New California Laws to Close out 2022 and Usher in the New Year

As the 2022 legislative year came to a close on September 30, 2022, several significant employment law bills were signed into law by Governor Gavin Newsom. This alert provides a recap of the most notable of these laws that employers should be familiar with as we close out 2022 and begin a new year in 2023.

AB 152

2022 COVID-19 Supplemental Sick Pay Extension and Grant Program for Small Businesses/Nonprofits

AB 152, which was signed into law by Governor Newsom on September 29, 2022, extends the deadline for employees to use their 2022 COVID-19 Supplemental Paid Sick Leave (SPSL) by three months, from the prior deadline of September 30, 2022, to December 31, 2022.

SB 114, California's 2022 COVID-19 SPSL Law, went into effect on February 19, 2022, and requires California employers in the public or private sector with more than 25 employees to provide their full-time, part-time, and variable-hour employees with supplemental paid sick leave for COVID related reasons. Under SB 114, eligible full-time employees are entitled to receive:

i. up to 40 hours of SPSL if they cannot work or telework after being diagnosed with COVID-19 or because they need to care for a family member diagnosed with COVID-19; to attend COVID-19 vaccine or booster appointments for themselves or their family members; to recover from symptoms associated with vaccines or boosters, or to care for a child whose school or place of care is closed due to COVID-19, and
ii. an additional 40 hours of SPSL if they themselves test positive for COVID-19 and cannot work or telework as a result.

Employees under SB 114 had until September 30, 2022, to use their SPSL. With the passage of AB 152, employees will now have until December 31, 2022, to do so. The new law, however, does not increase the total amount of COVID-19 SPSL available to employees, nor does it provide employees who have already used their total SPSL allotment with more leave. Accordingly, if employees already have used all of their 2022 SPSL allotment and they need leave for a COVID-19-related reason covered by SB 114, they will need to take the leave unpaid or use another paid benefit (e.g., sick or vacation leave) to receive paid time off. Conversely, if an employee has only used some or none of their 2022 SPSL allotment, the employee will have until the end of 2022 to utilize the SPSL available to them for a COVID-19 qualifying reason.

AB 152 also provides some employer-friendly amendments to SB 114 by allowing employers to require a third COVID-19 test within 24 hours of a second positive test and permitting employers to deny any additional SPSL to employees who refuse to submit to these tests. This is significant for employers whose employees are isolating from work due to COVID-19 and who take another test on or after the fifth day following the initial test in order to determine if the employees can end isolation and return to work. Employers can now require employees to take a third test after 24 hours have passed since the second test to determine if they are able to return to work. If an employee refuses to submit to the second or third test or to provide the results of these tests, the employer can refuse to provide additional SPSL to the employee. The cost of all tests must be covered by the employer.

Finally, AB 152 establishes a COVID-19 Relief Grant Program to provide grants to qualified small businesses and nonprofit organizations with 26 to 49 employees to subsidize COVID-19 SPSL

Elena K. Hillman
Member
ehillman@cozen.com
Phone: (415) 262-8314
Fax: (415) 644-0978

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costs incurred in 2022.

Employers in California should keep in mind that they still may be subject to COVID-related supplemental/emergency sick pay ordinances that remain in effect under local orders, such as in the City and County of Los Angeles and in Oakland, which are set to expire only after local states of emergency related to COVID-19 are lifted. California employers who are subject to the Cal/OSHA Emergency Temporary Standard (ETS) also, are still obligated, at least through the ETS's current expiration date of December 31, 2022, to provide exclusion pay and benefits to employees who test positive for COVID-19 as a result of workplace exposure and who must isolate (and cannot telework) as a result. Employees eligible for exclusion pay and benefits cannot be required to first exhaust their SPSL allotment before receiving exclusion pay.

AB 1041

Designated Person for Sick Leave and California Family Rights Act Leave

On September 29, 2022, Governor Newsom signed into law AB 1041, which expands the rights of employees in California to take protected leave for the care of a designated person who is not a family member under the California Healthy Workplaces, Healthy Families Act of 2014 (hereinafter, the California Paid Sick Leave Law), and the California Family Rights Act (CFRA). The new law will go into effect on January 1, 2023.

Currently, under the state's Paid Sick Leave Law, employees may use available paid sick leave to care for a family member (spouse, domestic partner, child, child of a domestic partner, parent, grandparent, grandchild, or sibling) who is sick or who is seeking preventative care or treatment. AB 1041 now expands the Paid Sick Leave Law to permit employees to use available paid sick leave to care for a designated person who is not a family member. Employees are not required by the new law to identify a designated person in advance but can identify that person at the time sick leave is requested. Employers, however, may limit employees to one designated person per 12-month period. AB 1041 also clarifies that employees may use available paid sick leave under state law to care for a parent-in-law.

