New California Laws for 2019: What Employers Should Know

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Continuing its active involvement in regulating the employer-employee relationship, in 2018 the California legislature again enacted many new laws affecting California employers.

The new laws address several topics, including:

- Workplace discrimination, harassment and retaliation protections.
- Required gender representation on boards of directors.
- Prohibitions on certain hiring practices.
- Paid Family Leave.
- Lactation accommodation.
- Wage and hour protections for employees.
- Workplace safety and workers' compensation.
- Human trafficking training.
- Imposition of joint liability in certain circumstances.

All employers with operations in California should be aware of these new laws, understand how these laws may affect their operations and consult with counsel to address any compliance questions. All laws are effective January 1, 2019, unless otherwise noted.

Laws Regarding Discrimination, Harassment and Retaliation

Discrimination and Harassment Claims

- **SB 1300** makes numerous changes to California's Fair Employment and Housing Act (FEHA) relating to workplace harassment claims. Notably, it makes it unlawful for an employer to require an employee, in exchange for a raise or bonus, or as a condition of employment or continued employment, to:
    - Agree not to sue or bring a claim against the employee's employer under FEHA.
    - Sign a non-disparagement or other agreement that would deny the employee the right to disclose information about unlawful acts in the workplace, including but not limited to sexual harassment.
- These prohibitions do not apply to negotiated settlement agreements to resolve FEHA claims filed in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process, so long as any such agreement is voluntary and entered into by the employee in exchange for valuable consideration.
- SB 1300 also prohibits a prevailing defendant from being awarded attorney's fees and costs unless a court finds the action was frivolous, unreasonable or groundless when brought or that the plaintiff continued to litigate after it clearly became so.
- SB 1300 also expands an employer's potential FEHA liability for acts of nonemployees to all forms of unlawful harassment (removing the "sexual" limitation).
- In addition, the new law expressly affirms or rejects several specific federal and state judicial decisions, effectively making it more difficult for employers to defeat workplace harassment claims on summary judgment.

Sexual Harassment Training

- Sexual harassment training requirements have been in place since 2005 for California employers with more than 50 employees, requiring employers to provide supervisors with two hours of anti-harassment training (including, effective January 1, 2018, training on the prevention of harassment based on gender identity, gender expression and sexual orientation) every two years, and all new supervisory employees such training within six months of their assumption of a supervisory position.
- **SB 1343** extends those training requirements. By January 1, 2010, all employers with five or more employees are required to provide two hours of sexual harassment training to supervisory staff and one hour

of such training to nonsupervisory staff within six months of hire or promotion, and every two years after that.
- Employers must also provide sexual harassment prevention training to temporary or seasonal employees within 30 calendar days after the hire date or within 100 hours worked if the employee will work less than six months. In the case of a temporary employee employed by a temporary services employer (as defined by the California Labor Code) to perform services for clients, the training must be provided by the temporary services employer, not the client.

Prohibition on Confidentiality Clauses in Settlement Agreements

- **SB 820** prohibits a settlement agreement from including a confidentiality provision that prevents the disclosure of factual information pertaining to civil or administrative complaints of sexual assault, sexual harassment, or workplace harassment, or discrimination based on sex. Any provision in a settlement agreement entered into on or after January 1, 2019, that prevents the disclosure of such information will be considered void as a matter of public policy. The law does permit a provision, however, that would safeguard the claimant's identity and any facts that could lead one to discover the claimant's identity (but only at the request of the claimant and in matters not involving a government agency or public official), as well as a provision that prevents the disclosure of the amount paid to settle the claim, at the request of either party.

Banning Waivers of Right to Testify

- Under **AB 3109**, any provision in a contract or settlement agreement that waives a party's right to testify about alleged criminal conduct or sexual harassment in an administrative, legislative or judicial proceeding will be deemed unenforceable. This law applies only where testimony is required, such as by subpoena or court order, or in response to a written request from an administrative agency or the legislature.

