

New California Legislation Requires Businesses to Rehire Employees Laid Off During the Pandemic

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On April 16, 2021, California Governor Gavin Newsom signed [Senate Bill No. 93](#) (SB 93) – a “rehiring and retention” law. SB 93 creates new Labor Code section 2810.8, which requires certain hospitality businesses to rehire workers who have been laid off due to the COVID-19 pandemic prior to hiring new employees to fill previously laid-off employees’ positions. Employers must provide eligible employees at least five business days to respond to a job offer notice and must award the job depending on seniority if more than one employee is entitled to a specific rehired position.

SB 93 also requires employers to keep records for three years, including records of communications regarding the offers. The new law carries substantial penalties and liquidated damages, including reinstatement, payment of front and back pay wages, and interest. SB 93 takes effect immediately and is set to expire on December 31, 2024.

Which Employers Are Impacted?

Hotels

Hotels with 50 or more guest rooms. This includes any contracted, leased, or sublet premises connected to or operated in conjunction with the building’s purpose, or providing services at the building.

Event Centers

Publicly or privately owned structures of more than 50,000 square feet or 1,000 seats that are used for public performances, sporting events, business meetings, or similar events, including concert halls, stadiums, sports arenas, racetracks, coliseums, and convention centers.

Building Services

Employers providing janitorial, building maintenance, or security services.

Private Clubs

Private, membership-based business 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

Businesses that prepare, deliver, inspect, or provide any other service in connection with the preparation of food or beverages for aircraft crew or passengers at an airport, or that provide food and beverages, retail, or other consumer goods or services to the public at an airport. This excludes carriers certified by the Federal Aviation Administration (FAA).

Airport Service Provider

Businesses that perform, under contract with a passenger air carrier, airport facility management, or airport authority, functions on the property of the airport that are directly related to the air transportation of persons, property, or mail. This also includes the loading and unloading of property on aircraft, assistance to passengers, security, airport ticketing and check-in functions, ground-handling of aircraft, aircraft cleaning and sanitization functions, and waste removal. Similar to Airport Hospitality Operations, Airport Service Providers excludes carriers certified by the FAA.

Who Is A Laid-Off or Covered Employee?

A “laid-off employee” is any employee who was employed by the employer for 6 months or more in the 12 months preceding January 1, 2020, and whose most 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, a reduction in force, or other economic, non-disciplinary reason due to the COVID-19 pandemic.

How is Notice of the Job Offer Conveyed?

Within five business days of establishing a position, an employer must offer its laid-off employees 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, all job positions that become available after the effective date of this section for which the laid-off employees are qualified. A laid-off employee is qualified for a position if the employee held the same or similar position at the enterprise at the time of the employee’s most recent layoff with the employer.

Subsequently, a laid-off employee will have five business days to respond. In the event multiple employees respond to the same position, the employer must offer the position to the employee with the “greatest length of service” (i.e., total period of time during which an employee has been employed by employer, from the beginning of the employee’s date of hire, which includes any time taken on leave or vacation).

If an employer declines to recall a laid-off employee on the grounds of lack of qualifications, it must provide the laid-off employee a written notice within 30 days and include a list of all employees hired for the position, with their length of service with the employer, along with the reasons why the employer did not rehire the employee.

What Records Must the Employer Maintain?

For at least three years, measured from the date of the written notice regarding the layoff, for each laid-off employee, Labor Code 2810.8 requires an employer to maintain the following records about the employee:

1. Full legal name;
2. Job classification at the time of separation from employment;
3. Date of hire;
4. Last known address of residence;
5. Last known email address;
6. Last known telephone number; and

7. 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 this section.

What Damages and Penalties are Associated with Noncompliance?

California's Division of Labor Standards Enforcement (DLSE) is charged with enforcing Labor Code § 2810.8. According to the new law, a laid off employee may file a complaint with the DLSE seeking:

1. Hiring and reinstatement rights;
2. Front pay or back pay for each day during which the violation continues – calculated at a rate of compensation not less than the highest of:
 - Average regular rate of pay received by the laid-off employee during the last three years of that employee's employment in the same occupation classification;
 - Most recent regular rate received by the laid-off employee while employed by the employer; or
 - Regular rate received by an employee occupying the position in place of the laid-off employee that should have been employed.
3. Value of the benefits the laid-off employee would have received under the employer's benefit plan; and
4. Interest on unpaid amounts due.

Although no criminal penalties may be imposed, any employer, including its agents, who violates this law will be subject to a civil penalty "of one hundred dollars (\$100) for each employee whose rights under these provisions are violated and an additional sum payable as liquidated damages in the amount of five hundred dollars (\$500), per employee, for each day the rights of an employee under this section are violated and continuing until such time as the violation is cured, which shall be recovered by the Labor Commissioner, deposited into the Labor and Workforce Development Fund, and paid to the employee as compensatory damages."

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