductive health decision-making” includes, but is not limited to, decisions to use or access a particular drug, device, product, or medical service for reproductive health.
- SB 523 also amends the California Government Code to require that most health benefit plans or contracts provide coverage for contraceptives and related services.

AB 2448: Recognition for Businesses Free from Discrimination and Harassment

- Under existing law, the California Fair Employment and Housing Act (FEHA) establishes the Civil Rights Department.
- Assembly Bill 2448 requires the department to establish a pilot program on or before January 1, 2025, to recognize businesses that are free from discrimination and harassment.
- This bill would also require the development of criteria to qualify for recognition, the creation of a certificate, and the publication of those certificates on a database.

AB 2188: Cannabis Use

- Effective January 1, 2024, Assembly Bill 2188 prohibits discrimination based upon an employee's or applicant's use of cannabis off the job and away from the workplace, with various exceptions.
- There is an exception for employees in the building and construction trades and applicants and employees in positions requiring a federal background investigation or clearance, as specified.
- The bill would specify that it does not preempt state or federal laws requiring applicants or employees to be tested for controlled substances as a condition of employment, receiving federal funding or federal licensing-related benefits, or entering into a federal contract.

Labor Code Section 515.5: Increased Minimum Compensation for Computer Professionals

- Labor Code Section 515.5 is updated annually to account for inflation according to the California Consumer Price Index for Urban Wage Earners and Clerical Workers.
- The California Department of Industrial Relations (DIR) published a memo on October 14, 2022 increasing the compensation threshold for exempt computer professionals by 7.6% for 2023 compared to the 2022 rates.
- To qualify for the California computer professional exemption, starting January 1, 2023, California employers must pay their computer professional employees a salary of at least \$112,065.20 annually (\$9,338.78 monthly) or an hourly wage of \$53.80 every hour worked.
- Many state and local laws, including California law, will also increase the minimum wage for all employees based on inflation starting in 2023. California will increase the state minimum wage by 3.5% to \$15.50 per hour, which will also impact the state exemption threshold. Employers should carefully review laws for each applicable jurisdiction.
- Additionally, in accordance with Labor Code Section 515.6(a), the DIR has adjusted the licensed physicians and surgeons' minimum hourly rate of pay exemption from \$91.07 to \$97.99 effective January 1, 2023.

AB 257: Wages, Hours, Health & Safety Standards in the Fast-Food Industry

AB 257 is also known as the “Fast-Food Accountability and Standards Recovery Act” or the “FAST Recovery Act.” Effective January 1, 2023, the law:

- Creates a Fast Food Council that includes two representatives of quick service restaurant franchisors, two representatives of quick service franchisees, two representatives of QSR employees, one representative of the governor’s Office of Business and Economic Development, and one representative of the California Department of Industrial Relations. The governor has authority to appoint all members of the Council, except for the employee advocates, who would be appointed by the speaker of the California State Assembly and the Senate Rules Committee.
- The Council will work to establish and authorize minimum wages, working hours, health, and safety standards for fast-food restaurant workers.

AB 257: Wages, Hours, Health & Safety Standards in the Fast-Food Industry, *Cont'd.*

The FAST Recovery Act is expansive, but there are two key provisions for industry employers.

Minimum Wage Provisions: The Act authorizes a minimum wage of up to \$22/hr. in 2023—an increase of \$6.50/hr. from California’s \$15.50/hr. minimum wage scheduled to take effect in 2023. Each year thereafter, the Act authorizes an increase of the lesser of 3.5% or the increase in the Consumer Price Index.

Anti-Discrimination/Anti-Retaliation Provisions: The Act prohibits fast-food restaurant operators from discharging, discriminating, or retaliating against any employee who has:

- made a complaint or disclosed information regarding employee or public health/safety;
- participated in a proceeding relating to employee or public health/safety; or
- refused to perform work the employee believes would violate employee or public health/safety laws.