Similarly, AB 1041 permits eligible employees to use their rights to up to 12 weeks of CFRA leave annually to care for a designated person with a serious health condition who is not a family member. The designated person with a serious health condition may be identified by the employee at the time the employee requests CFRA leave, and employers may limit an employee to one designated person with a serious health condition per 12-month period.

In what is sure to cause confusion to employers seeking to administer the provisions of the new law, a designated person is defined differently for purposes of paid sick leave and for purposes of CFRA leave. For paid sick leave, AB 1041 defines a designated person as "a person identified by the employee at the time the employee requests paid sick days." For CFRA, however, AB 1041 defines a designated person more narrowly as "any individual related by blood or whose association with the employee is the equivalent of a family relationship."

Employers in certain cities in California already are subject to local requirements permitting the use of paid sick leave for a designated person, but the definition of designated person under the revised Paid Sick Leave Law is broader than these local laws, which permit an employee to use paid sick leave to care for a designated person only if the employee does not have a spouse or domestic partner (e.g., Berkeley, Emeryville, Oakland, San Francisco), or only if the individual is a blood relative or is akin to a family member (e.g., Los Angeles).

Coverage for designated persons under CFRA also adds to the current uncertainty regarding whether CFRA leaves and leaves under the Family and Medical Leave Act (FMLA) run concurrently. While both CFRA and the FMLA provide leave for the serious health conditions of an employee's parent, spouse, or child, California employees also may take CFRA leave for a registered domestic partner, parent-in-law, sibling, grandparent, grandchild, and, now, a designated person. This leaves open the possibility that eligible employees might be able to take more than 12 weeks of leave annually to care for family members who are covered by one law and not the other. For instance, a California employee taking leave to care for a designated person with a serious health condition under CFRA could theoretically be entitled to up to 12 weeks of leave in the same year to

care for an FMLA-covered family member with a serious health condition.

While we await guidance on these issues, employers are advised to revise their paid sick leave and CFRA policies and designation notices for 2023 to reflect the expansion of employee rights with respect to the use of paid sick leave and CFRA leave for a designated person.

AB 1949

Bereavement Leave

AB 1949, another bill signed into law on September 29, 2022, requires California employers with five or more employees to provide up to five days of unpaid bereavement leave to employees who have worked 30 or more days with the employer for the death of a family member. A family member is defined similarly to the current CFRA and includes a spouse, registered domestic partner, child, parent, sibling, grandparent, grandchild, or parent-in-law. [Notably, AB 1949 does not require bereavement leave for a designated person.] The five days off for bereavement leave need not be consecutive and must be completed within three months of the date of death of the family member.

Bereavement leave under the statute may be unpaid. Eligible employees, however, must be permitted to apply vacation, personal leave, accrued sick leave, or compensatory time off (if available) to the otherwise unpaid leave. Employees covered by collective bargaining agreements that provide for at least as much bereavement leave and that meet certain specified conditions are not covered by the new law.

Within the first 30 days of an employee's first day of bereavement leave, employers may seek documentation confirming the need for bereavement leave in the form of a death certificate, published obituary, or written verification of death, burial, or memorial service from a funeral home, mortuary, crematorium, religious institution, or governmental agency.

Interestingly, AB 1949 is codified under Section 12945.7 of the California Government Code, not the California Labor Code, and makes it an unlawful practice for employers to engage in acts of discrimination, interference, or retaliation against employees who request or take protected bereavement leave. Employers also must maintain confidentiality related to an employee's request for bereavement leave. Because the right to bereavement leave is not codified in the Labor Code, employees will not be able to bring PAGA claims for the failure to provide bereavement leave.

The new law will go into effect on January 1, 2023. In the meantime, employers should update their handbooks or policy manuals to either create a bereavement leave policy or modify their existing policy to comply with AB 1949's requirements. California employers also may want to note in their sick-leave policies that an employee's accrued and available paid sick leave may be applied to a covered bereavement leave.

AB 2188

Discrimination in Employment: Cannabis Use in Employment Decisions

Since the passage of Proposition 64 in 2016, recreational marijuana has been legal for Californians aged 21 and older, but this protection has not extended to the use of marijuana by employees in the workplace. In 2008, the California Supreme Court ruled that employers were not required under the California Fair Employment and Housing Act (FEHA) to accommodate the medical use of marijuana because marijuana remained a controlled substance under federal law. And although employers in California are prohibited under Labor Code § 96 (k) from taking adverse actions against employees for legal off-the-job conduct, California employers have not had clear guidance as to whether or not they can take adverse action against an employee who tests positive for marijuana on-the-job as a result of lawful off-the-job usage.

