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Annual California Employment Law Update: New Laws for 2020 Expand Worker Rights and Limit Independent Contractor Status

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By Jennifer L. Nutter and David M. Prager

This year, Governor Gavin Newsom signed numerous employment-related bills that landed on his desk. Among the major changes that will affect employers with California operations in the coming year are the following:

- With certain exceptions, mandatory arbitration agreements that waive an employee's rights may no longer be imposed as a condition of employment or in exchange for employment benefits.

- The "ABC test" set forth in the California Supreme Court's landmark decision in *Dynamex Operations West, Inc. v. Superior Court* for determining whether an individual is an "employee" for purposes of the Wage Orders and Labor Code will be codified.

- An employee will have three years, rather than one year, to file an administrative charge with the Department of Fair Employment and Housing ("DFEH").

- Employment settlement agreements may generally not include "no rehire" clauses.

Unless otherwise stated, all the new laws discussed below will take effect on January 1, 2020.

ARBITRATION

Arbitration Agreements as a Condition of Employment. For employment contracts entered into after January 1, 2020, AB 51 prohibits employers from requiring an employee or applicant—as a condition of employment, continued employment, or receipt of any employment-related benefit—to waive any right, forum, or procedure for enforcing his or her rights under the California Fair Employment and Housing Act ("FEHA") or the Labor Code, including filing a civil or administrative complaint. AB 51 specifically prohibits agreements that require employees to opt out or take any affirmative action to preserve their rights. Moreover, the law bars retaliation against an employee or applicant who chooses not to enter into such an agreement.

AB 51 contains carve-outs for, and does not apply to, individuals registered with a "self-regulatory organization" (as defined by the Securities Exchange Act of 1934), post-dispute settlement agreements, or "negotiated severance agreements," and it is not intended to invalidate arbitration agreements that are "otherwise enforceable under the Federal Arbitration Act."

In addition, AB 51 also amends the California Government Code to make a violation of this new law an unlawful employment practice under FEHA. As such, an employee can file claims with either the Department of Labor Standards Enforcement or the DFEH and can pursue all available relief under FEHA, as well as the Labor Code, which makes the violation of the new law a misdemeanor.

See our previous discussion of AB 51 here.

Payment of Arbitration Fees/Costs. SB 707 requires a party drafting an employment or consumer arbitration agreement that is required to pay fees and costs before and during the pendency of an arbitration proceeding to pay those fees within 30 days after the due date. If the fees or costs are not paid within that period of time, the employee or consumer can, among other things, withdraw the claim from arbitration and proceed in a court. If an employee does so, that employee may bring a motion (or separate action) to recover all attorneys' fees and costs associated with the abandoned arbitration proceeding, without regard to any findings on the merits in the underlying action or arbitration. The court may also impose, among other things, evidentiary sanctions or terminating sanctions. If the employee or consumer continues in arbitration, the arbitrator will impose sanctions on the drafting party, including monetary sanctions, issue sanctions, evidentiary sanctions, or terminating sanctions.

SB 707 also requires a private arbitration company to collect and report on the Internet a variety of information, including, but not limited to, the identity of the prevailing party, the amount of the award and attorneys' fees awarded, the number of times the employer has used the arbitration company, and aggregate demographic data regarding the ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation of all arbitrators.

CHANGES TO THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT

Extension of Time to File Administrative Charges. AB 9 extends the time to file a complaint with the DFEH from one year to three years. A complaint is deemed filed upon completion of an intake form with the DFEH. Further, under the "late discovery" rule, an individual who first obtained knowledge of the facts of the alleged unlawful practice after the expiration of the limitations period has an additional 90 days following the expiration of the applicable filing deadline to file a verified complaint with the DFEH.

Hairstyle Discrimination as Racial Discrimination. SB 188 expands the definition of "race or ethnicity" under both the Education Code and FEHA to include traits historically associated with race, including, but not limited to, hair texture and protective hairstyles.

"Protective hairstyles" are defined as including, but are not limited to, braids, locks, and twists.

