Top 10 List – Keep Your Eyes on These California Employment Bills on Governor Newsom's Desk

Insights
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Eight months of legislative wrangling and dealmaking have come to an end as the California Legislature just wrapped up work for the year – and now employers across the Golden State turn their eyes to the governor's office to see which workplace law proposals will become law. While the Legislature adjourned on August 31 and will not return to Sacramento until 2023, the drama is just beginning as Governor Newsom now has until September 30 to sign or veto the bills that have reached his desk. For the first time since the COVID-19 pandemic, this year has been a "return to normal" year for California lawmakers, which means a return to aggressive legislation establishing and expanding workplace protections for employees. So what are the top 10 bills you should be keeping an eye on over the next month?

- NOTE: Unless otherwise noted, any of these bills that are signed into law will take effect January 1, 2023.
- NOTE: For a comprehensive list of all the employment-related bills pending on the Governor's desk, see our handy chart here.

Fast Food Sector Council

Certainly one of the more controversial proposals of 2022 has been a labor-sponsored effort to enact "sectoral" legislation for an entire industry. Assembly Bill 257 is purportedly aimed at the "fast food" industry (restaurants part of a chain of 100 or more establishments), although the bill's broad definition may include many fast-casual restaurants and many other types of business beyond what most people would consider "fast food."

AB 257 would establish a 10-member unelected body ("the Fast Food Sector Council") that would have unprecedented and virtually carte-blanche authority to establish industry-wide standards on wages, working hours, and other working conditions applicable to the entire fast food industry. This council's proposals would come before the Legislature and would take effect unless the Legislature specifically steps in to prevent it from taking effect.

Even employers in other industries or other states should keep a close eye on this one. For several years now, the hot "buzzword" among labor advocates and progressive think tanks has been this concept of "sectoral" bargaining/legislation. If this concept gets a toehold in California, expect to see

future legislation attempting to replicate this idea in other states or other industries. Read a full summary of this bill and what you should do about it here.

Card Check for Agricultural Employees

There have been numerous previous attempts to allow agricultural employees to organize under the ALRA utilizing a "card check" process. However, prior proposals have been vetoed by Governors Newsom, Brown, and Schwarzenegger.

Normally, employees seeking to unionize must submit authorization cards signed by a specified percentage of employees, followed by a secret-ballot election in which a majority of employees must vote for the union. By contrast, the concept of "card check" allows a union that submits authorization cards signed by a majority of employees to automatically be certified as the collective bargaining representative without having a formal secret-ballot election.

Assembly Bill 2183 attempts to establish such a card check process for agricultural employees under the ALRA. While the bill was amended late in the legislative session to take a slightly different approach, at the end of the day the bill is still a "card check" proposal.

Under AB 2183, each January an agricultural employer would have to decide whether they would agree to a "labor peace compact." Among other things, this would prohibit the employer from making statements against the union in any organizing campaign or conducting "captive audience" meetings with employees.

If the employer agrees to a "labor peace compact," the employees would vote via a newly created mail-in ballot process (rather than the existing secret ballot election process). However, if the employer does not agree to sign a "labor peace compact," then employees would be able to select a union via "card check" without an election.

In other words, an agricultural employer who does not agree to a "labor peace compact" would be forced to have their employees be able to organize merely by a "card check" process.

While Governor Newsom vetoed card check legislation last year (and received significant blowback from labor), it remains to be seen how he will act on AB 2183. There are some indications that he may not support the bill in its final format. This is definitely a high-profile bill to watch closely. Read a full summary of this bill and what you should do about it here.

CA COVID-19 Supplemental Paid Sick Leave

During the COVID-19 pandemic, employers saw California adopt a series of statewide requirements for employers to provide COVID-19 Supplemental Paid Sick Leave (SPSL) to employees who test positive or are otherwise impacted by COVID-19.

