



California Employers Face Challenges Under New Law Prohibiting Retaliation During “Emergency Conditions”

Insights

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California employers will soon be prohibited from taking adverse action against employees who refuse to report to a workplace in an “emergency condition,” according to a bill Governor Newsom signed into law on September 29. While some of the bill’s language was tightened up during the legislative process, the new law – which will take effect on January 1, 2023 – still contains some uncertainty and will raise compliance challenges and possible litigation risks for California employers. What do you need to know about SB 1044?

5 Key Details for Employers to Note

1. Senate Bill 1044 makes it unlawful for employers to take or threaten adverse action against an employee for refusing to report to or leave a workplace due to a reasonable belief that the workplace is unsafe due to a “emergency condition.” An emergency condition is defined to mean either of the following:
 - 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 the worker’s child due to natural disaster or a criminal act.
2. Notably, an emergency condition does not include a health pandemic, so SB 1044 will not apply to situations in which the employee says they feel unsafe, for example, due to COVID-19.
3. A worker’s belief is “reasonable” if a reasonable person would conclude there is a real danger of death or serious injury if that person enters or remains on the premises.
4. The existence of any health and safety regulations specific to the emergency condition and an employer’s compliance or noncompliance with those regulations will be a relevant factor if this information is known to the employee at the time of the emergency condition.
5. SB 1044 also makes it unlawful for employers to prevent employees from using their mobile device to seek emergency assistance, assess the safety of a situation, or communicate with a person to verify their safety in such an “emergency condition.”

What This Could Mean for Employers

Through SB 1044, California lawmakers aimed to address situations where employees may feel compelled to work during natural disasters — such as wildfires or active shooter situations. Although it’s no surprise that lawmakers want to address workplace safety, the new language will likely cause some confusion when you need to quickly find replacements for absent employees in order to continue operations.

For example, under this new law, an employee is required to notify you of the emergency condition prior to leaving or refusing to report to the workplace “if feasible.” When this is not feasible, the employee must report “as soon as possible.”

This vague language makes employers vulnerable in situations where an employee skips out on work without reason. This is especially detrimental in fast-paced work environments where the absence of an employee necessitates an immediate replacement to continue to run time-sensitive services. While it may be easy to imagine clear-cut situations where this could arise – a wildfire forces evacuation of the work location — there could be incidents that are less obvious (such as when a worker claims their home or child’s school – which are well away from the worksite – are subject to an emergency condition).

Further, this language forces employers to be extra delicate with how they implement a “no cellphone” policy in a situation that could be perceived as an emergency condition.

Moving Forward

With SB 1044 taking effect on January 1, 2023, there are preventative measures you can take to avoid or mitigate a claim. The language of SB 1044 also specifies that employers would have the right to remedy alleged violations pursuant to PAGA’s cure provisions, thus making it crucial for employers to act quickly if cited.

We recommend employers revisit any workplace safety and health management programs and ensure standard procedures are followed in the event of a catastrophe, disaster, or criminal act.

To avoid walking on eggshells, we suggest that you train supervisors on tempered communications in emergency situations.

This new law also highlights the value of strict recordkeeping of employee attendance and timeliness to combat an employee’s potential retaliation claim.

Conclusion

California’s PAGA laws have proven to be troubling to employers, and this new law is no exception. Make sure you subscribe to [Fisher Phillips’ Insight system](#) to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in [any of our California offices](#).

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