AB 257 also creates a private right of action for employees to seek reinstatement, treble damages, lost benefits, and attorney’s fees and costs for violations. Moreover, the law creates a rebuttable presumption of unlawful discrimination or retaliation if the employer takes an adverse action within 90 days of the date when the employer had knowledge of an employee’s protected action.

AB 1632: Restroom Access

- AB 1632 - Businesses open to general public for sale of goods/services with employee only restrooms need to permit access to non-employees if:
 - the individual has an “eligible medical condition” (e.g., Crohn’s Disease, IBS, etc.) or uses an ostomy device;
 - three or more employees are then onsite; – permitting bathroom access would not create obvious health/safety or security risk; and – Public restroom is not otherwise immediately accessible
- Businesses may require reasonable evidence of eligible medical condition or ostomy bag usage.
- A willful or grossly negligent violation will be subject to a civil penalty not exceeding \$100 per violation without creating or implying a private right of action.

AB 1601: Call Center Employment Protections: Terminations, Relocations, and Mass Layoffs

- Effective January 1, 2023, Assembly Bill 1601 amend Labor Code section 1400 to include additional Labor Commissioner enforcement mechanisms for California Worker Adjustment and Retraining Notification (Cal/WARN) Act notice violations. The labor commissioner may investigate the alleged violation and order appropriate temporary relief pending the investigation's completion.
- AB 1601 also adds Labor Code sections concerning call center relocations. These sections specify that Cal/WARN notices apply to call center relocations when the employer intends to move its call center, or a substantial portion of the call center operations to a foreign country.
- Call center employers that do not provide the required notice are "ineligible to be awarded or have renewed any direct or indirect state grants or state-guaranteed loans ... for five years after the date" that the California Employment Development Department publishes a list of call center employers that complied with providing notice.
- A call center employer that fails to provide notice is also "ineligible to claim a tax credit for five taxable years beginning on and after the date that the list is published."

AB 2871 & AB 2891: Exceptions to the CCPA for Workforce and B2B Data

The California Consumer Privacy Act (“CCPA”) sets forth restrictions and requirements with respect to the collection, storage, and sale of consumer data. Under existing law, the following categories of personal information are exempted from some of the CCPA’s requirements until January 1, 2023. AB 2891 would extend these exceptions to January 1, 2026, and AB 2871 would extend the exceptions indefinitely.

Workforce Personal Information Exception: Personal information collected about job applicants, employees, owners, directors, officers, medical staff members, or contractors, but only when collected and used:

- within the employment context;
- for that individual's emergency contact information; or
- to administer that individual's benefits.

Business-to-Business (“B2B”) Exception: Personal information collected in the context of due diligence or the provision/receipt of products or services to another organization.

AB 984: Vehicle Location Technology

AB 984 requires the Department of Motor Vehicles to allow vehicle location technology on fleet vehicles. This bill also permits employers to use such technology to monitor employees if the tracking is “strictly necessary” to the employee’s duties and only done during work hours. Employers that install monitoring devices on vehicles must provide a detailed notice of the monitoring, including:

- dates, times, and frequency that the monitoring will occur;
- who will have access to the data;
- where the data will be stored and the length of time it will be retained;
- how the data will be used, including whether it will be used for employment decisions; and
- notice of the employees’ right to disable the device during non-work hours.

Penalties for non-compliance are \$250 for each employee for the initial violation. For subsequent violations, penalties are \$1,000 for each employee, per day. Employers may face additional exposure for retaliating against an employee for removing/disabling monitoring devices outside of work hours.

