2023 EMPLOYMENT LAW UPDATE

It's that time of year again. A bevy of changes to employment law affecting California businesses is just around the corner. The recent session of the California Legislature produced a number of new laws that California employers will have to comply with in 2023. State and federal courts have also issued decisions that will impact California employers. We offer an overview of the most significant compliance obligations raised by these laws and court decisions, which will take effect on January 1, 2023.

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CALIFORNIA STATE LAW UPDATES

California Minimum Wage Increases

Effective January 1, 2023, California's statewide minimum wage increases to $15.50/hour for all employees, regardless of the size of the employer. Keep in mind that this minimum wage increase may impact certain salaried, exempt employees as well, considering they must earn an annual salary of at least two (2) times state minimum wage.

Compliance tip: Many local jurisdictions have a higher minimum wage, including San Diego, Los Angeles and San Francisco. And with many employees continuing to work remotely following the COVID-19 pandemic, employers should review employee information to ensure compliance with local minimum wage.

California Privacy Rights Act (CPRA)

Effective January 1, 2023, the California Privacy Rights Act (CPRA) will lift the employee exception that is currently in effect under the California Consumer Privacy Act (CCPA). The end of the exception means that all of the CPRA's requirements with respect to a business' handling of consumer personal information will apply to employees' personal information. As such, employees may now request that their employer disclose to them the personal information collected on them and request that this information be deleted or corrected. Employees may also direct the company not to sell or share their personal information, and each employee has the right to limit the use of sensitive personal information.

Compliance tip: Employees must be provided notice of their rights under the CPRA and be able to advise their employer of their exercise of these rights. Businesses should also review agreements in place with any vendors that handle employee personal information to ensure they include the CPRA's required clauses.

AB 1041:

California Family Rights Act (CFRA) Expansion

The California Family Rights Act (CFRA) requires covered employers to provide up to 12 weeks of unpaid family and medical leave during a 12-month period. Effective January 1, 2023, AB 1041 expands the class of people for whom an employee may take leave to care for to include a "designated person." A designated person means any individual related by blood or whose association with the employee is the equivalent of a family relationship. The designated person would be identified at the time the employee requests the leave. An employer is allowed to limit an employee to one designated person per 12-month period.

Compliance Tip: All California employers should prepare for this expansion by including the necessary provisions within their employee handbooks, personnel policies, leave of absence request forms, and other leave of absence documents to comply with the new provisions.

SB 1044:

California Prohibits Retaliation Against Employees For Refusal To Report To Work During Emergency Conditions

Effective January 1, 2023, SB 1044 will prohibit an employer from taking or threatening adverse action against any employee who refuses to report to, or leaves, a workplace or worksite due to an "emergency condition" if the employee has a "reasonable belief" that the workplace or worksite is unsafe. SB 1044 will require an employee to notify the employer of the emergency condition requiring the employee to leave or refuse to report to the workplace or worksite.

Compliance Tip: Help defining what are "reasonable beliefs" and "emergency conditions" can be found here.

AB 1661:

Expansion Of Businesses Required To Post Human Trafficking Notice

Effective January 1, 2023, businesses performing cosmetology and barbering services, including hair, nail, electrolysis, and skin care services, are required to post an informational notice regarding human trafficking. Businesses and establishments that do not comply may be subject to a penalty of $500.00 for a first offense, and $1,000.00 for each subsequent offense.

Compliance Tip: Copies of a human trafficking model notice can be found here on the California Department of Justice website. Notices are available in many different languages.

AB 257:

Fast Food Employment Standards

Effective January 1, 2023, AB 257 enacts the Fast Food Accountability and Standards Recovery Act (or FAST Recovery Act) and establishes the Fast Food Council within the Department of Industrial Relations. Starting January 1, 2023, the Fast Food Council will be empowered to determine industry-wide rules on minimum wages, working hours, working conditions and training for fast food restaurant workers.

The standards set forth by the Fast Food Council will not apply to fast food employees with a valid collective bargaining agreement.

Note: At the time of this writing, opponents of this bill are engaged in a signature-gathering campaign in an effort to qualify for a referendum of this bill. If they are successful in obtaining the required number of signatures before December 4, 2022, the effective date of this bill would be put on hold until voters weigh in, likely not until the November 2024 elections.

SB 523:

Reproductive Health Choices Give Rise To "Protected Class" Status

Effective January 1, 2023, the California Fair Employment and Housing Act (FEHA) will expand to cover individuals making choices relating to their reproductive health in the same way FEHA has covered employees in other protected classes (i.e., race, religious creed, national origin, and physical disability). It will now be unlawful to harass or discriminate individuals based on their decision to use or access a particular drug, device, product, or medical service for reproductive health.

