

# **BALLARD ROSENBERG GOLPER & SAVITT, LLP**

## **2023 California Employer Checklist**

### ***Getting Ready for 2023***

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It is that time of year again – as we jump into 2023, it is imperative that California employers implement changes to address California's bevy of new employment-related laws, rules, and regulations.

As is the case most years, the California legislature and California Governor Gavin Newsom finished the 2022 legislative session with a flurry of activity that will impact employers in numerous ways in 2023. As we have reported in our firm newsletter, [Compliance Matters](#), these newly enacted laws address leaves of absence, discrimination, pay scale and pay data, workplace safety and more.

The following 2023 California Employer Checklist addresses these new laws and other legal requirements, as well as important and relevant developments from our courts, and provides a list of items that California employers should review and consider as we commence the new year.

For more information or questions regarding items identified on this Compliance Checklist, please reach out to your BRGS attorney contact.

*This Compliance Checklist is designed to be educational and to update Ballard Rosenberg Golper & Savitt LLP's valued clients regarding updates to their policies and practices they might consider based on certain notable new laws or developments. This checklist does not address every new law impacting California workplaces and should not be considered legal advice. For more information or questions regarding items identified on this Compliance Checklist, please reach out to your BRGS attorney contact.*

### 2023 Minimum Wage Increases

1. **Review state and local minimum wages to meet new January 1, 2023, requirements and prepare to make necessary adjustments.**
  - a. California state minimum wage increases to \$15.50/hour all employers irrespective of size. \*
    - \*Minimum wage was originally scheduled to increase to \$15 per hour in 2023, but high inflation triggered a rate increase to \$15.50 per hour under Labor Code section 1182.12, effective January 1, 2023. The minimum wage can be subsequently increased each year up to 3.5 percent (rounded to the nearest ten cents) for inflation as measured by the national Consumer Price Index.
  - b. Look out for higher minimum wages in various municipalities, including Belmont (\$16.75), Burlingame (\$16.47), Cupertino (\$17.20), Daly City (\$16.07), East Palo Alto (\$16.50), El Cerrito (\$17.35), Foster City (\$16.50), Half Moon Bay (\$16.45), Hayward (\$16.34 (26+ employees) or \$15.50/hour (25 or fewer)), Los Altos (\$17.20), Menlo Park (\$16.20/hour), Mountain View (\$18.15), Novato (\$16.32), Oakland (\$15.97), Palo Alto (\$17.25), Redwood City (\$17.00), Richmond (\$16.17), San Carlos (\$16.32); San Diego (city) (\$16.30); San Jose: (\$17.00); San Mateo (city) (\$16.75); Santa Clara (\$17.20); Santa Rosa (\$17.06); Sonoma (city) (\$17.00 (26+ employees) or \$16.00 (25 or fewer); South San Francisco (\$16.70); Sunnyvale (\$17.95); West Hollywood (\$17.50 (50+ employees) or \$16.00 (25 or fewer)).
2. **Post new IWC Minimum Wage Order at worksite in conspicuous location and distribute new IWC Minimum Wage Order to remote employees. Available [here](#).**
  - a. Each of the local ordinances also have notice, posting and recordkeeping requirements.

### Exempt Employee Salary Increases

1. **Increase minimum salary for administrative, executive, and professional exemptions to \$5,377.33 per month (\$64,480 annually) and meet the applicable duties tests. \***
  - \*The minimum wage rate changes affect the classification of employees as exempt versus nonexempt as employees must meet salary-basis test (which means the employee's salary is no less than two times the state minimum wage for full-time employment) in addition to meeting all other legal requirements for the exemption.
2. **Confirm exempt computer professionals are paid at least \$112,065.20 per year, \$9,338.78 per month, or \$53.80 per hour, and meet the applicable duties tests.**

# Leave of Absence Updates

*California continues to expand its array of protected leaves, making bereavement leave a protected leave of absence in 2023 and expanding the persons an employee may care for under both the California Family Rights Act and California's paid sick leave law.*