AB 2206: Parking Cash-Out Program

- To combat air pollution, existing law requires certain “air basins designated as a nonattainment area” employers with 50+ employees to provide a parking subsidy and offer a “parking cash out program.”
- Parking bundled with leases makes it difficult to implement and enforce.
- To overcome flaws, effective January 1, 2023, AB 2206 requires:
 - lessors of new or renewed leases to list parking cost as separate line item or provide parking costs to employer within 30 days after
 - employers to maintain a parking cash-out program even if lessors do not comply (previously required if parking costs were enumerated in lease)
 - employers to provide parking cost information to employees upon request

SB 1260: Criminal History Information for IHSS & WPCS Providers

Existing law authorizes a defendant with a jail felony conviction to petition to withdraw their guilty plea and have their arrest and conviction records sealed if they have already completed their sentence and have not been convicted of an additional felony. SB 731 extends this relief to any felony convictions, except those requiring registration as a sex offender.

SB 1260, which was dependent on the passing of SB 731, provides that:

- record sealing will not make a person eligible to provide, or receive payment for providing, in-home supportive services (IHSS) or waiver personal care services (WPCS) if they are otherwise ineligible to do so under state or federal law; and
- record sealing does not relieve a defendant of the obligation to disclose a conviction in response to a direct question in an application for enrollment as a provider of such services.

SB 657 and AB 2068: Workplace Postings

- **Emails**

- Senate Bill 657 provides that in any instance in which an employer is required to physically post information, the employer may also distribute that information to employees by email with the document or documents attached.
- The bill does not alter the employer's obligation to physically display the required posting.

- **Spoken Languages**

- Existing law under the California Occupational Safety and Health Act of 1973 requires employers to comply with certain standards ensuring healthy and safe working conditions, and requires citations, orders, and special orders issued by the department to be prominently posted.
- Assembly Bill 2068 requires that citations, orders, and special orders issued by the Department of Industrial Relations be displayed in both English and specified languages.
- This bill would require an employer to post an employee notification containing specified information when the above-described citations or orders are issued.
- Violations will be enforceable by a civil penalty. By expanding the scope of a crime, the bill will impose a state-mandated local program.

EEOC Posting Requirement

- The Equal Employment Opportunity Commission released a new version of the “Know Your Rights: Workplace Discrimination is Illegal” poster on October 19, 2022, replacing the previous “EEOC is the Law” poster.
- The new poster:
 - uses straightforward language and formatting;
 - notes that harassment is a prohibited form of discrimination;
 - clarifies that sex discrimination includes discrimination based on pregnancy and related conditions, sexual orientation, or gender identity;
 - adds a QR code for fast digital access to the how to file a charge webpage;
 - provides information about equal pay discrimination for federal contractors.

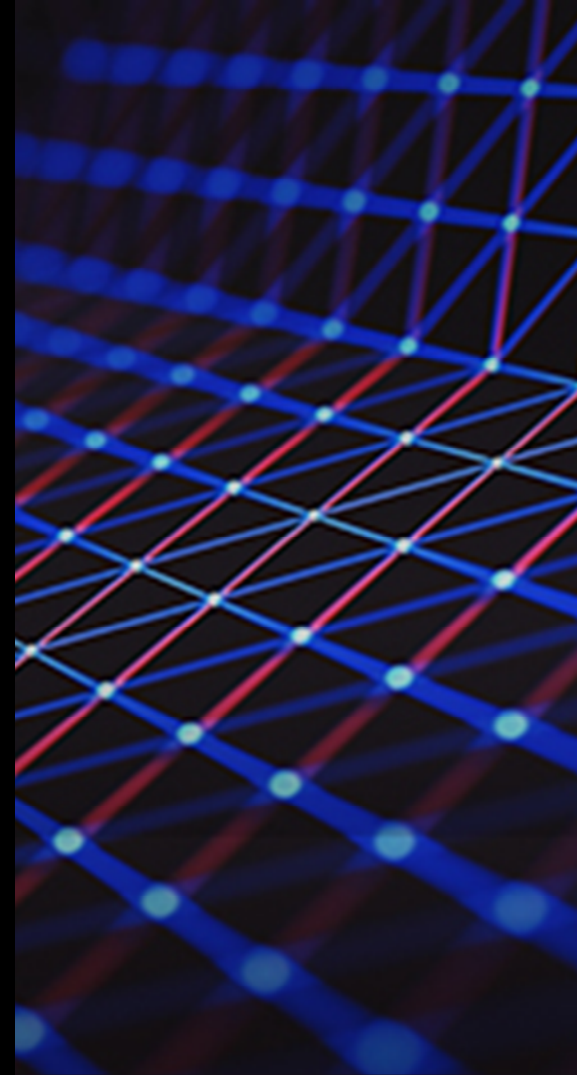
Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at www.morganlewis.com/topics/coronavirus-covid-19