Compliance Tip: Employers should review their employee handbooks and policies, and update their harassment, discrimination and retaliation prevention policies so they reflect this new protected class under FEHA. Employers should also provide their supervisors and all employees engaged in the hiring process with training and guidance concerning this change.

California Modifies COVID-19 Exposure Notification Requirements

Effective January 1, 2023, AB 2693 will make changes to COVID-19 notification requirements by amending the duties of employers when notified of potential exposure to COVID-19. The main modification will give employers the option to post a notice of potential COVID-19 exposure at the worksite and on existing employee portals, instead of providing other written notice.

Compliance Tip: Employers should understand that while AB 2693 will allow for worksite posting of potential exposure notices, most employers may also be subject to potential separate written notice requirements of the proposed permanent COVID-19 regulations.

AB 2068:

Cal/OSHA Citations Postings

AB 2068 addresses language barrier concerns in the workplace across California related to COVID-19 related deaths. Currently, California's division of Occupational Safety and Health (Cal/OSHA) is only mandated to post workplace citations and special orders in English. This bill requires that the posts be translated into languages spoken by at least 5% of workers at the worksite—most commonly Spanish, Chinese, and Tagalog.

Compliance Tip: If your business receives a workplace citation, be sure that you request that Cal/OSHA provide you the posting in all necessary languages.

AB 1747:

Contractors State License Board May Discipline Contractors For Permitting Issues

Existing law provides that the Contractors State Licensing Board ("CSLB") is empowered to discipline licensed contractors by imposing fines and penalties for certain problematic behaviors. Effective immediately, AB 1747 expands the list of specified behaviors to include violations of state and local laws relating to the issuance of building permits. These penalties are capped at $30,000.

AB 1949:

Additional Flexibility For Users Of Bereavement Leave

Effective January 1, 2023, AB 1949 will expand the California Family Rights Act (CFRA) to allow eligible employees to take up to five days of unpaid leave in connection with the death of a family member. If the employee has paid time off, they will be allowed to utilize this in lieu of the unpaid leave if they prefer. This bereavement leave need not be taken in consecutive days but must be completed within three months of the date of death of the family member. Further, within 30 days of the first day of the leave, the employer may request that the employee provide documentation of the death of the family member.

Compliance Tip: Employers should maintain the confidentiality of any employee requesting bereavement leave and any documentation the employee provides to the employer.

CASE LAW UPDATES

Individual PAGA Arbitration Waivers Held Enforceable by United States Supreme Court

In *Viking River Cruises, Inc. v. Moriana*, the United States Supreme Court held that the Federal Arbitration Act ("FAA") requires the enforcement of arbitration agreements that require arbitration of an employee's PAGA claim on an individual basis. Critically, the Court held that once those individual claims are sent to arbitration, the employee has no standing to continue litigating representative claims for violations of the California Labor Code on behalf of *other* aggrieved employees.

The California Supreme Court, however, granted review in *Adolph v. Uber Technologies, Inc.*, and will address the issue of whether an employee who has submitted the individual PAGA claim to arbitration lacks standing under state law to pursue a PAGA claim on behalf of others.

Compliance Tip: California employers should ensure that their arbitration agreements are up to date and provide for enforcement under the FAA and a broad waiver of class action and representative (PAGA) claims.

Job Applicants Need Not Be Paid for Time/Expenses Associated with Drug Testing

The district court in *Johnson v. WinCo Foods, LLC*, ruled employers are not required to compensate successful job applicants for the time and travel expenses related to drug testing during the preemployment process. The court specified that the job applicants were not yet employees when they took a drug test, as the employer did not have control over the manner of performance of the applicant's work itself.

Compliance Tip: As a best practice, employers should explicitly articulate to job applicants that an offer of employment is contingent on successfully passing a drug test.

Online-Only Business Protected From Predatory ADA/Unruh Act Claims

California online-only businesses have frequently been the target of website accessibility lawsuits in California for violations of the Americans with Disabilities Act of 1990 (ADA), either directly or through the Unruh Act. In the *Martinez v. Cot'n Wash, Inc.*, the California Court of Appeal held that website-only businesses are **not** places of public accommodation under the ADA. Therefore, the Court held that the ADA did not apply to an online-only business, and any attempt to enforce website accessibility requirements under California's Unruh Act would fail where there was no proof of any discriminatory intent.

Expansion of Exposure for Noncompliant and Meal and Rest Break Practices

Generally, California employers are required to provide hourly employees with uninterrupted meal and rest breaks. If hourly employees do not receive their meal and rest breaks, they must be compensated via "premium payment" penalties. The court in in *Naranjo v. Spectrum Security Services, Inc.* held that these premium payments are considered "wages" that can be the basis of derivative claims for waiting time penalties and wage statement penalties. The Court also determined that the applicable rate of prejudgment interest for amounts due for the failure to provide meal and rest breaks is seven percent.