## 1. Required Bereavement Leave (AB 1949) (Employers with 5+ Employees)

- a. Update handbooks and leave policies to allow five (5) days of bereavement leave upon the death of a family member, defined as including a spouse, child, parent, sibling, grandparent, domestic partner, or parent-in-law.
  - Bereavement leave is now a protected leave of absence and required for all employers with five or more employees. Leave may be unpaid but must allow employees to use otherwise accrued or available vacation, sick leave, or other paid time off to cover unpaid bereavement leave.
  - May require employee to provide documentation related to family member's death to support the leave.
  - Leave need not be taken consecutively but must be completed within three months of death.
  - Ensure requests and related documentation are kept confidential.

## 2. California Family Rights Act Expansion (AB 1041) (Employers with 5+ Employees)

- a. Update applicable leave policies to allow use of CFRA leave to care for a "Designated Person."
  - "Designated Person" is any individual with a serious health condition, which is "any individual related by blood or whose association with the employee is the equivalent of a family relationship," and may be identified by employee at time of request for leave.
  - May limit employees to one "Designated Person" per 12-month period for CFRA leave.
- b. Retain records for Designated Persons along with dates of requests.

## 3. Paid Sick Leave Expansion (AB 1041) (All California Employers)

- a. Update applicable leave policies to allow use of paid sick leave to care for a "Designated Person."
  - "Designated Person" is "a person identified by the employee at the time the employee requests paid sick leave." (*This is different than the CFRA definition*).

- May limit employees to one “Designated Person” per 12-month period.
- b. Retain records for Designated Persons along with dates of requests.

## COVID-19-Related Legislation, Reporting and Notices

*California continues to enact new workplace laws, or extend those enacted previously, relating to COVID-19.*

### 1. COVID-19 Supplemental Paid Sick Leave

- a. California’s 2022 COVID-19 Supplemental Paid Sick Leave Expired on December 31, 2022.
  - But per DLSE, “after December 31, 2022, workers who were not paid the SPSL they were entitled to when they were unable to work in 2022 due to COVID-19 can still request pay from their employer.” **FAQ:** [California’s 2022 COVID-19 Supplemental Paid Sick Leave Expired on December 31, 2022.](#)
- b. Review local laws to determine status and/or expiration dates.
  - City of Los Angeles to end on February 15, 2022.
  - Watch County of Los Angeles, Oakland, Long Beach, and other local laws for potential expiration dates.
  - City and County of San Francisco Public Health Emergency Leave (effective October 1, 2022, to private employers with 100+ employees).

### 2. COVID-19 Exposure Notices (AB 2693)

- a. Continue providing notification of potential COVID-19 exposure in the workplace through January 1, 2024.
- b. Per AB 2693, employers may now post notice in all places where notices to employees concerning workplace rules or regulations are customarily posted (including on existing employee portal if the employer posts other workplace notices on the portal) with required information regarding exposure.
  - Notice must be posted within one business day from when the employer learns of a potential exposure and remain posted for not less than 15 calendar days.
  - Notice must be in English and in a language understood by the majority of employees.
  - Retain log of the dates any notice of COVID-19 exposure in the workplace is posted.
- c. Consider reviewing COVID-19 policies and procedures to reflect new definitions of “close contact” and “infectious period,” available [here](#).

- d. Ensure written COVID-19 Prevention Program in place and updated (template can be found [here](#)).

### 3. Non-Emergency COVID Prevention Regulations

- a. On December 15, 2022, Non-Emergency COVID-19 Prevention Regulations were adopted and will become effective in the month of January 2023 once approved by the Office of Administrative Law. The COVID-19 Prevention Emergency Temporary Standards (ETS) remain in effect until the new regulations become effective. Read more about the non-emergency regulations and the ETS [here](#).

### 4. Extension of COVID-19 Workers' Compensation Provisions (AB 1751)

- a. AB 1751 extends to January 1, 2024, the current rebuttable presumption that an employee's illness resulting from COVID-19 was sustained in the course of employment for purposes of workers' compensation benefits.