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple “Stay Up to Date” button.

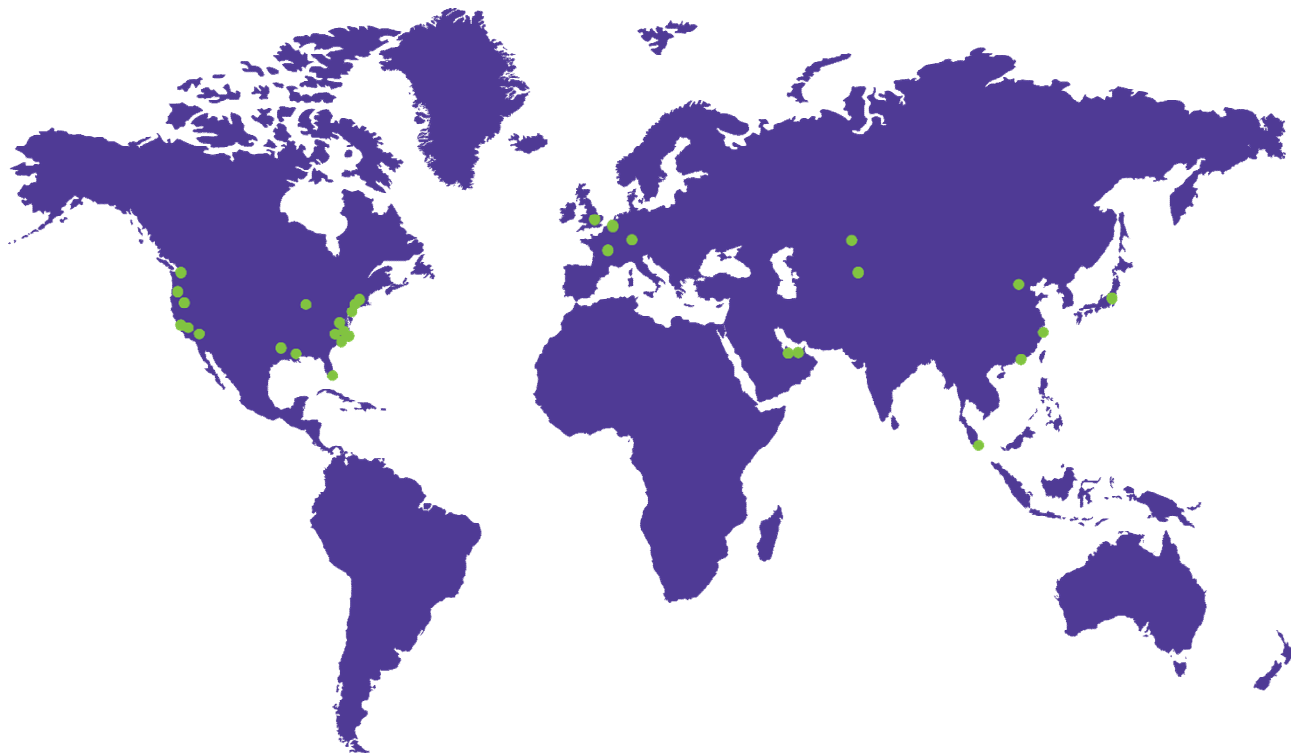


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