Ogletree Deakins

California, COVID-19/Coronavirus, Employee Benefits and Executive Compensation, Leaves of Absence, Reductions In Force, State Developments, Workplace Safety and Health

California Unleashes Last-Minute Onslaught of New Employment Legislation

October 4, 2022

Charles L. Thompson, IV

San Francisco

Author

Leslie E. Wallis

Los Angeles

Author

On September 29 and 30, 2022, Governor Gavin Newsom signed more than one hundred new pieces of legislation, several of which directly affect California employers. In addition to several California Division of Occupational Safety and Health (Cal/OSHA)-related bills, the governor signed the following employment-related legislation.

California Supplemental Paid Sick Leave Extension (AB 152)

Assembly Bill (AB) 152 extends and modifies California COVID-19 supplemental paid sick leave (COVID-19 SPSL) through December 31, 2022. This bill goes into effect *immediately*.

Importantly, AB 152 does not require that employers provide new supplemental paid sick leave to California employees. Instead, employees who have not exhausted their available SPSL time now have until the end of the year to use it. COVID-19 SPSL initially would have expired on September 30, 2022.

In addition, existing law specifies that an employer does not have any obligation to provide additional COVID-19 SPSL if the employee refuses to provide documentation of a test result. It further authorizes the employer to require a covered employee who tests positive to submit to another test on or after the fifth day after the first positive test and provide documentation of those results. These rules remain in effect but AB 152 also authorizes an employer to require the employee to submit to a second diagnostic test within no less than twenty-four hours if the diagnostic test is positive. The employer must provide tests at no cost to the employee.

AB 152 also extends the rules relating to specified in-home supportive service and personal care providers through December 31, 2022.

Finally, for certain small businesses and nonprofits, AB 152 excludes, for taxable years beginning on or after January 1, 2020, and before January 1, 2030, certain allocations received by a taxpayer pursuant to the California Small Business and Nonprofit COVID-19 Supplemental Paid Sick Leave Relief Grant Program and sets forth procedures for recapturing grant amounts if the Governor's Office of Business and Economic Development (GO-Biz) determines that the grantee has failed to meet the criteria for a qualified small business or nonprofit.

CFRA Expansion and California Paid Sick Leave (AB 1041)

AB 1041 amends Government Code 12945.2 (California Family Rights Act (CFRA)) and Labor Code 245.5 (California Paid Sick Leave) to add "designated person" to the definition of a "family member" for whom an employee can take protected leave. The law becomes effective January 1, 2023.

AB 1041 defines "designated person" under CFRA as "any individual related by blood or whose association with the employee is the equivalent of a family relationship." The employer may require employees to identify the "designated person" at the time they request CFRA leave. The employer may choose to limit an employee to one designated person per twelve-month period.

AB 1041 defines "designated person" under the California Paid Sick Leave law as "a person identified by the employee at the time the employee requests paid sick days." The new law provides that "an employer may limit an employee to one designated person per 12-month period" for this purpose as well.

Unpaid Bereavement Leave/FEHA Expansion (AB 1949)

AB 1949 adds section 12945.7 to the Government Code. It requires an employer to grant an eligible employee's request to take up to five days of unpaid bereavement leave upon the death of a family member. The law defines "family member" as a "spouse or a child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law." The law takes effect January 1, 2023.

An employee must complete statutory bereavement leave within three months of the family member's death, and the employer may not require that the employee take the days off consecutively. Although the employer need not pay for the bereavement leave, the employer must allow employees to "use vacation, personal leave, accrued and available sick leave, or compensatory time off that is otherwise available to the employee."

If the employer has an existing bereavement policy that provides for fewer than five days total, the employer must provide additional unpaid days to bring the number of days up to five. Although these additional days do not have to be paid, the employer must permit the employee to "use vacation, personal leave, accrued and available sick leave, or compensatory time off that is otherwise available to the employee."

Section 12945.7 also makes it an unlawful employment practice under the California Fair Employment and Housing Act (FEHA) for an employer to engage in specified acts of discrimination, interference, or retaliation relating to an employee's exercise of these rights. The employer must also maintain employee confidentiality relating to bereavement leave. AB 1949 does not apply to an employee who is covered by a valid collective bargaining agreement that provides for prescribed bereavement leave and other specified working conditions.

