Updates
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California Employment Law Legislative Update 2020

With the California legislative year now closed, we know which proposals became reality and offer insight into their likely impact on California employers in the coming year. The following update provides a brief overview of select legislation that will immediately affect California employers. This is not an exhaustive list of the many new employment-related statutes, but it does illustrate the extraordinarily high volume of legislative action that resulted in new laws protecting workers.

We have identified recommended action items resulting from the recently enacted laws, and advise clients to work with counsel to discuss the implications specific to each organization.

Ban on Mandatory Employment Arbitration (AB 51)

After January 1, 2020, employers cannot require applicants or employees to agree, as a condition of employment, to arbitrate claims for violation of the California Fair Employment and Housing Act or California Labor Code. The statute will not invalidate arbitration agreements that are voluntary or are otherwise enforceable under the Federal Arbitration Act (FAA). We expect that what constitutes an agreement otherwise enforceable under the FAA is going to be tested in court.

Action item: Employers should review arbitration agreements now and consider executing pending agreements before year end. They should ensure that future arbitration agreements that cannot be made subject to the FAA exclude the prohibited statutory-based claims and ensure that arbitration agreements that are subject to the FAA include specific language stating that the FAA applies. The key issue to invoke the FAA is whether the business relationship with the employee involves "interstate commerce." There is a good argument that an employer subject to Title VII (which requires that the individual is subject to "interstate commerce") is also subject to the FAA, but we also anticipate that this question will lead to litigation and appeals.

Employer's Failure to Timely Pay Arbitration Fees Can Invalidate Arbitration Agreement (SB 707)

Employers must pay arbitration initiation fees within 30 days following the due date or will waive their right to compel arbitration, allowing the employee to pursue claims in a court of appropriate jurisdiction.

Action item: Employers should immediately calendar the due date for payment of arbitration fees following a demand for arbitration (whether by employer or employee) or as soon as the due date can be determined. Due dates for payment of fees under the rules of the chosen arbitrator or arbitration forum should be double-checked, and in the event of any ambiguity, they should be paid by the earliest possible deadline.

Limited Use of "No Rehire" Provisions (AB 749)

It was previously unclear whether a settlement or severance agreement could include a provision that allowed an employer to refuse to rehire an individual based on the severance or settlement agreement. Under this new provision, a settlement agreement cannot include a "no rehire" clause unless there is a separate legitimate reason for doing so, or the individual has committed sexual harassment or assault.

Action item: All forms of settlement agreements and releases for use in California should be checked to ensure they do not contain a "no rehire" clause, and employers should consult with legal counsel about the risk of including a no-rehire clause where it may be appropriate or necessary. Note: there is no statutory definition of "legitimate reason."

Independent Contractor Classification Further Limited (AB 5)

This legislation codifies the Massachusetts "ABC Test" which was adopted by the California Supreme Court in the 2018 *Dynamex* decision for claims made under California's wage orders. California's adoption of the ABC Test has made it very difficult to support contractor status where the individual is not concurrently engaged in a business separate and distinct from the "hiring entity," (i.e., the service recipient). However, there are multiple industry exemptions, exceptions and carve-outs, as well as the consequence of intense lobbying and negotiating between business and labor. Some "gig economy" companies are actively working to further amend this law.

Action item: Consulting relationship contract agreements should be reexamined and, as appropriate, edited and updated. Employers should also seek advice of retained counsel with deep experience in California contractor law to determine whether other adjustments are needed with respect to any or all contractor relationships. Any changes to contractor relationships should be made only at the direction of legal counsel, and employers should be particularly circumspect where integral work or projects are being accomplished by contractors.

Extended Statute of Limitations for Employment Claims (AB 9)

Previously, employees needed to initiate state law-based claims of harassment, discrimination or retaliation within one year of when the wrong occurred. Under AB 9, employees will now have up to three years to file claims of discrimination, harassment and/or retaliation with the California Department of Fair Employment and Housing (DFEH) and one more year (after their receipt of a right-to-sue letter from the DFEH) to file a civil action in court. This means employers could face claims dating back four years from filing.

Action item: Document preservation policies should be established to line up with this new extended statute of limitations. Most importantly, employers should preserve all employee records for at least four years following separation from employment—including emails and electronic human resources records.

State Agency Enforcement of Federal Discrimination Laws (AB 1820)

This new law gives the DFEH the authority to bring civil actions for violations of specific federal civil rights and anti-discrimination laws (e.g., Title VII, ADA, FEHA).

Action item: Employers should increase their awareness of state agency prosecution capabilities and take further steps to ensure compliance with applicable anti-harassment and anti-discrimination laws. They also should ensure compliance with anti-harassment training obligations.

