Cooley

October 25, 2022

In late September 2022, California Governor Gavin Newsom signed several new laws impacting California employers, which included the new California pay transparency law, which we considered separately in an **October 5 client alert on the legislation**. Unless otherwise specified, the laws discussed below take effect on January 1, 2023.

COVID-19 supplemental paid sick leave extension

Effective September 29, 2022, **AB 152** extends California's COVID-19 Supplemental Paid Sick Leave (SPSL) law, which was originally enacted in early 2021. AB 152 extends the application of the current SPSL law for three months, **through December 31, 2022**.

As we previously **reported in a February 15 client alert**, the state's current SPSL law requires employers with 26 or more employees to provide supplemental paid sick leave to employees who are unable to work for COVID-19-related reasons, as well as use leave to care for family members. The SPSL law provides for two "banks" of available sick leave, with each bank providing up to 40 hours of leave time. The first bank provides leave for covered employees who are unable to work or telework due to qualifying COVID-19 reasons, which include being subject to a quarantine or isolation period, attending or accompanying a family member to an appointment to receive a vaccine or a booster, or caring for a child whose school or care provider is closed or unavailable due to COVID-19-related reasons. The second bank provides for up to 40 hours of leave if the employee, or a family member for whom the employee is providing care, tests positive for COVID-19. Importantly, AB 152 would **not** require any additional leave beyond the total of 80 hours from January 1, 2022, through December 30, 2022, but the law does change an employer's ability to require testing and provides for a grant program for small-business owners and nonprofits, as described below.

Testing procedures

Under current law, an employer has no obligation to provide leave time under the second bank if the employee refuses to provide documentation of a test result. As amended, the SPSL law clarifies that employers also do not need to provide leave if an employee refuses to submit to a diagnostic test. In addition, while under the current law an employer can require the employee to take a second test on or after the fifth day following an initial test, AB 152 amends the SPSL law so that an employer can require the employee to submit to a third diagnostic test within no less than 24 hours after the positive second test. Employers must continue to provide tests at no cost to the employee.

California Small Business and Nonprofit COVID-19 Relief Grant Program

This new grant program allows small businesses and nonprofit organizations to apply for and receive grants of up to a maximum of $50,000 to offset costs incurred in providing supplemental paid sick leave between January 1 and December 31, 2022. Among other requirements, eligible businesses must be incorporated as a C corporation, S corporation, cooperative, limited liability company, partnership, or limited partnership, or registered as a 501(c)(3), 501(c)(6), or 501(c)(19); have begun operating before June 1, 2021; be currently active and operating; and have 26 to 49 employees and provide payroll data and a supporting affidavit.

Emergency conditions protections

SB 1044 provides for new employee protections in the event of an emergency condition to address situations where employees may feel compelled to or expected to continue working during natural disasters, such as wildfires, or may be exposed to greater danger as a result of being prohibited from accessing communications devices during active shooter situations. Under the law, in the event of an "emergency condition," an employer will be prohibited from taking or threatening adverse action against any employee for refusing to report to or leaving a workplace or worksite when the employee has a reasonable belief that the workplace or worksite is unsafe. An "emergency condition" is defined as any "conditions of disaster or extreme peril" caused by natural forces or a criminal act, or an order to evacuate a workplace, worker's home or child's school due to a natural disaster or criminal act. Notably, the law excludes health pandemics.

The law also prohibits employers from, in the event of an "emergency condition," preventing employees from accessing their mobile devices to seek emergency assistance, assess the safety of the situation, or communicate with others to confirm their safety. Certain classes of workers are excepted from the law, including first responders, disaster service workers and other employees required by law to render aid. Where feasible, employees will be required to notify employers of the emergency condition requiring them to leave or refuse to report to the workplace or worksite. If this is not feasible, employees must notify employers of the emergency condition as soon as possible after leaving or refusing to report to the workplace.

Off-duty cannabis use protections

Effective **January 1, 2024**, AB 2188 will make it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, for the person's use of cannabis off the job and away from the workplace, or for an employer-required drug test that finds non-psychoactive cannabis metabolites in the person's hair, blood, urine or other bodily fluids. Importantly, employers can continue to prohibit the use, possession of, or impairment by cannabis on the job.

Employers also may still conduct certain types of pre-employment or employer-required drug testing, if those tests are conducted through methods that do not screen for non-psychoactive cannabis metabolites. According to the law, tests that screen for non-psychoactive cannabis metabolites "have no correlation to impairment on the job."

While we expect more guidance from the state in advance of 2024, AB 2188 appears to sanction the use of certain tests including impairment tests, which measure an individual employee against their own baseline performance, and tests that identify the presence of tetrahydrocannabinol (THC) – the chemical compound in cannabis that can indicate impairment and cause psychoactive effects – in an individual's bodily fluids.

The law would not apply to certain employers and employees, including employees in the building and construction trades and employers required by law to drug test or conduct certain background investigation or security clearance processes.