This new law also directs the California Civil Rights Department to create a small employer family leave mediation pilot program for small employers that have between five and nineteen employees.

Emergency Working Conditions (SB 1044)

Senate Bill (SB) 1044 adds Labor Code section 1193 and prohibits an employer from "tak[ing] or threaten[ing] adverse action against any employee for refusing to report to, or leaving, a workplace or worksite within the affected area because the employee has

a reasonable belief that the workplace or worksite is unsafe" in the event of an emergency condition. The new law becomes effective January 1, 2023.

Labor Code section 1193 defines an "[e]mergency condition" as the "existence of either … [c]onditions 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 "[a]n 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." "Emergency condition" specifically excludes a health pandemic.

The employee must have a "reasonable belief" that the workplace is not safe. A reasonable belief means that"a reasonable person, under the circumstances known to the employee at the time, would conclude there is a real danger of death or serious injury if that person enters or remains on the premises."

Employers may not take or threaten any adverse action against an employee for refusing to report or leaving a workplace or worksite within an affected area because the employee has a reasonable belief that the workplace or worksite is unsafe. The statute does not apply to certain specified workers, including but not limited to first responders and employees who provide direct patient care at a health care facility.

Additionally, Labor Code section 1193 prohibits employers from preventing employees "from accessing [their] mobile device or other communications device for seeking emergency assistance, assessing the safety of the situation, or communicating with a person to verify their safety."

Employers may require that, "when feasible, an employee shall notify the employer of the emergency condition requiring the employee to leave or refuse to report to the workplace or worksite prior to leaving or refusing to report." These provisions are "not intended to apply when emergency conditions that pose an imminent and ongoing risk of harm to the workplace, the worksite, the worker, or the worker's home have ceased."

FEHA Expansion/Reproductive Health Decisionmaking (SB 523)

The governor signed **SB 523**, the Contraceptive Equity Act of 2022, on September 27, 2022. It contains a provision revising the California Fair Employment and Housing Act concerning "reproductive health decisionmaking." The act is effective as of January 1, 2023.

SB 523 makes it an unlawful employment practice to discriminate against an applicant or an employee based on reproductive health decision-making. The statute also "make[s] it unlawful for an employer to require, as a condition of employment, continued employment, or a benefit of employment," applicants or employees to disclose information relating to reproductive health decision-making.

"Reproductive health decisionmaking" includes, but is not limited to, "a decision to use or access a particular drug, device, product, or medical service for reproductive health." Reproductive decision-making also may be construed to fall under the definition of "sex" in the FEHA.

In addition to the changes to the FEHA, SB 523 amends the California Government Code to require that most health benefit plans or contracts provide coverage for contraceptives and related services consistent with the requirements under section 1367.25 of the Health and Safety Code and section 10123.196 of the Insurance Code as

well as coverage for vasectomies and related services consistent with the requirements under section 1367.255 of the Health and Safety Code and section 10123.1945 of the Insurance Code beginning on January 1, 2024.

Cal/WARN Enforcement for Call Centers (AB 1601)

AB 1601 amends Labor Code section 1400 to include additional Labor Commissioner enforcement mechanisms for California Worker Adjustment and Retraining Notification (Cal/WARN) Act notice violations. The labor commissioner may investigate the alleged violation and order appropriate temporary relief pending the investigation's completion.

AB 1601 also adds Labor Code sections concerning call center relocations. These sections specify that Cal/WARN notices apply to call center relocations when the employer intends to move its call center, or a substantial portion of the call center operations to a foreign country. Call center employers that do not provide the required notice are "ineligible to be awarded or have renewed any direct or indirect state grants or state-guaranteed loans … for five years after the date" that the California Employment Development Department publishes a list of call center employers that complied with providing notice. A call center employer that fails to provide notice is also "ineligible to claim a tax credit for five taxable years beginning on and after the date that the list is published."

AB 1601 takes effect January 1, 2023.

Employers may want to carefully review their handbooks and policies and consider updating them to comply with the many changes to the California employment laws going into effect.