## Pay Scale / Pay Data Reporting

*SB 1162 significantly amends and expands California's pay transparency and pay disclosure requirements. La*

### 1. Pay Scale Disclosures (Applicable to All Employers)

- a. Establish pay scales for all positions.
- b. Provide pay scale information to applicants upon reasonable request.
  - "Pay scale" is the salary or hourly wage range the employer reasonably expects to pay for the position.
- c. Respond to requests from current employees by providing pay scale information for current position.
- d. Retain job title and wage history for each employee for the duration of employment plus three years.
- e. Consider impact of transparent pay scale and what objective criteria is supporting higher paid employees.
  - Consider reviewing job classifications and identifying clear and identifiable wage ranges for those positions.
- f. Consider developing policy and/or identifying person(s) responsible for responding to pay scale requests.
  - Consider developing process for training managers, recruiters, and human resources professionals on disclosure requirement when a request is made.

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- g. Consider developing policy and/or process for consistently publishing wage range information in job postings
- h. Lots of open questions; watch for further administrative guidance and/or rulemaking. Labor Commissioner's Office has updated its Equal Pay **FAQ** on a few key elements of this law: [California Equal Pay Act](#).

### 2. Pay Scale Disclosures (Applicable to Employers With 15+ Employees)

- a. Include pay scale information in job postings.
- b. Ensure third parties include pay scale in any job postings.
- c. Lots of open questions; watch for further administrative guidance and/or rulemaking from DLSE.

### 3. Pay Data Reporting (Applicable to Employers With 100+ Employees)

- a. Employers with 100 or more employees - submit California Pay Data Report on or before the new deadline of the second Wednesday in May 2023 (and every year thereafter). (Must submit California-specific report; can no longer submit EEO-1 report.)
- b. Employers with 100 or more employees hired through labor contractors during the prior calendar year - submit separate California Pay Data Report covering employees hired through labor contractors or before second Wednesday in May 2023 (and every year thereafter), with necessary data supplied by Labor Contractor.
  - Consider requesting this data from labor contractors early. Develop protocols with Labor Contractors for timely provision of necessary data, including potentially including relevant obligations in contracts.
- c. All required Pay Data Reports must include numerous items, including the number of employees by race, ethnicity, and sex in specified job categories and median and mean hourly rates for each combination of race, ethnicity, and sex within each job category.
- d. For detailed information, including a user guide, Excel Template, and FAQs, see the Civil Rights Department's California [Pay Data Reporting website](#), which is expected to be updated with the new rules for 2023.

## Wage and Hour Practice and Policy Updates

*Employees are filing more wage and hour class and PAGA representative actions than ever before. Employers should ensure their policies and practices are compliant with key legal developments, of which there have been many over the past few years.*

### 1. Meal and Rest Break Practices/Policies

- a. Review meal/rest break policies and consider auditing for compliance.
  - Because of recent adverse changes in the law via the California Supreme Court, owed meal and/or rest break premiums can now trigger statutory penalties for inaccurate wage statements, and waiting time penalties.

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*Naranjo v. Spectrum Security Services*, 13 Cal.5th 93 (May 23, 2022). Such penalties can dwarf actual amount of unpaid premiums.

- Because of a different recent adverse change in the law via the California Supreme Court, it is an employer's burden to prove that employees did not suffer a meal break violation where their time records show a non-compliant break. *Donohue v. AMN Services, Inc.*, 11 Cal.5th 58 (Feb. 25, 2021). A missing, short, or late meal period gives rise to a rebuttable presumption of a violation.
- b. Ensure meal and rest break premiums are being paid at the "regular rate of pay" and not just base hourly rate of pay.
  - The regular rate encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee. *Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal.5th 858 (July 15, 2021).
- c. Ensure meal and rest break premiums have separate payroll codes and are listed separately on wage statements.
- d. Ensure any meal and rest break premiums owed are timely included in final pay.
- e. Ensure policies inform employees of premium pay entitlement and advise how to request a premium payment.
- f. Consider implementing attestation forms / prompts related to wage and hour practices.
  - These forms/prompts seek verifications from employees, after the fact that their time records are accurate, that they have not worked off-the-clock, and that they have been provided all required meal and rest periods during the covered period. They can be added to timecards, time records or placed on separate forms. Payroll providers and timekeeping systems can also prompt employees to attest to the accuracy of their records, and their receipt of meal and rest breaks.