Harassment – Defamation Protection

- **AB 2770** amends Section 47 of the Civil Code to add three types of communications regarding sexual harassment that are now considered "privileged" communications – meaning they cannot be

used as a basis for a defamation claim – unless they are made with malice. Specifically, AB 2770 establishes that under California law:

- Employees who report sexual harassment, based on credible evidence and without malice, won't be liable for injury to the alleged harasser's reputation.
- Communications regarding the sexual harassment allegations between the employer and "interested persons" (such as victims or witnesses) are protected so long as they are made without malice.
- An employer will now be permitted to reveal in a job reference whether an individual is not eligible for rehire because the employer determined that he/she engaged in sexual harassment, without exposing the employer to a defamation claim.

Sexual Harassment – Professional Relationships

- Current California law imposes personal liability for sexual harassment that occurs in the course of a business, service or professional relationship, including but not limited to doctors, attorneys, bankers and accountants. **SB 224** expands the list to now include elected officials, lobbyists, investors, directors and producers among those who may be personally liable to a plaintiff for sexual harassment that occurs in the course of the relationship with such professional.

Sexual Harassment Educational Materials and Training – Talent Agencies

- **AB 2338** requires talent agencies must provide their adult artists with educational materials on sexual harassment prevention, retaliation and reporting resources, as well as on nutrition and eating disorders. All materials must be provided within 90 days in a language the artist understands. Artists who are between the ages of 14 and 17, along with their parent or legal guardian, will need to receive and complete training in sexual harassment prevention, retaliation and reporting resources before they are issued a work permit. AB 2338 further requires talent agencies to request and retain a copy of the minor's entertainment work permit prior to representing or sending that minor on an audition, meeting, or interview for engagement of the minor's services.
- The Labor Commissioner may assess civil penalties of $100 for each violation.

- Talent agencies will also be required to confirm to the Labor Commissioner, as a part of their license renewal process, that they have and will continue to provide the relevant educational materials.

In-Home Supportive Services Employers

- Under **AB 3082**, the State Department of Social Services, which administers the In-Home Supporting Services (IHSS) program, must develop or otherwise identify educational materials about sexual harassment and the prevention thereof, as well as a proposed method for uniform data collection to identify the prevalence of sexual harassment in the IHSS program, on or before September 30, 2019.

Sexual Violence and Harassment Prevention Training for Janitorial Services Providers

- **AB 2079** establishes the following requirements for any employer providing janitorial services:
    - Effective January 1, 2020, all employers completing new applications for registration and renewal of registration must establish completion of specified sexual violence and harassment prevention training requirements and provide an attestation of completion to the Labor Commissioner.
    - The Department of Industrial Relations (DIR) must convene an advisory committee by July 1, 2019, to develop requirements for qualified organizations and per-trainers for employers to use in providing training, and the DIR must maintain a list of qualified organizations and qualified peer-trainers.
    - Employers, upon request, must provide an employee a copy of all training materials.
- AB 2079 also prohibits the Labor Commissioner from approving a janitorial services provider's request for registration or renewal if the employer has failed to satisfy a final judgment for a violation of the FEHA.

Gender Representation on Boards of Directors

- **SB 826** mandates that any publicly held corporation whose principal executive offices, according to the corporation's SEC 10-K form, are in California must place at least one female director on its board by December 31, 2019. Any corporation covered by this law may

increase its authorized number of directors to comply with this requirement.
    - SB 826 imposes minimum seat requirements that must be filled by women, proportional to the total number of seats, by December 31, 2021. Specifically, by December 31, 2021, any California-based publicly held corporation with six or more directors must have at least three female directors on its board; if the number of directors is five, then at least two must be women; and if the number of directors is four or fewer, then the corporation must have at least one female director.
    - Any company that doesn't comply these requirements will face significant financial penalties, including (1) a $100,000 penalty for failing to timely file board member information with the Secretary of State pursuant to to-be-adopted regulations; (2) a $100,000 penalty for the first violation of the new law; and (3) a $300,000 penalty for the second and any subsequent violation.

