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2023's new employment laws (with a bit of color commentary)

WITH THE STATE LEGISLATURE FIRMLY IN THE HANDS OF DEMOCRATS, THE RIGHTS OF WORKING PEOPLE ENHANCED BY NEW LAWS

The California Legislature is firmly in the hands of the Democrats. In the Assembly, Democrats outnumber Republicans 60 to 19 – with one independent, while in the Senate, Democrats outnumber Republicans 31 to 9. With Democrat Gavin Newsom holding the office of Governor, 2023 brings a cornucopia of new pro-employee employment laws (opposed, of course, by the Republicans) designed to improve the lives of all employees in the state, regardless the type of job they hold.

On the federal level, the Republicans in the Senate continued to use the filibuster – a relic of Jim Crow – to stymie the enactment of federal laws designed to protect workers and consumers. For example, the Senate Republicans used the filibuster to block passage of the CROWN Act, which would have banned hair discrimination, including discrimination against natural Black hair, much as they last year blocked passage of the Paycheck Fairness Act, which would have imposed tougher standards and bigger penalties on companies over claims of pay discrimination based on sex. However, the most underestimated president in recent U.S. history, President Joseph R. Biden Jr., was able to sign four important employment acts into law.

Here is a rundown of some of these new federal and state employment (and employment-related) laws:

Ending forced arbitration of sexual assault and harassment

March 3, 2022 was a good day for justice as President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. The new law will end forced arbitration in workplace sexual assault and harassment cases, allowing survivors to file lawsuits in court against perpetrators. The Act was first introduced into Congress in 2017 by Sen. Kirsten Gillibrand (D-N.Y.) and Sen. Lindsey O. Graham (R-S.C.). It is unclear whether the measure is retroactive – i.e., invalidating any existing forced arbitration clauses in ongoing cases.

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This law will take an important step toward ensuring survivors have access to a free and fair trial, a fundamental human right that has eroded in recent decades as employers have increasingly forced workers to file claims of sexual harassment and sexual abuse under a rigged process of arbitration. This widespread and growing practice tilts outcomes in favor of abusers and robs survivors of their right to pursue justice in the courts. This law, however, is only a first step. Courts must interpret it broadly and in a way that doesn't split claims of harassment and assault from other employer harms. Congress must also end forced arbitration in all other cases of corporate harm and abuse against employees and consumers.

The Speak Out Act

On December 7, 2022, President Biden signed the Speak Out Act, which bans the use of pre-dispute non-disclosure and non-disparagement contract clauses involving sexual assault and sexual harassment claims. The new law renders unenforceable non-disclosure and non-disparagement clauses related to allegations of sexual assault and/or sexual harassment and that are entered into "before the dispute arises."

The new law does not prohibit the use of these agreements completely. The Speak Out Act prohibits and nullifies pre-dispute non-disclosure and non-disparagement agreements and does not apply to post-dispute agreements. Accordingly, the Act only applies to circumstances before a sexual harassment or sexual assault dispute arises. The Act does not apply to trade secrets, proprietary information, or other types of employee complaints such as wage theft, age discrimination, or race discrimination.

Pregnant Workers Fairness Act

In signing into law the recent $1.7 trillion Omnibus Spending Bill passed by Congress, President Biden ensured that the Pregnant Workers Fairness Act ("PWFA") became law. Effective June 27, 2023, the PWFA will help to eliminate discrimination and promote women's health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition. The PWFA prohibits this discrimination by extending the framework of the Americans with Disabilities Act ("ADA") to employees with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions regardless of whether the condition meets the definition of a disability specified in the ADA (a "qualified employee").

Accordingly, the PWFA requires employers with 15 or more employees to make reasonable accommodations for employees who have limitations stemming from pregnancy, childbirth, or related medical conditions, unless the accommodation would impose an undue hardship on the employer. Further, an employer may not force an employee to take a leave if another reasonable accommodation can be provided. The PWFA prohibits retaliating against an employee for requesting or using a reasonable accommodation.

