Tucker Ellis LLP

New California Employment Laws for 2024: What Employers Need to Know

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In 2023, California lawmakers passed and Governor Gavin Newsom signed more than 1,000 bills, and – as is often the case – with the new year comes a host of new California employment laws that took effect on January 1, 2024 or will take effect in the near future.

Examples of key changes to the law address a variety of topics, including:

- Non-Competes
- Arbitration Agreements
- Leaves of Absence
- Pandemic Recall Rights for Laid Off Workers
- Public Prosecution for Wage Theft/Labor Code Violations
- Protected Employee Conduct
- Workplace Violence Prevention
- Minimum Wages
- Wage and Hour Training
- Reporting Requirements
- Off-Duty Marijuana Use and Testing

Not all of these new laws will impact day-to-day operations; however, all employers with personnel in California should be aware of these new laws, understand how they may affect their operations, and consult with counsel to address any compliance issues.

SB 699 and AB 1076: NON-COMPETE AGREEMENTS UNLAWFUL, NOT JUST VOID

The first two laws of the new year codify existing laws related to the general unenforceability of non-compete agreements in California. As most companies are aware – absent specific exceptions – under California Business and Professions Code section 16600, California generally prohibits employers from entering into contracts with employees that preclude those employees from engaging in a lawful profession, trade, or business of any kind. And California's strong public policy against non-competes has been in existence since 1872.

Notwithstanding existing laws on the subject, on September 1, 2023, Governor Newsom signed SB 699. Specifically, SB 699 prevents employers from enforcing contracts that are void under California Business and Professions Code section 16600, regardless of whether the contracts were signed outside of California. Indeed, SB 699 provides that "an employer or

former employer shall not attempt to enforce a contract that is void under this chapter *regardless of whether the contract was signed, and the employment was maintained outside of California.*"

The law also creates a private right of action and authorizes employees to sue for injunctive relief, actual damages, and attorneys' fees for violations. SB 699 went into effect on January 1, 2024.

In addition to SB 699, Governor Newsom also signed Assembly Bill 1076. AB 1076 codifies existing case law, *Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937 (2008), by specifying that California's statutory provision voiding non-compete contracts is to be broadly construed to void the application of any non-compete agreement in an employment context, or any non-compete clause in an employment contract, no matter how narrowly tailored, that does not satisfy specified exceptions. *In addition, AB 1076 adds Business and Professions Code section 16600.1, which requires employers to notify, by* ***February 14, 2024***, *current and former employees (who were employed after January 1, 2022) whose contracts include a non-compete clause, or who were required to enter a non-compete agreement not covered by an exception, that the non-compete clause is void.* The new section 16600.1 provides that a violation of this law constitutes an act of unfair competition, which means employees may sue under California Business and Professions Code section 17200 for restitution and/or injunctive relief.

Employers should review their employment agreements, including any non-compete agreements, and immediately send any appropriate notices to former and current employees.

SB 365: ARBITRATION ENFORCEMENT

Senate Bill 365 was signed into law October 10, 2023 and substantially changes existing law related to appealing an order denying a motion to compel arbitration. Effective January 1, 2024, this law eliminates the automatic stay during the pendency of an appeal of an order dismissing or denying a petition to compel arbitration.

Prior to SB 365, California Code of Civil Procedure section 916 provided that "the perfecting of an appeal stays proceedings in the trial court… upon the matters embraced therein or affected thereby." In practice, Section 916 requires a trial court to stay proceedings of any claims that could be subject to arbitration when a party appeals the denial of a motion to compel arbitration. SB 365 amends Code of Civil Procedure section 1294 to provide that "Notwithstanding Section 916, the perfecting of such an appeal shall not automatically stay any proceedings in the trial court" when appealing an order denying a motion to compel arbitration. Thus, under the new law, parties who are appealing the denial or dismissal of an arbitration proceeding may be required to participate in costly court proceedings while the

appeal is pending.