Laws Regarding Hiring Practices and Enforcement

Salary History

- AB 2282 addresses certain ambiguities AB 168, which became effective January 1, 2018 and bars employers from requesting, orally or in writing, the pay history of job applicants and requiring employers to provide the pay scale for a position to applicants upon request.
    - AB 2282 amends the Labor Code to clarify that:
        - Employers may ask an applicant about the applicant's salary expectations for the position for which the applicant is applying.
        - Only external applicants (not current employees) are entitled to a pay scale upon request, and only after completing an initial interview.
        - The pay scale provided in response to an external applicant's request need only include salary or hourly wage ranges.
    - In addition, compensation decisions based on a current employee's existing salary, such as for determining raises or bonuses, will be permissible if justified by legitimate, non-discriminatory factors such as seniority or a merit system.

Criminal Background Checks

- Under existing law (California Labor Code Section 432.7), employers are generally prohibited from asking an applicant to disclose, seeking from any source, or considering as a factor in determining employment, any information related to a criminal conviction that has been judicially sealed or expunged. However, current law does not prohibit employers from asking about criminal convictions that have been judicially sealed or expunged if the employer is required to obtain such criminal conviction information pursuant to state or federal law.
- **SB 1412** provides that employers are not prohibited from seeking, receiving or considering an applicant's criminal conviction history, including those convictions that have been judicially sealed or expunged, if the employer is required by state, federal or local law to conduct criminal background checks for employment purposes. However, SB 1412 narrows an employer's ability to consider sealed or expunged convictions to only those circumstances where a *particular conviction* would legally prohibit someone from holding that job.

Laws Regarding Leaves of Absence and Benefits

Expansion of Paid Family Leave

- **SB 1123** expands the scope of the Family Temporary Disability Insurance Program (under Paid Family Leave), beginning January 1, 2021, to include time off to attend to a "qualifying exigency" related to an individual's spouse, registered domestic partner, child or parent who is an active duty member of the United States Armed Forces. Qualifying exigences include addressing any issue that arises from a call or order; attending an official ceremony, program or event sponsored by the military that is related to the covered active duty; or arranging for alternative childcare for a child when the active duty or call to active duty necessitates a change in the existing childcare arrangement.
- SB 1123 only affects "covered active duty members," meaning those members that are deployed in a foreign country.

Lactation Accommodation

- Current California law requires employers to provide a private location in close proximity to the employee's work area, *other than a toilet stall*, for an employee to express breast milk.

- **AB 1976** requires employers to provide a room or location, *other than a bathroom*, in close proximity to the employee's work area, to express breast milk. Employers can comply with this requirement by making available a temporary lactation location, so long as: (1) the employer is unable to provide a permanent lactation location because of operational, financial, or space limitations; (2) the temporary lactation location is private and free from intrusion while an employee expresses milk; (3) the temporary lactation location is used only for lactation purposes while an employee expresses milk; and (4) the temporary lactation location otherwise meets the requirements of state law concerning lactation accommodation.
- The employer is exempt from the law's mandate if it can demonstrate that having to provide the employee with the use of a room or other location, other than a bathroom, would impose an undue hardship when considered in relation to the size, nature, or structure of the employer's business. However, even if the exemption applies, the employer must still make reasonable efforts to provide the use of a room or other location, other than a bathroom, in close proximity to the employee's work area, for the employee to express milk in private.

Wage and Hour Laws

Minimum Wage Increase

- On January 1, 2019, California's state minimum wage increases to $11.00 per hour for employers with 25 or fewer employees and to $12.00 per hour for employers with 26 or more employees. This is not a new law – **SB 3** was signed in 2016, and this is the next mandatory increase.
- Under the salary test for exempt employees in California, an employee must be paid a monthly salary that is at least twice the state minimum wage for full-time employment. This means that, effective January 1, 2019, the minimum monthly salary for exempt employees is either: $4,160.00 (or $49,920.00 annually), if the employee works for an employer with 26 or more employees, or $3,813.33 (or $45,760.00 annually), if the employee works for an employer with 25 or fewer employees.

Phased-In Overtime Changes for Agricultural Employers

- Agricultural employers under Wage Order 14 with 26 or more employees will see the first in a series of phased-in overtime charges. Currently, agricultural workers receive time-and-a-half after working 10 hours per day, or 60 hours per week. **AB 1066** entitles them to collect overtime pay after 9.5 hours per day, or 55 hours per week. Agricultural employers with 25 or fewer employees will begin phased-in overtime changes in 2022.