The current iteration of the SPSL requirement (SPSL) was set to expire September 30, 2022. However, a last-minute proposal (AB 152) would extend that requirement until the end of the year. Importantly, that legislation will not entitle employees to a new bank of SPSL. Rather, it will merely extend the existing entitlement until the end of the year.

AB 152 makes a few small changes to the SPSL law, and also establishes a new grant program for specified small businesses to provide up to $50,000 in grants to cover some of the costs of SPSL provided in 2022. Read more in our recent Insight here.

Because the SPSL expires at the end of September, this bill is a "budget trailer" bill, making it effective as soon as signed by the Governor.

Employment Discrimination and Cannabis

After several previous attempts to establish employment discrimination protections regarding the lawful use of cannabis, the first such bill has made it to the Governor's desk.

Assembly Bill 2188 prohibits adverse action based on (1) an employee's use of cannabis off the job and away from the workplace, or (2) a drug-screening test that found the employee to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids. While this would restrict an employer's ability to act based merely on metabolite testing, adverse action based on THC-positive testing would still be permitted.

While the bill specifies that it does not permit an employee to possess or be "impaired" by cannabis on the job, this will be a challenge for employers. There is currently not a general, wide-spread and easy test for determining cannabis impairment.

AB 2188 does not apply to an employee in the building and construction trades, preempt requirements for federal contracts, or interfere with specified employer rights to maintain a drug and alcohol-free workplace. If signed, this bill would not go into effect until January 1, 2024.

Expansion of Pay Data Reporting and Posting of Pay Scale in Job Postings

California also continues to push the envelope when it comes to efforts to address pay inequities. Several years ago, the state enacted legislation to require certain employers with 100 or more employees to file pay data reports with the state.

This year, follow-up legislation (Senate Bill 1162) proposes to expand that existing law in a number of ways.

- First the bill would require all private employers with 100 or more employees to file such pay data reports, regardless of whether they are required to file a federal EEO-1 with the EEOC.

- Second, the date for submitting the report would change from March of each year to the second Wednesday of May.
- Third, SB 1162 would expand the information required to be included in pay data reports to include median and mean hourly rates within each job category by race, ethnicity and sex.
- Fourth, the bill would require employers who have 100 or more employees hired through labor contractors to file a separate pay data report covering those employees.
- And finally, the legislation establishes significant civil penalties for failure to submit pay data reports.

Most of the debate this year around SB 1162 focused on a "public shaming" provision that would have required pay data reports to be disclosed to the public on a state website. Thankfully for employers, that provision was stricken from the bill before it made it to the Governor's desk.

SB 1162 also addresses an issue that has been part of a growing trend in other states and local jurisdictions. The bill would require employers with 15 or more employees to include pay scale information in any job postings. The bill provides for administrative or civil enforcement of these and related provisions.

Bereavement Leave

After several prior unsuccessful attempts, it looks like California is on the cusp of enacting a bereavement leave requirement into law. Assembly Bill 1949 would apply to employers with five or more employees and would allow employees to take up to five days of bereavement leave upon the death of a family member (using the same definition of "family member" as under CFRA).

Bereavement leave under AB 1949 would be unpaid, but an employee can use other available paid time such as vacation pay, personal leave, sick leave, or compensatory time off. Bereavement leave must be completed within three months of the death of the family member and is only available to employees who have worked for the employer for at least 30 days prior to the commencement of the leave.

Importantly for employers, the provisions of AB 1949 are in the Government Code rather than the Labor Code (meaning there will not be the possibility of PAGA claims for alleged violations of the law).

Family Leave to Care for "Designated Persons"

California's family and medical leave law has seen some dramatic expansion of late. In recent years the California Family Rights Act (CFRA) has been extended to cover smaller employers and to expand the definition of covered family members to include adult children, siblings, grandparents, grandchildren, and parents-in-law.

CFRA could be expanded even further if Governor Newson signs Assembly Bill 1041. It would provide that (in addition to the already-covered family members) an employee can take job-protected leave to care for a "designated person."