SB 365 follows a trend of recent California laws adverse to arbitration. In October 2019, Governor Newsom signed Assembly Bill (AB) 51, which prohibited employers from requiring employees to enter into certain arbitration agreements, including agreements to arbitrate claims under California's Fair Employment and Housing Act and California's Labor Code. AB 51 was immediately challenged by business groups led by the U.S. Chamber of Commerce, who argued the law was preempted by the FAA. Eventually, in February 2023, the Ninth Circuit declared AB 51 was preempted by the FAA in its entirety because the law stood as an obstacle to entering into arbitration agreements. Similar to AB 51, it is likely SB 365 will be challenged on preemption grounds.

SB 616: PAID SICK LEAVE EXPANSION

On October 4, 2023, Governor Newsom signed Senate Bill 616, which increases the amount of paid sick leave employers are required to provide to California employees.

Starting January 1, 2024, an employee must be eligible to earn at least 40 hours or 5 days of sick leave or paid time off ("PTO") by the 200th calendar day of employment, up from 24 hours or 3 days by the employee's 120th calendar day. The bill also increases the continuous accrual and carryover cap for paid sick leave from 48 hours or 6 days to 80 hours or 10 days. This means that for employers who use accrual methods, unused sick days must be carried over from year to year and capped at no less than 80 hours or 10 days. However, no accrual or carryover is required if the employer provides 5 days/40 hours of paid sick leave upfront each year of employment, calendar year, or 12-month period. Additionally, though employers may still limit an employee's annual use of paid sick leave, the usage cap increases to 40 hours or 5 days, up from 24 hours or 3 days. Employers, alternatively, remain free to frontload the entire leave amount of 5 days or 40 hours, which is greater, per year or 12-month period. Last, the standard minimum accrual method of 1 hour for every 30 hours worked remains unchanged for those using the state-guided accrual calculation. Our team at Tucker Ellis LLP is available to provide guidance on implementing and adapting policies to ensure compliance with these significant changes.

SB 848: CALIFORNIA EMPLOYEES GAIN LEAVE FOR REPRODUCTIVE LOSS

In addition to the expansion of sick leave, California passed and Governor Newsom signed Senate Bill 848 expanding bereavement rights for "reproductive loss events." This law took effect on January 1, 2024, and amends the California Fair Employment and Housing Act by requiring up to 5 days of reproductive loss leave for eligible employees following events such as a miscarriage, unsuccessful assisted reproduction, failed adoption, failed surrogacy, or stillbirth. This law applies to private employers with five or more employees and all public

employers. The leave must be taken within three months of the reproductive loss event, either consecutively or nonconsecutively, and whether it is paid or unpaid depends on the employer's existing leave policies. In the absence of policies providing for a paid leave, reproductive loss leave may be unpaid, but employees can utilize other available leave, including accrued paid sick leave or PTO. Furthermore, the legislation prohibits discrimination or retaliation against employees exercising their rights under this bill and emphasizes the need for employers to maintain confidentiality regarding reproductive loss leave requests. Indeed, under this law, employers cannot even require that employees provide documentation showing that the leave is necessary.

SB 723: RE-HIRING RIGHTS FOR LAID-OFF EMPLOYEES

Senate Bill 723 amends Senate Bill 93, signed by Governor Newsom in 2021, which required certain employers in hospitality and service industries to rehire employees laid off due to the COVID-19 pandemic. The covered businesses include hotels, private clubs with 50 or more guest rooms, event centers, airport hospitality operations, airport service providers, and providers of janitorial, building maintenance, or security services to commercial buildings. Currently, employers in these covered enterprises are required to offer their laid-off employees specified information about job positions that become available for which the laid-off employees are qualified, and to offer positions to those laid-off employees based on a preference system, in accordance with specified timelines and procedures until December 31, 2024. The law also prohibits a covered employer from refusing to employ, terminating, reducing compensation, or taking other adverse action against a laid-off employee for seeking to enforce their rights under these provisions.