Construction Industry PAGA Prohibition

- **AB 1654** prohibits construction industry employees covered by collective bargaining agreements (CBAs) from pursuing a Private Attorneys General Act (PAGA) claim. To qualify for a PAGA exemption, a CBA must:
    - Apply to working conditions, wages, and hours of work of employees in the construction industry.
    - Ensure employees receive a regular hourly wage not less than 30 percent more than the minimum wage.
    - Prohibit all violations of the Labor Code that would be redressable by PAGA and provide for a grievance and binding arbitration procedure to redress those violations.
    - Expressly waive the requirements of PAGA in clear and unambiguous terms.
    - Authorize an arbitrator to award any and all remedies otherwise available under Labor Code, other than those that would be payable to the state.

Petroleum Facility Rest Break Exception

- The decision in *Augustus v. ABM Security Services, Inc.*, 2 Cal. 5th 257 (2016), hinders employers' ability to reach employees even in emergency situations because the court determined that employees could not be required to carry instant communication devices during breaks.
- **AB 2605** created an extremely limited exception for required rest breaks in the petroleum industry – those employers with petroleum facilities covered under Wage Order 1 – allowing such employers to require that employees holding safety-sensitive positions at petroleum facilities be on-call and carry instant communication devices during rest breaks. Employees must be able to make up the missed break or receive a rest break penalty of one hour's pay.

- AB 2605 took effect when signed on September 20, 2018, and does not apply retroactively.

Meal Break Exception for Feed Truck Drivers

- **AB 2610** creates an extremely limited meal break exception for certain commercial drivers who are transporting commercial feed to customers in remote, rural areas. Any such driver may start a meal period after six hours of work (rather than within the fifth hour of work) if the driver's regular rate of pay is no less than one and one-half times the state minimum wage and the driver receives overtime compensation.

Copies of Payroll Records

- Existing law allows employees to "inspect or copy" their payroll records. **SB 1252** clarifies that employers must make and provide such copies and may not require employees to find ways to make their own copies.

Laws Regarding Workplace Safety and Workers' Compensation

- **AB 2334** extends employers' liability for workplace injury reporting violation penalties from six months to five years.
- AB 2334 also clarifies that, under the California Health and Safety Code, record-keeping violations continue until corrected or discovered by the California Division of Occupational Safety and Health (Cal/OSHA), or until any recordkeeping duty is eliminated.

Additional Laws

Human Trafficking Training

- ***Mass Transit Employers – AB 2034*** requires that mass transit employers (i.e., those that operate intercity passenger rails, light rails and bus stations) who may interact with victims, or who are likely to receive reports from other employees about suspected human trafficking, attend a training session of at least 20 minutes on recognizing and reporting suspected human trafficking. This training must be completed by January 1, 2021.

- ***Hotels and Motels – SB 970*** mandates that hotel and motel employers must provide at least 20 minutes of classroom or other effective interactive training and education regarding human trafficking awareness to any employee who is likely to interact with victims of human trafficking, such as those who work in reception areas, perform housekeeping duties, help customers in moving their possession or drive customers. This training must be completed by January 1, 2020, and every two years thereafter.

Joint Liability – Port Trucking Companies

- **SB 1402** extends wage and hour liability to employers, with 25 or more employees, who hire port drayage motor carriers (trucking companies) to perform transportation services.
- The Division of Labor Standards Enforcement will create and post on its website a list of port drayage motor carriers with any unsatisfied final judgment for taxes, various wage and hour violations, unreimbursed expenses, failure to provide workers' compensation coverage, or independent contractor misclassification.
- Any employer that uses a port trucking company on this "blacklist" will share all civil legal responsibility and civil liability for services obtained after the date the trucking company appeared on the list.

Labor-Related Liabilities – Direct Contractor

- AB 1565 strikes language placed into the Labor Code by last year's AB 1701 that indicated a direct contractor's liability for unpaid wages or benefits is in addition to any obligations and remedies otherwise provided by law. AB 1701 also explains that, in order for a direct contractor (or a higher-tiered subcontractor) to withhold disputed sums for a subcontractor's failure to provide information, the contractor must specify in the relevant contract the documents and information that must be provided on request.
- AB 1565 took effect on September 19, 2018.