Extension of Sexual Harassment Training Deadline. SB 778, effective immediately, extends the deadline for California employers to comply with the state's new anti-harassment training mandate. The training deadline, previously set for January 1, 2020, is now January 1, 2021.

SB 778 clarifies employer obligations and deadlines concerning the retraining of supervisory employees who received training in 2018. Employers that trained their supervisory employees in 2018 must retrain them in 2020, not 2019. We previously wrote about this emergency amendment here.

HIRING & WORKFORCE MANAGEMENT

Independent Contractor Status. AB 5 codifies the "ABC test" set forth in the California Supreme Court's 2018 decision in *Dynamex Operations West, Inc. v. Superior Court* for determining whether workers in California should be classified as employees or as independent contractors. To satisfy the "ABC test," the hiring entity must establish each of these three factors:

A. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

B. The worker performs work that is outside the usual course of the hiring entity's business; and

C. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

Also included are numerous exceptions arising from what has long been known as the "Borello test," established in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations*. The exceptions include individuals with insurance licenses; certain health care providers; licensed lawyers, architects, engineers, accountants, and private investigators; registered investment advisors; commercial fishermen; and certain providers of professional services. AB 5, however, does not include exemptions for independent truckers, physical therapists, manicurists, exotic dancers, and musicians—or gig economy workers.

AB 5 applies retroactively to existing claims and actions to the maximum extent permitted by law, while other provisions (including the exceptions) apply only to work performed on or after January 1, 2020. In addition, AB 5 does not permit an employer to reclassify an individual who was an employee on January 1, 2019, as an independent contractor due to the bill's enactment.

"No Rehire" Provisions in Settlement Agreements. A key provision in many settlement agreements is a "no rehire" or "no application" clause. AB 749 does not permit settlement agreements to contain provisions prohibiting, preventing, or otherwise restricting an "aggrieved person" from obtaining future employment with the employer. An "aggrieved

person" is defined as "a person who has filed a claim against the person's employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process." Importantly, for larger entities, this extends to a prohibition on "obtaining future employment with the employer against which the aggrieved person has filed a claim, *or any parent company, subsidiary, division, affiliate, or contractor of the employer"* (emphasis added).

An exception exists for employees whom the employer has, in good faith, determined engaged in "sexual harassment" or "sexual assault," as defined by statute.

Lactation Accommodation. SB 142 requires employers to develop, implement, and make available a policy regarding lactation accommodation. Labor Code sections 1030 *et seq.* are amended to require employers to (1) provide a reasonable amount of break time for employees desiring to express milk for the employee's infant child; (2) make reasonable efforts to provide an employee with the use of a room, or other location other than a bathroom, in close proximity to the employee's workspace for the employee to express milk in private; and (3) provide access to such room or location with (among other things) electricity, a sink, and a refrigerator.

Employers are prohibited from discharging, discriminating, or retaliating against an employee for exercising or attempting to exercise rights under the law, and SB 142 establishes various remedies for employees. Further, SB 142 deems a denial of reasonable break time or adequate space to express milk a failure to provide a rest period in violation of Labor Code section 226.7, which would entitle the employee to an additional hour of pay at the employee's regular rate. The new law also requires employers to implement a lactation accommodation policy and distribute it to new employees upon hire or request for parental leave.

An employer with fewer than 50 employees may seek an exemption from those requirements based on undue hardship, i.e., that compliance would cause the employer significant difficulty or expense. The employer seeking the exemption remains required to make a reasonable effort to provide a place for an employee to express milk in private.

PAID FAMILY LEAVE BENEFITS

Expansion of Paid Family Leave ("PFL") Benefits. SB 83 expands the number of weeks that an employee can receive PFL benefits from the state from six to eight weeks within a 12-month period. An eligible worker is one who takes time off work to care for a seriously ill child, spouse, parent, grandparent, grandchild, sibling, or domestic partner, or to bond with a minor child within one year of the birth or placement of the child in foster care or adoption. SB 83 also mandates that the Division of Labor Standards Enforcement establish an outreach and education program aimed at promoting awareness of, and compliance with, labor protections affecting the domestic work industry and promoting fair and dignified labor standards in this industry and other low-wage industries.