Effective January 1, 2024, SB 723 revises the definition of laid-off employee to mean any employee employed by the employer for six months or more and whose most recent separation from active employment occurred on or after *March 4, 2020*, and was due to a reason related to the COVID-19 pandemic. In addition, SB 723 adds a presumption that a laid-off employee's separation from employment due to a lack of business, reduction in force, or other economic, non-disciplinary reason is due to a reason related to the pandemic, "unless the employer establishes otherwise by a preponderance of the evidence."

Covered employers who establish open employment positions must – within five business days – offer those positions to qualified laid-off employees. Employers must then give those laid-off employees at least five business days to accept or decline the job offer. Further, employers who decline to recall laid-off employees on the grounds of lack of qualifications shall provide them with written notice that others were hired, the reasons for the employer's decision, and the length of service with the employer of those hired in lieu of the laid-off employees. SB 723 sunsets on December 31, 2025.

AB 594: WAGE THEFT ENFORCEMENT

Assembly Bill 594 seeks to address wage theft issues in California by introducing an additional method of enforcing the Labor Code. AB 594 permits public prosecutors, including the Attorney General, a district attorney, a city attorney, a county counsel, or any other city or county prosecutor, to independently prosecute certain wage and hour violations that occur within their geographic jurisdiction. These wage and hour violations include unpaid minimum wage, unpaid overtime, failure to provide meal breaks, failure to provide rest breaks, and misclassifications violations. Previously, only the Labor Commissioner's office had this power.

AB 594 also provides an option for injunctive relief, adding a layer of preventive action against ongoing violations. Crucially, the bill renders null and void any agreement between workers and employers attempting to limit the Labor Commissioner or public prosecutor's ability to enforce the Labor Code. This bill signals the need for heightened vigilance and proactive compliance strategies as it is in addition to and separate from (and thus does not replace) the Labor Commissioner's right to investigate and hear employee complaints and the Labor Workforce and Development Agency's rights under the California Labor Code Private Attorneys General Act (PAGA), which authorizes employees to file representative lawsuits to recover civil penalties for Labor Code violations on behalf of themselves, other employees, and the State of California. The provisions of AB 594 will remain in effect until January 1, 2029.

SB 497: PRESUMPTION OF RETALIATION

Employers all around the United States are prohibited from discriminating, retaliating, or taking any adverse employment action against an employee or applicant because they engaged in protected conduct. Now, under California law, there is a rebuttable presumption of retaliation if the employer disciplines or takes adverse action against an employee within 90 days of that employee's engaging in protected conduct. This means that simply by taking that action, the plaintiff will be able to establish its initial burden of proof. It will be up to the employer to dispute this by articulating a legitimate, nonretaliatory reason for the adverse action. SB 497 further provides that in addition to other remedies, employers are liable for a civil penalty of up to $10,000 per employee per violation to be awarded to the employee who was retaliated against. SB 497 went into effect on January 1, 2024.

AB 933: PRIVILEGED COMMUNICATIONS: WORKPLACE HARASSMENT

Assembly Bill 933, passed in October 2023 and effective January 1, 2024, expands protections to defendants in defamation lawsuits to assert a privilege defense for communications made without malice about factual information related to an incident of sexual assault, harassment, or discrimination experienced by them. The law also allows a

prevailing defendant to recover reasonable attorney's fees and costs, plus treble damages for any harm caused to them by the lawsuit. Furthermore, AB 933 specifies that punitive damages would also be available. This law is intended to protect victims of sexual assault, harassment, or discrimination from the threat and chilling effect of retaliatory defamation lawsuits.

SB 553: WORKPLACE VIOLENCE PREVENTION

On May 31, 2023, the California Senate passed Senate Bill 553 requiring California employers to take steps to prevent and respond to workplace violence. SB 553 adds section 6401.9 to the California Labor Code, which requires California employers to implement and/or adhere to: (i) extensive workplace violence prevention plans, (ii) new record retention and reporting requirements, and (iii) specified training to employees by July 1, 2024.