With the passage of AB 2188, signed into law by Governor Newsom on September 18, 2022, California employees will soon get greater protection for their lawful use of marijuana off the job and away from the workplace. Recognizing that "Tetrahydrocannabinol (THC) is the chemical compound in cannabis that can indicate impairment and cause psychoactive effects" and that after THC "is metabolized, it is stored in the body as a non-psychoactive cannabis metabolite that… does not indicate impairment, only that an individual has consumed cannabis in the last few

weeks," AB 2188 amends the California FEHA to make it unlawful to discriminate against an employee or an applicant who has engaged in the lawful use of marijuana outside of work. AB 2188 also makes it unlawful for an employer to take adverse action against employees or applicants solely on the basis of a drug test that measures the presence of cannabis metabolites in the system, such as hair, blood, or urine tests, as opposed to a test that measures for active THC. If, however, an employer uses a scientifically valid test that tests for active THC, the new law will not prohibit employers from "discriminating in hiring, or any term or condition of employment" based on those test results.

The new law does not go into effect until January 1, 2024. AB 2188 does not apply to employees in the building or construction trades and does not preempt state or federal laws requiring applicants or employees to be cleared, screened, or tested for controlled substances. The new law also does not alter an employer's right to prohibit the use, possession, sale, or purchase of marijuana on the job or in the workplace or to discipline workers who are impaired by marijuana while at work.

AB 2188 does not address marijuana use by prescription. However, applying the above principles to marijuana usage off the job for a medical purpose, employers would not be able to terminate employees for such usage if the employee does not have active THC in the employee's system at the time of the test, or if an employee is not impaired by such usage on the job. If, however, an employee using marijuana off the job for a medical purpose tests positive for active THC, an employer could still take adverse action against the employee, according to the new AB 2188.

AB 2693

COVID-19 Exposure Notice

AB 2693, recently signed into law by Governor Newsom, extends the obligation of California employers to provide COVID-19 exposure notices until January 1, 2024.

Under Labor Code 6409.6, California employers or their representatives, who are notified of a potential exposure to a COVID-19 positive case on the worksite premises, must provide written notice of the potential exposure within one business day to all employees, and to the employers of subcontracted employees, who were at the same "worksite" as the confirmed COVID-19 case during the infectious period. This notice requirement was set to expire on January 1, 2023.

With the passage of AB 2693, the notice requirement is extended until January 1, 2024. Employers, however, will now be able to satisfy the notification requirement by prominently displaying a notice in all places where notices to employees regarding workplace rules are customarily posted, including an existing employee portal. The displayed notice must state the dates on which an employee, or employee of a subcontracted employer, with a confirmed case of COVID-19 was on the worksite premises within the infectious period; the location of the exposure(s) including the department, floor, building or other area; contact information for employees to receive information regarding COVID-19 related benefits to which they may be entitled if they must isolate or quarantine from work, and contact information to receive the cleaning and disinfection plan the employer plans to implement per federal or state guidelines. The notice must be displayed within one business day of the employer's notice of potential exposure and must remain posted for 15 days, and must be in English and in any language understood by the majority of employees. Employers also will be required to keep a log of all of the dates such notices are posted, and must allow access to the Labor Commissioner to such records.

Employers are not required to post their COVID-19 potential exposure notices as set forth above. In lieu of posting, employers still may provide written notice to all employees, and the employers of subcontracted employees, who were on the premises at the same worksite as the confirmed COVID-19 case. Written notice can be provided in a variety of ways—by personal service, email, or text message—as long as the notice can reasonably be anticipated to be received within one business day. Written notices also must be in both English and the language understood by the majority of employees.

SB 523

FEHA Protection for Reproductive Health Decision-making

Effective January 1, 2023, SB 523, which was signed into law by Governor Newson on September 27, 2022, revises the California Fair Employment and Housing Act to clarify that the protected category of sex includes "reproductive health decision-making." SB 523, also known as the Contraceptive Equity Act of 2022, makes it an unlawful employment practice to discriminate against applicants or employees based on their reproductive health decision-making. Employers also are prohibited by the new law from requiring applicants or employees to disclose information relating to reproductive health decision-making as a condition of employment or receiving an employment benefit. The definition of "reproductive health decision-making" includes, but is not limited to, "a decision to use or access a particular drug, device, product, or medical service for reproductive health."

California employers are required to list the protected categories under the FEHA in their policies against harassment and should consider revising their harassment policies to state explicitly that the protected category of sex includes reproductive health decision-making.

SB 1162

Pay Transparency

On September 27, 2022, SB 1162 was signed into law which continues and expands California's efforts at increasing pay transparency and equity by expanding employers' obligations to provide and publish pay scale information and by increasing covered employers' pay data reporting requirements to the state.

Since January 1, 2018, Labor Code Section 432.3 (often referred to as the state's "salary history ban") has prohibited California employers of all sizes from relying on or seeking salary history information of an applicant in determining whether to make that applicant an offer and in determining how much pay to offer the applicant. In addition, the "salary history ban" has required California employers to provide pay scale information to an applicant upon reasonable request. Effective January 1, 2023, SB 1162 expands the requirements of Labor Code § 432.3 and will now require California employers to provide pay scale information to *current* employees as well who request such information.