Maternal Protections for Nursing Mothers Act

Also included in the Omnibus Bill signed into law by President Biden was the Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP" Act).

The Break Time for Nursing Mothers law, passed in 2010, requires employers to provide reasonable break time and a private, non-bathroom space for non-exempt employees to pump during the workday. The PUMP Act makes several important changes to this landmark legislation, including:
(i) expanding coverage to salaried employees and other types of workers not covered under existing law; and
(ii) clarifying that pumping time must be paid if an employee is not completely relieved from duty.

The legislation went into effect immediately when it was signed, however, the enforcement provision included a 120-day delay, making the effective date for that provision April 28, 2023. In addition, there is a three-year delay in the implementation of the protections for railway workers. Unfortunately, due to significant industry opposition, the law does not apply to flight attendants and pilots.

The PUMP Act also amends the Fair Labor Standards Act ("FLSA") to clarify that the same damages that are available under other FLSA provisions apply to PUMP Act violations, which include, but are not limited to, the payment of back pay, liquidated damages, reinstatement, and reasonable attorneys' fees.

SB 523: The Contraceptive Equity Act of 2022

On June 24, 2022, the radical, activist, far-right-wing conservatives on the U.S. Supreme Court did something that even the über conservative *Lochner*-era Supreme Court didn't do. The (Trump) Court, in a 5-4 decision authored by Justice Samuel Alito Jr. in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022), reversed *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania. v. Casey*, 505 U.S. 833 (1992), and took away a fundamental constitutional right (the right to choose) – the first time such a right has been taken away in the history of America.

Perhaps most surprising about the *Dobbs* decision is that the right to choose was cavalierly stolen from the country even though it was repeatedly affirmed and re-affirmed year after year for nearly 50 years in opinions written by and/or concurred in by 10 different Republican Justices nominated by five different Republican Presidents. Justice Clarence Thomas, in his concurring opinion, advocated for the Supreme Court to go even further toward a dystopian world straight out of The Handmaid's Tale and reverse all of the Court's prior substantive

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due process decisions, including *Griswold v. Connecticut*, 381 U.S. 479 (1965), which held that the right to privacy protected against state restrictions on contraception.

In response to both the horrific *Dobbs* decision and threats by Republicans to do away with other reproductive rights that Americans have taken for granted for decades, Governor Newsom signed SB 523, the Contraceptive Equity Act of 2022, into law on September 27, 2022. This law amends California's Fair Employment and Housing Act ("FEHA") to add "reproductive health decision-making" as a legally protected category. "Reproductive health decision-making" is defined to include, but not be limited to, "a decision to use or access a particular drug, device, product, or medical service for reproductive health."

SB 951: Paid family leave wage replacement in 2025

According to the World Policy Center, the United States is one of only two nations in the world without paid family leave, sharing this disgraceful distinction with Papua New Guinea, a nation with a population smaller than Los Angeles County. Since its enactment in 2002, California's Paid Family Leave ("PFL") program has been a model for a country woefully behind the rest of the world in terms of paid leave.

Yet, with skyrocketing costs of living in the Golden State, countless workers living paycheck to paycheck, and a paid leave program that covered only a little more than half of workers' regular wages, many Californians still could not afford to take time off. The California Budget and Policy Center estimates that high- and middle-wage workers have used the State's PFL program at a rate four times the rate of lower-wage workers. Without adequate wage replacement, lower-wage workers, who are disproportionately Latinx, Black, and female-identifying, have put off seeking urgent medical care, lost precious time with newborn and adopted children, and left ailing loved ones home alone to care for themselves.

SB 951 has the potential to make paid family medical leave a reality for all California workers. Starting January 1, 2025, employees who earn 70 percent or less than the average wage in California will be eligible to receive 90 percent of their wages through the PFL and State Disability Insurance ("SDI") programs. Those who make more will receive 70 percent of their pay. With this expansion, California continues to blaze the trail towards fully paid family medical leave.