The new law requires that workplace violence prevention plans be in writing, "available and easily accessible" to employees, and include, for example, the following:

- "Effective procedures to obtain the active involvement of employees and union representatives" in developing and implementing the plan, identifying and correcting "workplace violence hazards," and designing and implementing employee training;
- The names and job titles of all persons responsible for implementing the plan;
- Procedures to identify and correct workplace violence hazards in a timely manner;
- "Effective procedures to respond to actual or potential workplace violence emergencies";
- "Effective procedures to communicate with employees regarding workplace violence matters" and to alert employees of workplace violence emergencies, including the "presence, location, and nature" of such emergencies;
- Procedures for post-incident response and investigation; and
- Periodic review of the plan and updates and corrections as needed.

Employers must also maintain written logs of workplace violence incidents that set forth a great deal of specified information. And Cal/OSHA is charged with enforcing the new requirements. Cal/OSHA will have authority to issue notices to correct and civil penalties.

"All employers, employees, places of employment, and employer-provided housing" are subject to the new requirements, other than those that meet one of a few exemptions in section 6401.9. Exempt employers are: (1) places of employment where no more than nine employees are present at any one time and that are not accessible to the public; (2) employees working remotely from a place of their choosing and that their employer does not control; (3) certain healthcare facilities; and (4) certain law enforcement and correctional facilities. Our team at Tucker Ellis LLP is available if you have questions about whether any of these exemptions apply or to assist with preparing or reviewing compliant workplace

violence prevention plans.

SB 428: EXPANSION OF WORKPLACE RESTRAINING ORDERS TO HARASSMENT

Employers in California need to be aware of changes to their ability to seek temporary restraining orders on behalf of employees. Under existing law, any employer whose employee has suffered *unlawful violence or a credible threat of violence* from any individual that can be carried out or has been carried out at the workplace is authorized to seek a temporary restraining order and an injunction on behalf of the employee, his or her immediate family members, and other employees. (Cal. Code of Civ. Proc. § 527.8). Now, Senate Bill 428 expands these protections to employees that have suffered *harassment* or may suffer *harassment* in the workplace.

SB 428 defines "harassment" as "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be that which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress." Actual threats of violence or acts of violence are not required. However, note that, as a limitation, the law does not permit employers to seek temporary restraining orders or injunctions for behavior that is protected by any other provision of law, such as the constitutionally protected freedom of speech or the right to engage in concerted activity under the National Labor Relations Act. SB 428 will take effect on January 1, 2025.

SB 525: HEALTHCARE WORKERS MINIMUM WAGE

Senate Bill 525, signed by Governor Newsom on October 13, 2023, creates a series of new minimum wage requirements varying by type of healthcare employer with yearly increases. Effective June 1, 2024, coverage under SB 525 is expansive, applying to most healthcare employees and facilities.

Under the law, a "covered healthcare employee" is defined as an employee providing patient care, healthcare services, or other services supporting the provision of healthcare. SB 525 also covers independent contractors if there is a contract with the healthcare facility to provide healthcare services or services supporting the provision of healthcare, and the healthcare facility, directly or indirectly, exercises control over the contractors' wages, hours, or working conditions. However, its coverage does not include outside salespersons, work performed in the public sector where the primary duties are not healthcare services, delivery or waste collection work, and medical transportation services.

"Covered healthcare facilities" include medical hospitals, psychiatric hospitals, skilled nursing facilities, home health agencies, and a patient's home when an entity owned or operated by a

general acute care hospital delivers the healthcare services.

Healthcare employers will be required to comply with the minimum wage requirements outlined in SB 525 based on how the facility is categorized.

