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Keeping Up With California: New Employment-Related Laws

California has recently enacted several new laws that will affect California employers. A brief summary of the key points of these new laws is below.

Pay Transparency

On September 27, 2022, California Governor Gavin Newsom signed Senate Bill 1162, which amends Section 12999 of the Government Code and Section 432.3 of the Labor Code. The new law requires certain pay disclosures, both in job postings and in annual pay data reporting.

- Beginning January 1, 2023, California employers with 15 or more employees must include the pay scale for a position in every job posting. "Pay scale" is defined as "the salary or hourly wage range that the employer reasonably expects to pay for the position." If the employer engages a third party to "announce, post, publish, or otherwise make known a job posting," the employer must provide the pay scale to the third party to include in the job posting. The law also requires an employer, upon request, to provide to an employee the pay scale for the position in which the employee is currently employed.
- The new law requires California employers with 100 or more employees to submit an annual pay data report to the California Civil Rights Department that discloses the median and mean hourly rates within each listed job category, by race, ethnicity and sex within each job category. If the employer hires employees through labor contractors, it also must submit a separate pay data report for those employees. The reports are due beginning May 10, 2023, and every second Wednesday in May annually thereafter. Failure to file the report may subject the employer to a civil penalty of up to $100 per employee, and up to $200 per employee for subsequent violations.
- Employers must maintain job title and wage rate history records for each employee for the duration of the employment plus three years after the end of the employment.

This new California law reflects a growing trend across the country requiring pay information be disclosed to job applicants and employees. Other states with similar pay transparency laws include Colorado, Connecticut, Maryland, Nevada, Rhode Island and Washington.

Extended COVID-19 Supplemental Paid Sick Leave Through 2022

On September 29, 2022, Governor Newsom signed Assembly Bill 152, which (1) extends the COVID-19 Supplemental Paid Sick Leave program ("SPSL") contained in Senate Bill 114 through December 31, 2022, (2) permits employers to require an additional diagnostic test before employees may use SPSL in certain circumstances, and (3) creates a grant program to assist qualified small business and nonprofits with costs incurred for SPSL provided in 2022.

1. The extension of SPSL through the end of 2022 does not require employees receive additional SPSL. Rather, employees may continue to use any available SPSL through the end of 2022.
2. With respect to the additional diagnostic testing, under existing law, if an employee uses SPSL because they tested positive for COVID-19, the employer may require the employee to submit to a second diagnostic test. Under the new law, if the second diagnostic test is also positive, the employer may require the employee submit to a third diagnostic test within no less than 24 hours, and the employer must provide the second and third diagnostic tests at no cost to the employee. If the employee refuses to submit to testing, the employer has no obligation to provide SPSL.
3. Finally, the new law establishes a grant program to assist qualified small businesses and nonprofits, with between 26 to 49 employees, for actual costs incurred in connection with SPSL in 2022. Qualified small businesses and nonprofits may receive up to $50,000.

Notice of COVID-19 Exposure

On September 29, 2022, Governor Newsom signed Assembly Bill 2693, which amends Section 6409.6 of the California Labor Code relating to an employer's duties when it receives notice of potential exposure to COVID-19 at the workplace. Employers may satisfy the notice requirements by posting a notice in all places where notices to employees concerning workplace rules or regulations are customarily posted that includes the dates on which an employee with a confirmed case of COVID-19 was on the worksite premises within the infectious period and the location of the exposure. The notice must remain posted for 15 days. The new law permits an employer to satisfy the notice requirements by posting the notice on an existing employee portal. The new law also extends the COVID-19 exposure notice requirements until January 1, 2024.

Expanded Definition of "Family Member" Under CFRA and HWHFA

Also on September 29, 2022, Governor Newsom signed Assembly Bill 1041, which expands the definition of a "family member" to include a "designated person" under the California Family Rights Act ("CFRA")—which allows eligible employees to take up to 12 weeks of job- protected leave—and the Healthy Workplaces Healthy Families Act ("HWHFA")—which requires employers with employees in California to implement paid sick leave. The new law is effective January 1, 2023.