Compliance Tip: This ruling reinforces the importance of complying with California's meal and rest break laws. California employers should audit their policies and practices, employee wage statements, and final pay policies to confirm that meal and rest break premium payments are timely paid and reported.

Enforceability of Arbitration Provisions

In *Morgan v. Sundance, Inc.*, the United States Supreme Court found that a party opposing arbitration on the ground that the moving party waived its right to compel arbitration by waiting "too long" need not make a separate showing that it was prejudiced by the delay.

FEDERAL LAW UPDATES

HR 4445:

The End Of Mandatory Arbitration For Sexual Harassment Claims

On March 3, 2022, President Biden signed into law a bill that limits the enforceability of arbitration agreements for workplace sexual harassment and sexual assault claims. The new law provides that an arbitration agreement signed by an employee prior to a claim or dispute in which sexual harassment or assault is alleged is voidable **at the employee's discretion**.

Compliance Tip: California businesses must be sure that their arbitration agreements are compliant with the latest state and federal laws—including that arbitration agreements in California must be voluntary and not made a condition upon which employment is made contingent.

EEOC Releases Updated "Know Your Rights" Poster

On October 19, 2022, the U.S. Equal Employment Opportunity Commission ("EEOC") released an updated "Know Your Rights" poster, which replaces the previous "EEO is the Law" poster. Covered employers (most employers with at least 15 employees) are required by federal law to prominently display the poster at their work sites. The new poster includes a QR code for employees to link directly to instructions for filing a charge of workplace discrimination with the EEOC. The poster is currently available in English and Spanish with more languages to follow.

Compliance Tip: Be sure to display the new poster as soon as possible.

Federal Appeals Court Finds Pre-Shift Computer "Boot Up" Time May Be Compensable

A Nevada federal appeals court recently held that the time spent by hourly employees "booting up" their computers may be compensable pursuant to the Fair Labor Standards Act, reversing a lower court's decision.

In *Cadena v. Customer Connexx, LLC*, the employees' primary responsibility in a Las Vegas call center was to provide customer service and scheduling over a phone operated only through their employer-provided computers. To reach their computers' timekeeping program, employees had to turn on their computers, log in with a username and password, and open the time keeping system, which took from a minute to 20 minutes. The employees argued the time spent booting up the computers was an "integral and indispensable part of their duties," making their time compensable under the FLSA, which provides that some work-related activities may be compensable. The federal appeals court agreed.

The federal appeals court's decision stated that "all of the employee's principal duties require the use of a functional computer, so turning on or waking up their computers at the beginning of their shifts is integral and indispensable to their principal activities" and is compensable. Notably, under the same theory, shutting down computers was not considered integral and indispensable to the employees' ability to conduct calls, and was therefore not found to be compensable.

Compliance Tip: Employers should be aware of when an hourly employee's work shift truly "starts" as any work performed prior to clocking in may be considered improper, compensable off-the-clock work. As California employers know, any wage and hour violations can quickly turn into expensive class or representative actions.

Uniformed Service Employment And Reemployment Rights Act (USERRA)

The Uniformed Service Employment and Reemployment Rights Act (USERRA) generally protects the employment rights of persons who serve in the armed forces by guaranteeing a right to reemployment if they leave a civilian job to undertake duties in the uniformed service, subject to their compliance with certain notice and tenure requirements. The act also provides discrimination and retaliation protections based on an individual's status as a past or present member of the armed forces. The agency tasked with investigating violations of USERRA is the US Department of Labor, Veterans Employment and Training Service.

On September 29, 2022, President Biden expanded USERRA protections by signing the "Civilian Reservist Emergency Workforce Act of 2021" or the "CREW Act" into law. The CREW Act expands USERRA employment protections to Federal Emergency Management Agency ("FEMA") reservists who deploy to major disaster sites.

Compliance Tip: Employers, regardless of size, are required to provide persons entitled to the rights and benefits under USERRA, a notice of their rights, benefits, and obligations. Employers may provide the notice "Your Rights Under USERRA" by posting it where employee notices are customarily placed.

It is important to be aware of changes that may affect your business as non-compliance may result in serious penalties or legal liability. Annual audits, record maintenance, and policy updates are crucial to mitigating any potential exposure to your business.

DDWK is ready to assist your business with employment audits, compliance reviews, and ensuring your employee handbook, agreements, and policies are up to date. Please do not hesitate to contact our employment law attorneys at DDWK. We are here to help.