The bill defines a "designated person" to mean any individual related by blood or whose association with the employee is the "equivalent of a family relationship." The legislation does not clearly define what this means, so many employers are likely to be left scratching their heads trying to determine if someone is the "equivalent of a family relationship."

AB 1041 provides that an employee may identify a "designated person" in advance and that an employer may limit an employee to one designated person per 12-month period.

Emergency Conditions: Retaliation

Brought in response to concerns over reports of employees being required to work in unsafe wildfire conditions, Senate Bill 1044 would prohibit an employer, in the event of an "emergency condition," from taking adverse action against an employee for refusing to report to, or leaving, a workplace or worksite because the employee has a "reasonable belief" that the workplace or worksite is unsafe.

An "emergency condition" is defined to mean (1) conditions of disaster or peril caused by natural forces or a criminal act, or (2) an order to evacuate a workplace, worksite, a worker's home, or the school of a worker's child. Notably an "emergency condition" does not include a health pandemic – so SB 1044 will not be applicable to employees that claim the worksite is unsafe due to COVID-19.

An employee's belief that the workplace is unsafe is "reasonable" if a person under similar circumstances would conclude there is a real danger of death or serious injury if that person enters or remains on the premises.

Based on some amendments made to the bill towards the end of the legislative process, many employer organizations removed their opposition to the bill.

Extension of COVID-19 Requirements

The Legislature also voted to extend two additional pieces of COVID-19 related legislation that were set to expire at the end of the year.

- Assembly Bill 2693 would extend the statutory COVID-19 notice requirements (originally enacted as AB 685) until January 1, 2024. Previously, these notice requirements generally required employers to provide notice to employees and others who may have been exposed to COVID-19 in the workplace.

AB 2693 also makes some important changes to the notice requirements. Most significantly, the bill will require employers (in lieu of individual notice) to simply post a notice in the workplace for 15 days when there has been a COVID-19 exposure. In the alternative, an employer can provide individual notices in the same general manner as previously required under the law.

However, employers should keep in mind that Cal/OSHA may impose additional notice requirements that maintain an individual notification requirement. For example, Cal/OSHA is currently considering a proposed "permanent" COVID-19 regulation that would go into effect in 2023 and remain in effect for two years. Employers will need to monitor that proposed standard closely to see if it maintains an individual notice requirement (such as for close contacts), regardless of whether the Labor Code notification requirements are changed.

- Assembly Bill 1751 would extend a previous "rebuttable presumption" established for workers' compensation purposes for COVID-19. Previous legislation (SB 1159) established a rebuttable presumption that certain COVID-19 cases are work-related under certain outbreak circumstances and required employers to provide information about COVID-19 cases to their workers' compensation claims administrator. AB 1751 would extend these requirements until January 1, 2024.

What Didn't Happen – Extension of CCPA Exemption for Employee Data

Finally, it is important for California employers to note what didn't happen – the exemption in the California Consumer Privacy Act (CCPA) for employee personal information (and a related exemption for business-to-business data) ***was not*** extended.

The current CCPA requirements (with a few exceptions) do not apply to personal information regarding employees – but that exemption expires at the end of the year. Despite efforts by the business community to extend or make permanent this exemption (including several last-minute legislative proposals), the Legislature was unable to come to a deal to do so.

Therefore, California employers should be prepared to comply with the full panoply of CCPA requirements with respect to employee data come January 1, 2023. Check out this latest Insight from our Fisher Phillips Consumer Privacy Team for more information on this development and the steps employers will need to take to comply with these requirements regarding employee data.

Conclusion

We will continue to monitor each of these bills to see if they are approved by Governor Newsom or whether they are vetoed, and will provide further analysis and compliance assistance for any of these bills are enacted. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. In the meantime, for more information about this legislation feel free to contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our California offices.

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