SB 1044: Preventing retaliation during public emergencies

As climate-related disasters increase in intensity and frequency, employees are regularly expected (and sometimes required) to place their lives in danger by continuing to work through these calamities. For example, during recent tornadoes in Illinois, Amazon not only refused to let workers leave a warehouse in the expected route of a tornado but also refused to allow its workers to access communications devices to track the dangerous conditions. The warehouse was destroyed, and several workers were killed. Similarly, during the Getty Fire, domestic workers and gardeners were required to continue working in Los Angeles evacuation zones. Agricultural workers in Sonoma County were required to continue picking produce during the Atlas/Tubbs fires. There were landscapers and housekeepers, along with children, among the 23 lost and 167 injured in the 2018 Montecito debris flow.

SB 1044 was designed to enhance workers' protections during natural disasters by requiring employers to allow workers to have access to their cell phones or other communications devices during these emergencies to seek emergency assistance, assess the safety of the situation, or communicate with a person to confirm their safety and by permitting workers to leave a workplace or worksite within an area affected by an "emergency condition" if they feel that they must do so for their safety. "Emergency condition" is defined to mean the existence of either of the following: (i) conditions 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 (ii) an 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. SB 1044 specifically excludes a health pandemic from the definition of "emergency condition."

Sadly, the California Chamber of Commerce designated this common-sense prophylactic as a "job killer," as it routinely does with laws designed to protect employees and consumers, and many Republicans voted against it.

SB 1126: CalSavers retirement planning expansion

SB1126 expands the CalSavers Retirement Savings Trust Act to define an "eligible employer" as a person or entity engaged in a business, industry, profession, trade, or other enterprise in the state that has at least one eligible employee, excluding certain government entities and entities employing only their business owners. The act previously covered only employers with five or more employees. Eligible employers must establish or participate in a payroll deposit retirement savings arrangement, prescribed by the act.

SB 1162: Expanded pay data reporting and pay scale disclosures

Effective January 1, 2018, California's Equal Pay Act prohibited employers, with one exception, from seeking applicants' salary history information and required employers to supply pay scales upon the request of an applicant.

SB 1162 expands upon these pay transparency measures and counters workplace discrimination by requiring employers of 15 or more employees to: (i) include the pay scale for a position in any job posting; (ii) provide pay scale information to current employees and to applicants upon reasonable request; and (iii) maintain employee records, including job titles and wage rate histories, through the term of each employee's employment and for three years after their employment has ended.

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SB 1162 also expands covered employers' pay data reporting obligations. Since 2021, California law has required private employers who have 100 or more employees and who must file a federal EEO-1 to file an annual pay data report with the California Civil Rights Department (formerly the California Department of Fair Employment and Housing) on or before March 31 of each year. SB 1162 broadens these obligations in several significant ways.First, the bill expands who must file a pay data report so that all private employers with 100 or more employees will be required to file a pay data report regardless of whether they also must file a federal EEO-1, and private employers with 100 or more employees hired through labor contractors will be required to submit a separate pay data report regarding these contracted workers.

Second, in addition to demographic and pay band information, employers' pay data reports will also need to identify, within each job category, the median and mean pay rate for each combination of race, ethnicity, and sex.

AB 257: Working conditions for fast food workers

With AB 257, the Legislature will establish a new and powerful Fast Food Council, the first of its kind in the State. Sponsored by the Service Employees International Union ("SEIU") and inspired by its "Fight for $15 and a Union" movement, the council will be empowered to regulate wages, hours, and working conditions of California's fast-food employees, a population of workers historically subjected to hazardous working conditions and shamefully low wages.

The Fast Food Council will be made up of 10 members, appointed by the Governor, Speaker of the Assembly, and the Senate Rules Committee, and will dictate working conditions for employees of chains with at least 100 outlets nationwide. The council is expected to raise fast food worker wage rates as high as $22 an hour.