Designated persons leave

Under existing law, the California Family Rights Act (CFRA) and the state's paid sick leave law (formally known as the Healthy Workplaces, Healthy Families Act of 2014) both permit eligible employees to take time off to care for a "family member," as defined in each statute. AB 1041 expands the definition of "family member" in both statutes, allowing employees to take time off to care for a "designated person."

For purposes of leave under the CFRA, a designated person is defined as "any individual related by blood or whose association with the employee is the equivalent of a family relationship." However, for purposes of leave under the paid sick leave law, a "designated person" is more vaguely and broadly defined as "a person identified by the employee at the time the employee

requests paid sick days." In both instances, an employer may limit the employee to one designated person per 12-month period.

Bereavement leave

AB 1949 requires employers with five or more employees to provide up to five days of bereavement leave to eligible employees (those employed for at least 30 days prior to commencement of leave) upon the death of a spouse, child, parent, sibling, grandparent, grandchild, domestic partner or parent-in-law. The leave – which need not be taken consecutively – must be completed within three months of the date of death.

If an employer does not have an existing bereavement leave policy, the leave may be unpaid. However, an employee must be permitted to use other leave balances available to them, including accrued paid sick time, vacation or personal leave time.

AB 1949 also outlines provisions regarding documentation. For example, employers may request appropriate documentation within 30 days of the first day of the leave to verify the need for leave, which includes a death certificate, published obituary, or written verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution, or governmental agency. If such documentation is furnished, however, employers are required to maintain it as confidential and not disclose it except to internal personnel or counsel, or as required by law. Employers also are generally required to maintain confidentiality for any employee requesting leave under this law. Employees using bereavement leave would also be protected from discrimination and retaliation.

Abortion-related privacy protections

After the US Supreme Court's *Dobbs v. Jackson Women's Health Organization* decision earlier this year, California passed several laws aimed at protecting abortion access and the right of privacy with respect to personal reproductive decisions, including AB 2091. Effective September 27, 2022, this law prohibits an employer from releasing medical information that would identify an individual, or information that is related to an individual seeking or obtaining an abortion, in response to a subpoena or law enforcement request, if the subpoena or request is based on or intended for the purpose of enforcing another state's laws interfering with a person's right to choose or obtain an abortion, or a foreign penal civil action. A "foreign penal civil action" is defined as "a civil action authorized by the law of a state other than this state in which the sole purpose is to punish an offense against the public justice of that state." It remains an open question how AB 2091, along with other abortion-related laws from the state, will interact with other states' restrictive abortion laws.

Reproductive health decision-making protections

SB 523, the Contraceptive Equity Act of 2022, amends the California Fair Employment and Housing Act to protect reproductive health decision-making, defined as including but not limited to "a decision to use or access a particular drug, device, product, or medical service for reproductive health." As amended, it will be an unlawful employment practice for an employer to discriminate against an employee or applicant on the basis of reproductive health decision-making, or require disclosure of information relating to an applicant's or employee's reproductive health decision-making as a condition of employment, continued employment, or benefit of employment. SB 523 also clarifies that the existing protected category of "sex" includes reproductive health decision-making.

Minimum wage increase

California employers are reminded that beginning January 1, 2023, the minimum wage in California will increase to **$15.50** per hour for **all employers**. While in prior years the applicable minimum wage depended on an employer's size, in July 2022, the state's

Department of Finance certified that based on the annual inflation rate in the prior year, the state hourly minimum wage must be increased, regardless of the number of workers employed by an employer.

This increase will also impact the minimum exempt salary for California employees, which will rise to **$64,480** effective January 1, 2023.

Employers are reminded that many cities have their own minimum wage requirements that are higher than the state's minimum wage.

Next steps

Employers should review their policies, forms and practices to ensure compliance with these new laws. Employers also should stay tuned for further guidance from the state regarding such laws, including AB 2188.

If you have any questions about these laws or how to comply, please contact a member of Cooley's employment group.

Key Contacts

Selin Akkan Palo Alto	sakkan@cooley.com +1 650 843 5076
Ann Bevitt London	abevitt@cooley.com +44 (0) 20 7556 4264
Wendy Brenner Palo Alto	brennerwj@cooley.com +1 650 843 5371
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175

Helenanne Connolly Reston	hconnolly@cooley.com +1 703 456 8685
Ross Eberly Santa Monica	reberly@cooley.com +1 310 883 6415
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Anna Matsuo New York	amatsuo@cooley.com +1 212 479 6827
Gerard O'Shea New York	goshea@cooley.com +1 212 479 6704
Miriam Petrillo Chicago	mpetrillo@cooley.com +1 312 881 6612
Ryan Vann Chicago	rhvann@cooley.com +1 312 881 6640
Summer Wynn San Diego	swynn@cooley.com +1 858 550 6030