## 2. Timekeeping Practices/Policies

### a. Strongly consider ceasing any rounding practices.

- Because of recent adverse changes in the law, if your timekeeping system can and does capture employees' actual work time, consult counsel about whether to cease rounding considering risk of liability for underpayment of wages. *Camp v. Home Depot USA, Inc.*, 84 Cal.App.5th 658 (Oct. 24, 2022).

### b. Employees with computer-based timeclocks.

- If employees use their computers for their jobs and clock-in and clock-out using a timekeeping application on the same computer, consult counsel about whether to adjust timekeeping/compensation practices to mitigate risk that time spent turning on, waking up, and/or logging on to computers

may be found to be compensable. *Cadena v. Customer Connexx LLC*, 51 F.4th 831 (9th Cir. Oct. 24, 2022)

- c. **Evaluate employee workdays to ensure you are paying for all time worked (all time an employee is subject to the control of the employer).**
  - This should include things such as time spent waiting for COVID screenings, waiting for an employer's required entry or exit security search, waiting to be let out of the workplace, time spent setting the alarm or walking co-workers to their car and potentially commuting time if employees are using personal vehicles to carry tools and supplies.
- d. Ensure policies prohibit off-the-clock work and inform employees to report concerns about off-the-clock work, or other policy violations, and advise that they can report such concerns or violations without fear of retaliation.

### 3. Suitable Seating Practices/Policies

- a. California's Wage Orders have long provided that California employees "shall be provided with suitable seats when the nature of the work reasonably permits the use of a seat." Recent case authority clarified what it means to "provide" suitable seats. *Meda v. Autozone, Inc.*, 81 Cal.App.5th 366 (2022).
- b. If the nature of the work permits sitting, consider providing seats in visible proximity to employees and conspicuously posting a seating policy informing employees of their seating rights while also communicating such to the employees during onboarding.
  - A detailed explanation of the seating policy in the workplace can prevent employees from erroneously believing that they could only use a seat as an accommodation, such as for a temporary injury.

### 4. Regular Rate of Pay Calculations Deserve New or Increased Focus

- a. Increased litigation focus on regular rate of pay issues justifies review of pay practices.
- b. Ensure that overtime rates, break premium pay, paid sick leave, and supplemental sick leave are all being paid at the regular rate of pay, and not just base rate of pay.
- c. Ensure "flat-sum" bonuses (those that do not increase or have the potential to increase roughly in proportion to hours worked) are being calculated into the regular rate correctly.

## Business Expense Reimbursement

- 1. Ensure all "necessary" remote work expenses are being reimbursed. Consult with counsel regarding recent case developments regarding remote work expenses (note: expense reimbursement may be required for more than just internet and phone).
- 2. Effective January 1, 2023, the IRS standard mileage rate for the use of a car (also vans, pickups or panel trucks) will be the equivalent of no less than 65.5 cents per mile (the IRS

already increased mileage reimbursement to 62.5 cents per mile in the middle of 2022). Watch for further adjustments from the IRS in light of inflation.

3. Review reimbursement policy(ies) and ensure clear instructions to employees as to how to submit expenses for reimbursement.