In addition, effective January 1, 2023, California employers with 15 or more employees must include the pay scale for a position in any job posting. If the employer engages a third party to post or publish its job postings, the employer must provide pay scale information to the third party, who must include the information in the job posting. "Pay scale" is defined as the "salary or hourly wage range that the employer reasonably expects to pay for the position." The new law is silent as to whether the pay data disclosures are required only of California employers with 15 or more employees in California or 15 or more employees anywhere. Because the law does not explicitly define a covered employer as having 15 or more employees in California, however, employers should assume that it applies to employers in California with 15 or more employees anywhere. The new law also is silent about whether the requirements apply to remote work job positions (where that job may be performed outside of California) or if it applies to employers headquartered outside of California who have remote workers in California. Employers should keep an eye out for future guidance from the California Department of Industrial Relations, which may address these questions.

SB 1162 also adds a document retention requirement to Labor Code § 432.3, requiring employers to maintain records of job titles and wage rate histories for each employee for the duration of their employment and for an additional three years after the end of their employment and directing that such records be open and available for inspection by the Labor Commissioner. The law creates a rebuttable presumption in favor of an aggrieved employee under Labor Code § 432.3 when such records are not maintained by the employer.

Finally, SB 1162 also expands existing requirements under Government Code Section 12999 for private employers in California with 100+ employees to submit an annual pay data report to the California Civil Rights Department (CRD, formerly the DFEH). The current law applies to private employers with 100+ employees who also are required to file EEO-1 reports with the Equal Employment Opportunity Commission. With SB 1162, all private employers with 100+ employees (even those not required to file EEO-1 reports) will now need to file a report with the state agency.

The current law requires covered employers to report annually the number of employees working in or assigned to a California establishment by job category, race/ethnicity and sex, pay band, and hours worked during a snapshot period in the prior reporting year. With the passage of SB 1162, covered employers will also have to submit the median and mean hourly rate "for each combination of race, ethnicity, and sex" within each job category. Effective 2023, private employers with 100+ employees hired through labor contractors, such as temporary staffing agencies, also must submit a separate pay data report to the CRD. Finally, the date for submission of the report will change from March 31 of each year to the second Wednesday in May, beginning in 2023.

Prior to SB 1162, the CRD had indicated that covered employers could submit their EEO-1 reports to the CRD to satisfy their reporting requirement only if the EEO-1 report contained the same or substantially the same information required by California law. Now, however, the legislature has clarified that EEO-1 reports, which do not contain the required pay data information (pay bands, hours worked, and now the mean and median hourly rate), cannot be submitted in lieu of the pay data report required by the state.

California's new law allows courts to impose civil penalties of $100 per employee for the first violation for failure to file a pay data report and up to $200 per employee for each subsequent violation. For violations of Labor Code Section 432.3, the new law authorizes the Labor Commissioner to order an employer to pay a civil penalty of no less than $100 and no more than $10,000 per violation.

SB 1044

Emergency Conditions

Dubbed the "Job Killer Bill" by its opponents, SB 1044 was passed by the legislature and signed into law by Governor Newsom on September 29, 2022. The law, which goes into effect on January 1, 2023, prohibits an employer in the event of an emergency condition from taking or threatening adverse action against an employee for refusing to report to, or for leaving, a workplace or affected worksite because the employee has a reasonable belief that the workplace or the worksite is unsafe. An "emergency condition" is defined as either:

i. conditions of disaster or extreme peril to the safety of persons or property at the workplace or worksite that are caused by natural forces or a criminal act; or
ii. an order to evacuate a workplace, worksite, an employee's home or the school of an employee's child as a result of a natural disaster or criminal act.

The new law also prohibits an employer from preventing an employee from accessing their mobile device or another communication device to seek emergency assistance, to assess the safety of the situation, or to communicate with a person to verify their safety.

Health pandemics are specifically excluded from the definition of an emergency condition. The law also does not apply to several categories of employees, including first responders; disaster and emergency service workers; employees or contractors of health care facilities who provide direct patient care or support during emergencies; employees working on a military or defense base; employees of companies providing utility, communications, energy, or roadside assistance while actively engaged in emergency response activities; employees of licensed residential care facilities; and transportation employees working directly in active emergency evacuations.

Employees who claim a violation of the law are authorized by SB 1044 to pursue civil penalties against their employers under the Private Attorneys General Act (PAGA).

Takeaways

Employers in California should begin preparing for the new changes in California law by reviewing and revising their handbook policies and procedures to reflect the requirements of the new laws, by developing language for their job postings to address the new pay scale information requirement, and by taking steps to assess and address any compliance issues with respect to their pay data disclosure and reporting requirements.