For “large health systems” or healthcare facilities with 10,000 or more full-time employees, dialysis clinics, or facilities owned, affiliated, or operated by a county with more than five million people, the minimum wage for covered healthcare employees is set at:

- $23.00 per hour from June 1, 2024;
- $24.00 per hour from June 1, 2025; and
- $25.00 per hour from June 1, 2026.

For hospitals with high populations of Medicare/Medicaid patients, rural healthcare facilities, and facilities owned, affiliated, or operated by a county with fewer than 250,000 people, the minimum wage for covered healthcare employees is set at:

- $18.00 per hour, with a 3.5% increase annually, from June 1, 2024; and
- $25.00 per hour from June 1, 2033.

For free clinics not conducted or maintained by a government entity, community clinics, urgent care clinics, rural health clinics, and associated intermittent clinics, as well as licensed skilled nursing facilities where a patient care minimum spending requirement is in effect, the minimum wage for covered healthcare employees is set at:

- $21.00 per hour from June 1, 2024; and
- Beginning on June 1, 2026, different increments depending on facility type.

Finally, the catch-all for all other healthcare facilities sets the minimum wage for covered healthcare employees at:

- $21.00 per hour from June 1, 2024;
- $23.00 per hour from June 1, 2026; and
- $25.00 per hour from June 1, 2028.

Healthcare employers should evaluate the applicability of SB 525 to their facility type and closely review existing policies to prepare for SB 525 minimum wage increases, as well as its impact on exempt workers. To the extent the salaried positions are exempt, then to meet the salary requirement for exempt status, the exempt employees’ monthly salary equivalent must be no less than 150% of the healthcare minimum wage or 200% of the applicable minimum wage, whichever is greater.

AB 1228: MINIMUM WAGE FOR FAST FOOD WORKERS

Assembly Bill 1228 repealed the controversial Fast Food Accountability and Standards Recovery Act (FAST Act) and implemented new regulations for the fast food industry in California. Notably, it increased the minimum wage for fast food workers at national fast food chains (defined as a set of limited-service restaurants consisting of more than 60 establishments that share a common brand or that are characterized by standardized options for decor, marketing, packaging, products, and services) to $20 per hour, effective April 1, 2024. The state minimum wage at that time will be $16.00 (although some cities are higher).

The bill also creates a new Fast Food Council that will determine minimum standards on wages, working hours, and other working conditions. The Fast Food Council will institute minimum wages for these employees on an annual basis. AB 1228 and the Fast Food Council it created are intended to regulate fast food restaurants primarily engaged in providing food and beverages for immediate consumption on or off premises, where patrons generally order or select items and pay before consuming, with limited or no table service. Bakeries that produce for sale on the establishment's premises bread and sell bread as a stand-alone menu item are not covered by the law. Also, restaurants in grocery establishments where the grocery establishment directly employs the staff of an on-premises restaurant are not considered fast food restaurants under the new law.

The impact of AB 1228 is far-reaching for more than 500,000 non-union fast-food workers, especially with regard to the applicable minimum wage law in some cities that currently pay the California minimum. Tucker Ellis urges all fast food employers to review their labor and employment practices and policies to ensure they comply with this and other California law.

SB 476: FOOD HANDLER CARDS

SB 476 requires employers to treat as compensable hours worked the time it takes employees to complete the food handler card training and examination. Under existing law, with specified exceptions, food handlers must obtain a food handler card within 30 days after their date of hire. Each food handler must maintain a valid food handler card for the duration of the food handler's employment as a food handler. SB 476 shifts compliance costs for these requirements entirely to the employer of a food handler. Accordingly, the employer will now be required to pay for the mandatory food handler course itself and for the time spent by a food handler completing it, which must be compensated at the employee's regular hourly rate. SB 476 also requires employers to relieve employees of all their job duties while they take the required food handler training. In addition, SB 476 prohibits employers from requiring that applicants obtain a food handler card as a pre-requisite for their employment. The new law went into effect on January 1, 2024.