## Arbitration Agreements

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1. Consider revising arbitration agreements to provide for arbitration of individual PAGA claims and to preclude arbitration of PAGA claims on behalf of other aggrieved employees. *Viking River Cruises v. Moriana*, 142 S.Ct. 1906 (June 15, 2022).
2. Consider revising arbitration agreements to acknowledge that employee choice to bring sexual assault and sexual harassment disputes in court, but that other claims will nevertheless be arbitrated. (HR 4445)

## Data Privacy Policies / Practices

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1. **Determine if your business is covered by California Consumer Privacy Act (CCPA) / California Privacy Rights Act (CPRA).**
  - a. Applicable to: (1) for profit businesses, (2) doing business in CA, and (3) that meet one of three criteria: (i) gross annual revenues over \$25 million, or (ii) buy, receive, or share the personally identifiable information of \$100,000 or more consumers, or (iii) derive 50% of annual revenue from selling or sharing consumers' personal information.
2. **If so, consider planning and implementing a compliance program in connection with employee/applicant personal information, including:**
  - a. Identify which data is subject to CCPA requests.
  - b. Update privacy policies.
  - c. Plan for processing privacy requests.
  - d. Train employees / vendors who will be implementing this plan.
  - e. Update existing notices of collection and data security protocols.

## Other Notable Workplace Rules / Regulations.

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1. **Reproductive Health Decisionmaking (SB 523)**
  - a. California's Fair Employment and Housing Act (FEHA) to include "reproductive health decisionmaking" as a new protected category. Update handbooks and EEO statements accordingly.

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### 2. Emergency Conditions (SB 1044)

- a. Effective January 1, 2023, California law prohibits an employer, in the event of an “emergency condition,” from taking or threatening adverse action against the employee (i.e., retaliation) for refusing to report to, or leaving, a workplace because the employee has a “reasonable belief that the workplace is unsafe.
- b. With some exceptions, Employers are also prohibited from preventing any employee from accessing their mobile device or other communications device to get emergency assistance, assess a situation's safety or communicate with someone to verify their safety.
- c. Update handbooks and cell phone policies accordingly.

### 3. Mandatory Retirement Savings Plan Amendment (SB 1126) (Employers with 1+ employees)

- a. Since June 30, 2022, employers with more than five employees have been required to offer a retirement plan through either the state-run CalSavers program or a private-market option. SB 1126 extends mandatory retirement plans to employers with at least one employee. Eligible employers will need to offer a retirement savings program by December 31, 2025. SB 1126 excludes sole proprietorships, self-employed individuals, and businesses that do not employ individuals other than business owners.
- b. Eligible employers who do not yet offer a program and wish to use CalSavers may register at <https://www.calsavers.com/>.

### 4. Employee Restroom Access to Members of Public with Certain Medical Conditions (AB 1632)

- a. Requires businesses open to the public that have restrooms for employees to allow individuals who have Crohn's disease, ulcerative colitis, irritable bowel syndrome, or any other similar medical condition, to use the employee restrooms during business hours.
- b. Consider training employees on new obligation.

### 5. Motor Vehicle Tracking (AB 984)

- a. AB 984, which requires the department of motor vehicles to allow vehicle location technology on fleet vehicles, prohibits employers from using the devices to monitor employees except during work hours, and only if strictly necessary for the performance of an employee's duties.
- b. Employers that install the tracking devices on vehicles must provide notice of the monitoring that includes information about employees' right to disable the devices during non-work hours. If using such tracking devices, consider policy and acknowledgment informing employees of rights.

### ***Reminder to Update Employee Handbooks and Posters***

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With all these new and updated laws for the new year, employers should consider updates to their employee handbooks and related policies. Furthermore, there are no less than 18 employment posters that all California employers must post (in addition to any local requirements); with about half of them being updated for 2023 (California's Minimum Wage notice (reminder: California's minimum wage increases to \$15.50 per hour for all employers on January 1, 2023); Family Care and Medical Leave and Pregnancy Disability Leave notice; Your Rights and Obligations as a Pregnant Employee notice; California Law Prohibits Workplace Discrimination and Harassment notice; Transgender Rights in the Workplace notice; Know Your Rights: Workplace Discrimination is Illegal notice (formerly EEO is the Law); Your Rights Under USERRA notice; and Safety and Health Protection on the Job (Cal/OSHA) notice (change to hotline number).

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