Unsurprisingly, the Chamber of Commerce has made destroying the bill a priority. As this article was going to print, a judge temporarily blocked the State from implementing the law as the result of a lawsuit filed by a coalition of giant corporate chain restaurants, which is seeking a referendum on the November 2024 ballot in a bid to overturn the law. "If and when the referendum challenging AB 257 qualifies for the ballot, the law will be put on hold," said Katrina Hagen, Director of the Department of Industrial Relations.

None of this corporate chicanery would be possible but for the Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (holding that the Free Speech Clause of the First Amendment prohibits the government from restricting independent expenditures for political campaigns by corporations). Of course, while the Founders were well aware of the existence of various types of business enterprises (joint-stock companies, corporations such as the East India Company which was incorporated in 1600, and the like), the Founders did not provide for any corporate rights in the Constitution or the Bill of Rights. Rather, the Founders understood that, to the extent that corporations had any type of personhood, it was a legal fiction limited to a courtroom. But we digress.

AB 1041: CFRA and paid sick leaves expanded

AB 1041 amends the California Family Rights Act ("CFRA") and the Healthy Workplaces, Healthy Families Act of 2014, also known as the Paid Sick Leave Law, to permit eligible employees of covered employers to take leave to care for a "designated person" who does not have to be a family member. Rather, a "designated person" can be any individual related to the employee by blood or whose association with the employee is the equivalent of a family relationship. The designated person may be identified by the employee at the time the employee requests the leave. An employer may limit an employee to one designated person per 12-month period.

AB 1576: Superior Court lactation rooms beginning July 1, 2024

Until AB 1576, nursing parents who visited California Superior Courts had no choice but to pump or feed their babies while sitting on a toilet in the courthouse bathroom or in the hallway across from their adversaries. This includes nursing lawyers, whose work requires them to spend hours tethered to the courtroom in hearings and trials. Fortunately, beginning July 1, 2024, California Superior Courts will be required to provide court users, including lawyers and litigants, with access to a lactation room in any courthouse in which a lactation room is also provided to court employees. The bill requires the lactation room to meet the requirements imposed upon an employer with respect to providing a lactation room for employees.

AB 1949: Employers to provide five days of bereavement leave

AB 1949 makes it an unlawful employment practice for a covered employer to refuse to grant a request by an eligible employee to take up to five days of bereavement leave (which need not be consecutive) upon the death of a family member. A "covered" employer is: (i) a person who employs five or more persons to perform services for a wage or salary; and (ii) the State and any political or civil subdivision of the State, including, but not limited to, cities and counties. An "eligible" employee means a person employed by the employer for at least 30 days prior to the commencement of the leave. A "family member" means a spouse or a child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law as defined in Government Code section 12945.2.

The law provides that the bereavement leave may be unpaid, except that an employee may use vacation, personal leave, accrued and available sick leave, or compensatory time off that is otherwise available to the employee.

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The law requires that the leave be completed within three months of the date of death.

The law also requires employees, if requested by the employer, within 30 days of the first day of the leave, to provide documentation of the death of the family member. "Documentation" includes, but is not limited to, a death certificate, a published obituary, or written verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution, or governmental agency.

AB 2068: Posting Cal/OSHA citations or orders in English and other languages

Employers must already post Cal/OSHA citations in English in places readily seen by all employees. Now, AB 2068 expands worker access to these disclosures by requiring Cal/OSHA citation notices to be in English as well as the top seven non-English languages used by limited- English-proficient adults in California, as determined by the U.S. Census Bureau's American Community Survey, as well as Punjabi (if not already included in the top seven). Employers that fail to post citations in all required languages may be subject to (further) citation by Cal/OSHA.

AB 2134: Information on reproductive healthcare for employees of religious employers

Despite countless offensive and degrading decisions from the U.S. Supreme Court diminishing access to safe and affordable reproductive healthcare over the last several years, California Democrats continue to take measures to secure access to abortion services and contraceptives for their constituents. Under AB 2134, if a religious employer's healthcare coverage fails to provide employees with abortion and contraceptive coverage or benefits, the employer must provide its employees with written information regarding abortion and contraceptive services that may be available to them at no cost through the California Reproductive Health Equity Program. AB 2134 also requires the Department of Industrial Relations to post to its website information regarding abortion and contraception benefits available through the program.

