California Hospitality Employers Will Need to Track COVID-19 Layoffs Until 2025 Due to New Right-of-Recall Bill

Insights
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California Governor Gavin Newsom signed into law on Friday a statewide right of recall for employees in certain industries who were laid off due to effects of the COVID-19 pandemic. SB 93, which enacts Labor Code Section 2810.8 *effective immediately*, primarily impacts hospitality employers in California but also includes a few other industries. The new law will remain in effect until December 31, 2024 and contains some potentially devastating consequences for violations – so compliance will be critical. Especially as we head towards the full reopening of the state's economy, what do California employers need to know about this new law?

Do These Laws Apply To Our Business?

The right-to-recall language applies to the following employers, most of which are directly or tangentially related to the hospitality industry:

1. **Hotel Employer**: An owner, operator, or manager of a residential building designated or used for public lodging or other related service for the public and contains 50 or more guestrooms, calculated based on the room count at the opening of the hotel or on December 31, 2019, whichever is greater. This employer includes any "contracted, leased, or sublet premises connected to or operated in conjunction with the building's purpose, or providing services at the building." Presumably, this broad inclusion would include any restaurants, bars, gift shops, retailers or other businesses that are physically connected to the hotel and/or directly serve the hotel's guests.
2. **Event Center Employer**: An owner, operator, or manager of a publicly or privately owned structure of more than 50,000 square feet or with a seating capacity of 1,000 seats or more that is used for public performances, sporting events, business meetings or similar events. Specific examples include concert halls, stadiums, sports arenas, racetracks, coliseums, and convention centers. Similar to hotels, this category also includes "any contracted, leased, or sublet premises connected to or operated in conjunction with the event center's purpose, *including food preparation facilities, concessions, retail stores, restaurants, bars, and structured parking facilities*."
3. **Airport Service Provider**: Any employer that provides any service at an airport or provides any service to any employer servicing the airport, including but not limited to the loading and

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unloading of property on aircraft, assistance to passengers, security, airport ticketing and check-in functions, ground handling of aircraft, aircraft cleaning and sanitization functions, and waste removal. It does not include an airline carrier.

4. **Airport Hospitality Employer**: A business that prepares, delivers, inspects, or provides any other service in connection with the preparation of food or beverage for aircraft crew or passengers at an airport, or that provides food and beverage, retail, or other consumer goods or services to the public at an airport. It does not include an airline carrier.
5. **Private Club Employer**: This employer includes a private, membership-based business or nonprofit organization that operates a building or complex of buildings containing at least 50 guest rooms or suites of rooms that are offered as overnight lodging to members. Similar to hotels, the number of guest rooms is calculated based on the room court on the opening of the private club or on December 31, 2019, whichever is greater.
6. **Commercial Property Building Service Employer**: Any employer that provides janitorial, maintenance, and security service to office, retailer or other commercial buildings. Notably, only janitorial, maintenance, and security service workers are covered employees and any administrative employees to such businesses are excluded.

How Do These Laws Apply To Those Businesses?

First, this ordinance only applies to "laid-off workers." To qualify, a laid-off worker must have: 1) performed at least two hours of work for a covered employer; (2) worked for six months or more with the employer (including leave and vacation times), and; (3) the most recent separation from the covered employer caused by a reason related to the COVID-19 pandemic (i.e., public health directive, government shutdown order, lack of business, reduction in work force, or other economic reason) and not for a disciplinary reason.

Second, within five *business* days of establishing an open position, an employer must offer its "laid-off workers" any open positions that are available for which the worker is qualified in writing to the last known mailing address, e-mail, and text message phone number. A laid-off worker is deemed "qualified" if they held the same or similar position for the employer prior to being laid off. For employers with multiple worksites, the statute is silent as to whether laid-off workers are confined to only their previously assigned worksite.

If more than one laid-off worker is entitled to recall for the same position, the employer must first offer the position to the laid-off worker with the greatest length of service. An employer may make simultaneous, conditional offers of employment to laid-off employees, with a final offer of employment conditioned on application of the seniority system.

A worker who is offered a position must have at least five *business* days to accept or decline the offer. The bill does not provide any guidance on how to treat laid-off workers who fail to respond to job offers or outright deny an offer under this bill.

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Lastly, if all that was not enough, an employer that declines to recall a laid-off worker on the grounds of lack of qualifications and instead hires someone else **shall** provide the laid-off employee a written notice within 30 days which includes all of the reasons not to recall the laid-off worker, including the length of service of those employees who were recalled and hired. Records of the written notices to the employee and all other communications concerning offers of employment between the employer and the employee must be kept for **three years** measured from the date of the original layoff date.

This law also applies in instances where: 1) ownership of the employer changed but the employer is conducting the same or similar operations; 2) the form of the organization changed (e.g. LLC to Inc.); 3) substantially all assets of the employer were acquired by another entity that conducts the same or similar operations using the substantially the same assets, and/or; 4) the employer relocates to a different location.

What Are The Penalties For Noncompliance?

The penalties for violation of this statute are potentially crippling. A violation of these statutes shall subject an employer to a civil penalty of $100 for *each employee* whose rights under these provisions are violated and an additional sum payable as liquidated damages in the amount of $500 *per employee for each day* the employee can prove their rights were violated up and until the violation is cured. In addition, laid-off employees may be awarded reinstatement, front or back pay during each day the violation continues and/or the value of benefits that would have been received. Importantly, enforcement is under the exclusive jurisdiction of the Division of Labor Standards Enforcement (DLSE).

What Should Employers Do?

These requirements are unquestionably administrative nightmares for employers. However, it is now law and employers must comply with its requirements to avoid potentially damaging penalties.

You should begin this process by identifying positions that you plan to "reopen" and rehire. Then, you should create a separate contact checklist for each reopened position at each worksite (if multiple worksites), sorted by seniority, with all required contact information (last known mailing address, e-mail, and text message phone number) of those laid-off workers. You should then work your way down the list during the rehiring process, confirming that each form of contact was made, the date each form of contact was made (should be on the same day), whether a response was received from the laid-off worker, and what that response was. This list and its seniority dates should be continually updated as necessary as this law is in effect for 3.5 more years. This or similar tracking methods should alleviate some of the administrative burden of tracking the required information.

For multisite employers, the reasonable interpretation of the law would be that this law is site-specific (except as expressly provided when an employer changes locations) as the definitions of covered employers are generally focused on typically fixed-location businesses (e.g. hotels, airports

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covered employers are generally focused on typically fixed-location businesses (e.g. hotels, airports, event centers) and employees are not necessarily cross-trained or familiar with operations of other worksites. However, you may want to weigh placing laid-off workers from other sites at the bottom of your recall lists with the administrative costs of doing so as it may lessen the burden of onboarding a completely unfamiliar employee while providing coverage from currently unknown exposure.

Conclusion

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, any attorney in any of our California offices, or any member of our Post-Pandemic Strategy Group Roster.

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