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PERSPECTIVE

As California reopens, employers have duties to laid-off employees

By David Hatch

As California is aiming to scrap the color-coded tier system that has restricted the operations of businesses by June 15, Gov. Gavin Newsom recently signed into law Senate Bill 93. SB 93 provides rights to certain workers that have been laid-off due to the COVID-19 pandemic, particularly employees in the hard-hit hospitality industry. While employers must also be aware of local ordinances, such as the Right of Recall Ordinance and Worker Retention Ordinance passed by the Los Angeles City Council, SB 93 was signed into law by Newsom on April 16 and went into immediate effect statewide. Covered employers under SB 93 must now comply with this new law or face significant penalties imposed by the Department of Labor Standards Enforcement, including reinstatement, front and back pay, and civil penalties.

Until Dec. 31, 2024, covered employers must provide eligible employees that have been laid-off due to the COVID-19 pandemic with specified, written information about job positions that become available for which the laid-off employee is qualified for within 5 days of establishing the position. Eligible employees (those employees that held the same or similar position at the time of the layoff) will then have at least 5 business days from the date of receipt, to accept or decline the offer. If there are multiple employees entitled to preference for this same position, the employer is required to offer the position to the laid-off employee with the greatest length of service based on the employee's date of hire with the employer. The offer must be in writing, either by hand or to their last known physical address, and by email and text message to the extent the employer possesses such information.

If an employer declines to recall a laid-off employee on the grounds that they are not qualified for the position, and hires someone else, the employer is required to provide the laid off employee with a written notice within 30 days specifying the length of service with the employer of those hired in lieu of the employee and all reasons for the decision.

Not All Employers Are Covered

SB 93 applies to the following employers:

- Hotels with 50 or more guest rooms.
- Event Centers, whether publicly or privately owned structures with more than 50,000 square feet or 1,000 seats that are used for purposes of public performances, sporting events, business meetings or similar events, including concert halls, stadiums, sports arenas, race tracks, coliseums and event centers.
- Private Clubs that are membership- based businesses or nonprofit organizations that operate a building or complex of buildings containing at least 50 guest rooms or suites of rooms that are offered as overnight lodging to members.
- Airport Hospitality Operations that prepare, deliver, inspect, or provide any service in connection with the preparation of food or beverage for aircraft crew or passengers at an airport, or that provide food and beverage, retail, or other consumer goods or services to the public at an airport. Air carriers that are certified by the Federal Aviation Administration are excluded from the definition of "Airport Hospitality Operations."
- Airport Service Providers that are under contract with a passenger air carrier, airport facility management, or airport authority, that perform functions on the property of an airport that are directly related to the air transportation of persons, property or mail, including the loading and unloading of property on aircraft, security, airport ticketing and check-in functions, ground-handling of aircraft, aircraft cleaning and sanitization functions, and waste removal. Once again, air carriers that are certified by the FAA are excluded from the definition of "Airport Service Providers."

Which Employees Are Covered?

The new law provides rights to "laidoff employees." A laid off employee is defined as "any employee who was employed by the employer for six months or more in the 12 months preceding Jan. 1, 2020, and whose recent separation from active service was due to a reason related to the COVID-19 pandemic, including a public health directive, government shutdown order, lack of business, reduction in force, or other economic, nondisciplinary reason due to the COVID-19 pandemic." This definition is fairly broad, but would exclude employees laid off or separated due to performance related reasons, assuming there is documentation that this was the ground for the layoff.

Record Keeping Requirements

The Act also has significant record keeping requirements. Pursuant to Labor Code Section 2810.8, for at least three years, measured from the date of the written notice regarding the layoff, for each laidoff employee, the employer is required to also retain records, which includes:

- The employee's full legal name.
- The employee's job classification at the time of separation from employment. • The employee's date of hire.
- The employee's last known address of residence.
- The employee's last known email address.
- The employee's last known telephone number.
- A copy of the written notices regarding the layoff provided to the employee and all records of communications between the employer and the employee concerning offers of employment made to the employee pursuant to SB 93.

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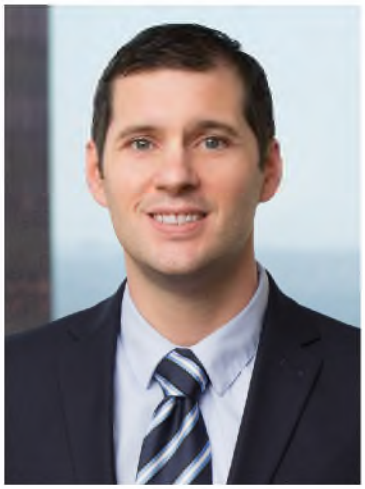

DLSE's Enforcement

While there are no criminal penalties imposed for violations, the DLSE has broad enforcement tools that can be used against employers in violation of SB 93, including:

- Hiring and reinstatement rights.
- Front pay or back pay for each day during which the violation continues.
- Value of the benefits the laid-off employee would have received under the employer's benefit plan.
- Civil penalty of $100 for each employee whose rights under these provisions are violated and an additional sum payable as liquidated damages in the amount of $500, per employee, for each day the rights of an employee are violated and continuing until such time as the violation is cured.

Fortunately for employers covered under SB 93, SB 93 cannot be enforced through a private right of action or the Private Attorneys General Act. The DLSE has exclusive jurisdiction to enforce SB 93.

What This Means for Employers

The take away is that with California and local municipalities enacting their own COVID-19 ordinances regarding rehiring and retention of employees, California employers need to ensure they are compliant not only with their federal and state obligations, but need to ensure they are compliant in each locality that they operate in. Employers need to determine what laws they are required to comply with, what employees are covered, and what their obligations are to their workforce, both current and those that have been laid-off.

If employers have not done so already, it is time to ensure human resource departments are apprised of the influx of new COVID-19 laws, provide training on an employer's obligations, and prepare forms and other documentation to ensure compliance to avoid costly penalties. More specifically, if they are covered, employers may want to prepare and maintain a list of employees subject to recall for which they will need to comply with these state and local recall statutes. Employers are reminded of the importance of seeking regular review by counsel of their handbooks, policies and procedures to ensure compliance with their diverse obligations. This is especially when coming out of a pandemic that has wreaked havoc to many sectors of the economy and has left many employees without jobs and motivated to litigate. ■