As amended, the CFRA and HWHFA now allow employees to identify a "designated person" for whom they can take leave to provide care. Under both acts, employers may limit an employee to one "designated person" per 12-month period.

Under the CFRA, a "designated person" means "any individual related by blood or whose association with the employee is the equivalent of a family relationship." Under the HWHFA, however, a blood relationship or the equivalent of a family relationship is not necessary. Rather, the HWHFA defines a "designated person" as "a person identified by the employee at the time the employee requests paid sick days."

This amendment is intended to reflect cultural, economic and social forces that result in households departing from the traditional nuclear family structure, particularly including the LGBTQI community and extended families who live in multigenerational households.

Protection for Off-Duty Cannabis Use

On September 18, 2022, Governor Newsom signed Assembly Bill 2188, which prohibits employers from discriminating against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person, based on the person's use of cannabis off the job and away from the workplace, or based on a drug test finding the presence of "nonpsychoactive cannabis metabolites" in their hair, blood, urine or other bodily fluids. This law goes into effect on January 1, 2024.

The new law explains that tetrahydrocannabinol ("THC"), which is the chemical compound in cannabis that may indicate impairment and cause psychoactive effects, is stored in the body as a nonpsychoactive cannabis metabolite. These metabolites do not indicate impairment; rather, they indicate only that an individual has consumed cannabis in the last few weeks. The intent of drug tests is to identify employees who may be impaired, but most drug tests only show the presence of the nonpsychoactive cannabis metabolite, which does not actually correlate to on-the-job impairment.

The new law will not permit employees to possess, to be impaired by or to use cannabis at work, nor will it affect the rights or obligations of an employer to maintain a drug- and alcohol-free workplace. It also will not apply to employees in the building and construction trades, or to applicants or employees hired for positions that require a federal government background check or security clearance. The law also does not preempt state or federal laws requiring applicants or employees to be tested for controlled substances, including laws and regulations requiring applicants or employees to be tested, or the manner in which they are tested, as a condition of employment, receiving federal funding or federal licensing-related benefits, or entering into a federal contract.

This law was one of 10 cannabis-related bills that Governor Newsom signed into law on September 18, reflecting his goals to "strengthen California's cannabis laws, expand the legal cannabis market and redress the harms of cannabis prohibition."

Bereavement Leave

On September 29, 2022, Governor Newsom signed Assembly Bill 1949, which amends the CFRA to require covered employers to provide eligible employees with up to five days of unpaid bereavement leave. Under this new law, employers with five or more employees must provide up to five days of bereavement leave for employees who have been employed by the employer for at least 30 days.

The bereavement leave must be taken within three months of the death of a family member, which is defined as a spouse, child, parent, sibling, grandparent, grandchild, domestic partner or parent-in-law. The bereavement leave may be unpaid, except that an employee may use vacation, personal leave, accrued and available sick leave, or compensatory time off that is otherwise available to the employee.

Employees Excused From Work During Emergencies

On September 29, 2022, Governor Newsom signed Senate Bill 1044, which protects employees who refuse to report to work, or who leave work, because the employee has a reasonable belief that the workplace is unsafe due to an "emergency condition." The law defines an "emergency condition" as (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," or (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." The law expressly excludes a health pandemic from the definition of "emergency condition."

The law requires employees, when feasible, to notify the employer of the emergency condition before the employee leaves or refuses to report to work. If prior notice is not feasible, the employee must provide notice as soon as possible.

The law does not apply to employees in certain industries or roles, including first responders; disaster service workers; employees required by law to render aid or remain on the premises in case of an emergency; employees or contractors of healthcare facilities who provide direct patient care, who provide services supporting patient care operations during an emergency, or who are required by law or policy to participate in emergency response or evacuation; employees performing essential work on nuclear reactors or nuclear materials or waste; employees working on a military base or in the defense industrial base sector; and employees of licensed residential care facilities.

In addition to the laws summarized above, California also has enacted several laws that are applicable in specific industries, including fast food, call centers, hospitality and healthcare, which are not discussed in this update. If you have any questions about the new California laws, or how they may impact your organization, please contact your Kutak Rock attorney or a member of the firm's National Employment Law Group. You may also visit us at www.KutakRock.com.