The new law becomes effective July 1, 2020, and remains effective until January 1, 2021. The Governor's office, through consultation with a task force, will develop a proposal to increase the PFL duration to a full six months by 2021–2022.

WAGE & HOUR

Recovery of Unpaid Contractual Wages over the Minimum Wage. SB 688 allows the Labor Commissioner to recover unpaid contractual wages over the minimum wage—as opposed to only the unpaid minimum wages—in addition to civil penalties upon a determination that there has been a failure to pay wages owed by contract. An undertaking posted by an employer seeking to file a writ of mandate to contest a civil penalty imposed by the Labor Commissioner that is forfeited (for failure to pay wages or damages within 10 days of judgment), now transfers to the Labor Commissioner for distribution, rather than the affected employee.

Recovery of Penalties for Unpaid Wages. AB 673 enables an employee to sue to recover statutory penalties against an employer as part of an administrative hearing to recover unpaid wages. The new law permits an employee to alternatively enforce civil penalties under the Labor Code Private Attorneys General Act of 2004 for unpaid wages.

INDUSTRY-SPECIFIC BILLS

Family Care and Medical Leave for Flight Crews. AB 1748 provides eligibility requirements for airline flight deck or cabin crew employees to qualify for protected, unpaid family and medical leave established under the California Family Rights Act. The new law authorizes the DFEH to adopt regulations to calculate leave available to flight crew employees under these provisions.

Sexual Harassment Training for Janitorial Workers. AB 547 requires the Director of the Department of Industrial Relations to convene a training advisory committee to assist in compiling a list of qualified organizations that janitorial employers must use to provide biennial, in-person sexual violence and harassment prevention training for certain non-supervisory workers and supervisors of non-supervisory workers.

Sexual Harassment Training for Construction and Temporary Employees. SB 530 instructs the Division of Labor Standards Enforcement to develop recommendations for an industry-specific harassment and discrimination prevention policy and training standard for use by employers in the construction industry. SB 530 allows for employers in multi-employer collective bargaining agreements to satisfy anti-harassment training by verifying that they have received requisite training under existing sexual harassment training and education requirements.

Employers with seasonal, temporary, or other employees hired to work for less than six months have until January 1, 2021, to provide training under existing sexual harassment training and education requirements.

Occupational Safety and Health Regarding Valley Fever. AB 203 requires construction employers engaging in specified work activities or vehicle operation in counties where Valley Fever is highly endemic to provide effective awareness training on Valley Fever to all employees annually and before an employee begins work reasonably anticipated to cause substantial dust disturbance. Employers in the counties of Fresno,

Kern, Kings, Madera, Merced, Monterey, San Joaquin, San Luis Obispo, Santa Barbara, Tulare, and Ventura have until May 1, 2020, to implement effective awareness programs.

Public Employment Relations Board ("PERB") Adjudication of Orange County Transportation Authority Complaints. AB 355 requires employers and employees of the Orange County Transportation Authority to adjudicate complaints of specified labor violations before PERB as an unfair practice. The new law also authorizes specified parties aggrieved by PERB's decision or order to petition for relief from that decision or order.

WHAT CALIFORNIA EMPLOYERS SHOULD DO NOW

California's new laws affect a wide range of policies and procedures throughout the employment relationship. Employers with a California workforce should:

- review and revise employee handbooks to ensure that they are otherwise up to date;
- evaluate whether workers currently classified as independent contractors are properly classified;
- review mandatory arbitration agreements and consider if revisions are required; and
- ensure that all complaint investigations, as well as counselings, write-ups, performance reviews, and termination documents are well documented and preserved for at least four years (due to the extension of time to file a complaint with the DFEH under AB 9).

Finally, employers should make sure that they are in compliance with state and local minimum wage laws. On January 1, 2020, the state minimum wage goes up to $13 an hour for employers with 26 or more employees ($12 an hour for employers with fewer than 26 employees). Local minimum wages may be higher.

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For more information about this Advisory, please contact:

Jennifer L. Nutter
Los Angeles
310-557-9518
jnutter@ebglaw.com

David M. Prager
Los Angeles
310-557-9523
dprager@ebglaw.com

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