AB 2183: Card checks for farmworkers

AB 2183 makes it easier for farmworkers to unionize. Until passage of this new law, union elections usually took place on the growers' properties. The new measure allows farmworkers to vote by mail or fill out a ballot card to be dropped off at Agricultural Labor Relations Board.

AB 2188: Protections for off-site, off-duty marijuana use

The legalization of recreational marijuana in 2016 led many to question the California Supreme Court's decision in *Ross v. RagingWire Telecommunications Inc.*, 42 Cal.4th 920 (2008), which held in part that, despite the legalization of medical marijuana in 1996, an employer could lawfully refuse to hire a job candidate who failed a drug test, even if it was the result of legal marijuana use. Although the passing of Proposition 64 in 2016 did not impact the holding in *Ross* (in fact, the law explicitly preserved its holding), societal attitudes towards marijuana have shifted significantly since the Court's decision.

Starting on January 1, 2024, AB 2188 will amend FEHA to prohibit discrimination based upon an employee's use of cannabis off the job and away from the workplace, partially superseding *Ross*. The bill does not prohibit an employer's use and reliance on pre-employment drug screenings that determine current impairment or active levels of tetrahydrocannabinol ("THC"). It also has some exceptions, including for workers in the building and construction trades and applicants and employees subject to federal background investigations or clearances.

AB 2693: Updated requirements for COVID-19 exposure notification

AB 2693 extends until January 1, 2024 employers' obligation to provide notice to employees within one day of learning of a potential COVID-19 exposure in the workplace and, as an alternative to providing written notice to employees, now allows employers to post notice of a potential COVID-19 exposure. If an employer elects to post, it must display the notice where notices concerning workplace rules or regulations are customarily displayed.

Consumer privacy protections for employees under CCPA

When the California Consumer Privacy Act ("CCPA") originally took effect in 2020, it exempted employees from most of its provisions. This year, the California Privacy Rights Act ("CPRA") finally extends major consumer privacy rights under the CCPA to employees and job applicants of covered employers. In addition to requiring covered employers to provide privacy notices at the time employee personal information is collected, the CPRA grants employees several new rights, including the rights to request what personal information their employers have collected and/or disclosed and to request that their employers delete their personal information, with some exceptions.

Covered employers do not need to – and in some instances may not – delete certain data, including where a business's legal obligations require its retention, such as under California Labor Code Sections 1198.5(c) (retention of personnel files) and 226(a) (retention of payroll records). Among its other provisions, the CPRA also allows employees to opt out of the sale or sharing of their personal information and to limit the use of "sensitive" personal information, a new category of data under the CCPA that includes an employee's social security number, driver's license, and financial information, as well as race, ethnicity, and religion. The CPRA includes an anti-

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discrimination provision, which prohibits retaliation for the exercise of rights under the Act.

Though its provisions are wide sweeping, the CCPA focuses on larger companies and those engaged in the sale of data. It covers only companies doing business in California that fall within one of three categories: (i) businesses having annual gross revenues that exceed $25 million; (ii) those that annually buy, receive, share, or sell personal information of more than 100,000 consumers or households in California; or (iii) companies that derive at least 50 percent of their annual revenue from selling or sharing personal information of residents of California.

Minimum-wage increases

Finally, California raised the minimum wage to $15.50 per hour on January 1, 2023, for all employers – regardless of the number of workers employed by an employer. This increase means that employees in California must be paid a minimum annual salary of $64,480.00 ($5,373.33 per month) if they are to be classified as exempt. However, covered computer professional employees must be paid a minimum of $53.80 per hour, or $112,065.20 in annual salary, in order to qualify as exempt. According to the Economic Policy Institute, a Washington D.C.-based think tank, an estimated 3.2 million Californians – 18.9% of the workforce – will benefit from this minimum wage increase. It is important to note that some cities and counties in California have a local minimum wage that is higher than the State rate.

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