

Insights, News & Events

# WHAT WOULD A RECALL OF GOVERNOR NEWSOM MEAN FOR CALIFORNIA EMPLOYERS? PROBABLY LESS THAN YOU MIGHT THINK

Insights  
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With the California gubernatorial recall election less than a week away, the campaign season is in high gear as Governor Newsom and his putative replacements crisscross the state in last minute appeals to voters. California employers likely wonder if they should expect wholesale changes should the governor be replaced by one of his Republican challengers. However, due to timing and the political makeup of the state legislature, any workplace law ramifications may be muted at best. What do you need to know in advance of the vote to prepare your organization?

## **COVID-19-Related Policies and Requirements**

With so much of the recall campaign focused on Governor Newsom's actions during the COVID-19 pandemic, it is no surprise that candidates running to replace him have promised sweeping changes when it comes to pandemic policies. In somewhat of an ironic twist of fate, several replacement candidates have pledged to use the same emergency authority and executive orders for which they have criticized Newsom in scaling back the state's COVID-19 mandates.

For California employers, most mandates have come from the California Department of Public Health (CDPH) or Cal/OSHA through the adoption of an Emergency Temporary Standard (ETS). Theoretically, a new governor could issue executive orders to revoke or modify policies previously enacted by CDPH or Cal/OSHA. In fact, several recall challengers have pledged to revoke statewide rules such as face-covering requirements or vaccine mandates.

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However, it is likely that there would be court challenges and legal battles over the use of such authority. Moreover (as discussed more below), Democrats have sufficient control in the legislature such that they could pass legislation mandating COVID-19 restrictions – could even override a veto by any new governor.

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Because of all the attention focused on COVID-19 related policies, this in one area where California employers could see significant action in the short term – but any changes would likely be countered over time by the legislature.

### **Agency Appointments and Administrative Enforcement**

Governors generally have a far greater impact in more subtle ways – most particularly through whom they appoint to lead executive branch agencies and the enforcement priorities they establish.

Theoretically, a new governor could clean house and appoint new top leadership for key state agencies – including the Labor and Workforce Development Agency, Cal/OSHA, and the Division of Labor Standards Enforcement. New agency leadership could put the brakes on existing rulemaking and enforcement interpretations and attempt to move things in a new direction.

However, substantive change could be rather limited. New rulemaking or interpretations to effect change in the workplace law context (especially if controversial) would likely be challenged and tied up in court for months or years. More significantly, key executive branch appointments must be confirmed by the state senate (remember “checks and balances?”). With overwhelming control by Democrats in the state senate, they could use this power to refuse to confirm appointees that are deemed too “controversial.” This could bog down a new governor’s ability to enact change at the agency level in the short 15 months they would have under the remainder of Governor Newsom’s term – or force them to moderate some of their appointments.

Instead, if a new governor is elected, enforcement focus and priorities would be one area where they could have significant impact. We’ll pay attention to whether they could influence certain agencies through resource deployment or other mechanisms.

### **What About the Other Elephant in the Room – AB 5?**

It seems hard to believe, but there was a time when the biggest employment issue in California did not involve COVID-19. Pre-pandemic, the hottest issue concerned AB 5 and the codification of the “ABC test” for determining employee or independent contractor status. This law has been quite controversial since it was enacted. In fact, several of the putative replacement candidates have pledged that they would “repeal” or “revoke” AB 5 is elected.

While a new governor could attempt to take on AB 5 via executive authority, any changes (even if successful) could be short-lived. With overwhelming numbers in the legislature, Democrats could pass new legislation and have the numbers to override any veto.

What could change more significantly is enforcement action around AB 5 by state agencies – such as the Labor Commissioner or the Employment Development Department. A new governor could direct their agencies to “de-prioritize” AB 5 enforcement, or simply not pursue such claims at all.

Unfortunately, state agency enforcement is only half of the equation when it comes to AB 5 enforcement. A far bigger threat to California employers comes from private litigation and PAGA claims – which would be far less impacted by a gubernatorial recall. In other words, you should not expect to see the last of AB 5 even if a conservative replacement takes the governor’s office next week.

### **Other Major Changes Unlikely with a Democrat “Super-Duper” Majority in the Legislature**

Many recall candidates have talked a big game about the sweeping changes they would make as governor, including repealing or revoking certain policies or enacting new ones.

While California employers might be excited at that prospect, the political dynamic in Sacramento would bring a cold dose of reality. As discussed in other contexts above, at the end of the day the Democrats still hold an overwhelming majority in both the Assembly and Senate. In fact, their numbers are so overwhelming that they exceed a mere super-majority and commentators refer to their control as a “super-duper” majority.

With these numbers comes power. The legislature can still pass any measure they like – including very worker-friendly labor and employment measures. And Republican bills to

pare back some employment laws would continue to never see the light of day.

But a new governor could just veto all those bills, right? Not so fast. Democrats hold such sway in the legislature that they could easily override legislation that a new governor vetoed (something that only requires a 2/3 vote). That is a power that the legislature has only very rarely exercised. However, if Governor Newsom were to be recalled and be replaced by a Republican challenger, it would likely be “gloves off” when it comes to relations between the aisles in Sacramento. Democrats in the legislature would likely easily override any vetoes, meaning pro-worker policies and mandates would likely continue to be enacted in California.

### **Limited Time, Limited Impact?**

The other issue to keep in mind is that even if Governor Newsom is recalled, his replacement will only take over his current term for the next 15 months until the November 2022 election. That’s not a lot of time to have a major impact, especially if matters are bogged down in court challenges or fights with the Democrat-controlled legislature.

And then there would be an entirely new election for governor at the end of those 15 months. Based on the political makeup of California and election dynamics, there’s a good chance a Democrat would be elected governor in the general election in 2022 – when turnout is high due to the high-profile midterm elections. There is even speculation that, should he be recalled, Newsom could simply turn around and run for governor again in 2022.

So even if Newsom is recalled and replaced with a more business-friendly governor, any substantive policy changes could be short lived.

### **Conclusion**

All eyes will be on California next week as the state faces the prospect of recalling a governor for the second time in as many decades. However, the 2003 recall of Governor Gray Davis and his replacement by Governor Arnold Schwarzenegger was different in several respects. Democrats held a much narrower majority in the legislature at that time, meaning they had to work with Governor Schwarzenegger to find compromise whether they liked it or

not. They simply did not have the numbers to override his legislative actions on bills.

As discussed above, things are much different this time around. Democrats hold such sway in the legislature that they could (and most assuredly would) use those numbers to their advantage to advance policy proposals over gubernatorial vetoes. There likely would be some high-profile changes in the short term, most likely around COVID-19 policies and mandates. But overall such changes would be muted, and political gridlock would rule the day.

We will keep a close eye on further developments concerning the gubernatorial recall election and provide updates as warranted. You should ensure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions about any aspect of these potential developments and impacts on your workplace, contact your Fisher Phillips attorney, the author of this Insight, [or any attorney in our California offices](#).