SB 54: REPORTING OBLIGATIONS FOR VENTURE CAPITAL COMPANIES

SB 54, signed into law by Governor Newsom in October 2023, extends to the venture capital ecosystem pay data reporting requirements similar to what was enacted in 2022 for large employers.

This bill was intended to combat the following problem: “Venture capital investment does not reflect the diversity of California. Companies founded or co-founded by women receive far less investment from venture capital funds than companies founded by men. According to PitchBook, companies with female-only founders comprised 7% of all deals funded in 2022, which represented only 2% of the total capital provided by VCs. Businesses co-founded by men and women performed marginally better with 20% of all deals funded, representing 16% of the total capital provided. According to the author’s office, the data on race and ethnicity is no better, stating that ‘startups founded by Black and Latinx individuals received only 2.6% and 0.6% of venture capital funding, respectively.’”

Under the new law, commencing on March 1, 2025 and annually thereafter, every “venture capital company” that operates, invests, or raises capital in California must file a report with the Civil Rights Department (“CRD”), which report must provide certain information about the covered entity’s funding determinations with respect to businesses “primarily founded by diverse founding team members.”

If a covered entity fails to file the required report by March 1 of a given year, the CRD must notify the covered entity that it must submit the report within 60 days. If the covered entity fails to submit its report within the 60-day period, then the CRD may file an ex parte petition naming the covered entity as the respondent and seeking a court order for all of the following relief: (a) compelling the respondent to comply; (b) requiring the respondent to pay CRD a penalty sufficient to deter the respondent from failing to comply, as determined by the court; (c) CRD’s reasonable attorney fees and costs incurred in pursuing the ex parte action; and (d) any other relief that the court deems appropriate.

It bears mentioning that the statute authorizes the CRD to bring one of these ex parte actions in any county where the CRD has an office, as well as in the county where the noncompliant covered entity resides or has its principal place of business. The CRD presently has six offices, which are located in Bakersfield, Elk Grove, Fresno, Los Angeles, Oakland, and Riverside. Thus, the CRD is empowered to bring an ex parte petition against a noncompliant “covered entity” in any of the six counties in which the CRD has an office. Even if the noncompliant covered entity has no presence in, or anywhere close to, any of those six counties, it will nevertheless have to bear any and all burdens entailed in fighting an ex parte petition filed in one of those counties.

Venture capital firms and other investors should work with counsel to determine whether they are “covered entities” under SB 54 and ensure they are prepared to comply with SB 54’s reporting requirements, which will commence on March 1, 2025 but will look back to the 2024 calendar year.

AB 2188 and SB 700: OFF-DUTY MARIJUANA USE QUESTION AND DRUG TEST RESULT PROTECTIONS

Passed in 2022 and set to take effect January 1, 2024, AB 2188 amended the California Fair Employment and Housing Act to make it an unlawful employment practice for any employer to discriminate against, terminate, or otherwise penalize a person for their off-the-job and away-from-work use of cannabis. AB 2188 did not prohibit an employer from discriminating in hiring or any term or condition of employment or otherwise penalizing a person based on scientifically valid pre-employment drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites. Possession, impairment, or use on the job are not permitted. The law also included exemptions for the building and construction trades and jobs requiring federal background checks or security clearance or jobs requiring testing for controlled substances for federal funding, federal licensing, or federal contracts.

SB 700, which was signed into law on October 7, 2023 and took effect on January 1, 2024, provides protections for job applicants by expressly making it unlawful for an employer to request information from them relating to their prior use of cannabis. However, the law exempts information about a person’s prior cannabis use if obtained from their criminal history, so long as that information is obtained lawfully and is otherwise legally permissible to consider.

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As you navigate this evolving California employment law landscape, remember: our team is here to help. We encourage you to reach out with any questions you have concerning these new laws and their impact on your specific business operations. Tucker Ellis remains committed to supporting your compliance efforts and ensuring a smooth transition into the new year.

Additional Information

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