Expanded Labor Commissioner Enforcement of Wage Rates (SB 688)

This legislation enables the California labor commissioner to recover unpaid contractual wages even if there was no minimum wage violation.

Action item: Documentation of, and clear communication with the work force about, any rate changes should be practiced. Employers also should ensure that clear advance notice is given regarding any changes to employee compensation or wage-and-hour policies.

Increased OSHA Exposure (AB 1805)

This law removes the 24-hour minimum hospitalization stay required to qualify a workplace illness or injury as "serious" for the purpose of reporting to the Industrial Relations Division of Occupational Safety and Health by telephone or a not-yet-established online means. It also changes the definition of "serious exposure" to exposure to a hazardous substance in an amount sufficient to create a "realistic possibility that death or serious physical harm in the future could result from the actual hazard created by the exposure."

Action item: The Division of Occupational Safety and Health should be notified immediately of a serious injury or illness. Employers should be aware of the expanded definition and increased potential exposure for a "serious injury or illness" suffered on the job.

Additional Lactation Accommodation Requirements (SB 142)

This statute expands existing requirements for lactation areas. Such areas must be "safe, clean, and free of hazardous materials," contain a surface on which to place a breast pump and personal items, include a place to sit, provide access to electricity or alternative devices including, but not limited to, extension cords or charging stations needed to operate an electric or battery-powered breast pump, and access to a sink with running water and a refrigerator (or cooling device or cooler). It also must be in close proximity to the employee's workspace. If the lactation room serves a dual purpose, lactation should take precedence. Note that other recent legislation made it clear that this lactation area may not be a bathroom. Certain employers may be able to claim that providing this form of lactation accommodation constitutes an undue burden.

Action item: Employers must ensure existing lactation space meets expanded requirements and consult counsel if there is a question about whether providing this accommodation may constitute an undue burden.

Penalties Available for Wage Claims (AB 673)

Employees seeking to recover unpaid wages have a private right of action to recover statutory penalties against the employer. They also may seek civil penalties under the Private Attorneys General Act (PAGA) but may not pursue both avenues for the same violation.

Action item: Proper wage payments should be addressed with the payroll provider. Where indicated, audits of payroll practices should be conducted only under direction of legal counsel to keep privileged any remedial steps to make corrections and limit liability.

The CROWN Act (AB SB 188)

The Creating a Respectful and Open Workplace for Natural Hair (CROWN) Act prohibits employers from discriminating based upon "protective hairstyles," defined as "braids, locks, and twists." Based on comments from the California legislature in passing the act, the CROWN Act is intended to eliminate the disparate impact

certain dress and hairstyle policies may create on black applicants and employees.

Action item: While the legislative history mentions specific hairstyles, the limitations of the CROWN Act are not limited to any one race. Employers should be attentive to the obligation to accommodate hairstyles that may have connections with an individual's race or national origin, as well as other protected hairstyles (such as religious dress or hairstyles related to an individual's medical status).

Extended Deadline for Employer Training Compliance (SB 778)

Under prior law, employers with 50 or more employees needed to provide all supervisors and managers with sexual harassment prevention training at least every other year. California then passed SB 1343, which mandated that all employers with five or more employees needed to provide bi-annual sexual harassment prevention training to all employees, including supervisory and non-supervisory employees. The initial compliance deadline was January 1, 2020, and the DFEH previously took the position that employers needed to ensure that all employees received this training in calendar year 2019—even if some or all employees were otherwise provided compliant sexual harassment prevention training in 2018. Under SB 778, employers are granted more time—until January 1, 2021—to provide sexual harassment prevention training that meets statutory requirements under SB 1343. This alleviates some of the pressure on employers to conduct training before 2020 for non-supervisory employees. It also means that employers who trained supervisors in 2018 do not have to retrain supervisors in 2019. There are some limitations on this extension, most notably for temporary employees.

Action item: Appropriate interactive harassment training should be scheduled in 2020 for all relevant employees (and within six months for a new hire). Temporary employees hired in 2020 should be trained within 30 days of hire.

Extended Deadline for Compliance With California Consumer Privacy Act (AB 25)

Personal information of an employee collected solely for employment purposes is exempt from all provisions of the CCPA until January 1, 2021, except for a business's obligation to disclose what information is collected and why, and the ability of employees to file a civil action with statutory damages for unauthorized access of their information.

Action item: Employers must ensure compliance with all Fair Credit Reporting Act provisions as to applicants and employee data, and structure data protections for all "consumer" records (employees and otherwise).

For more information about the new law, see our previous update.

Notice of Expiring Flexible Spending Account Dollars (AB 1554)

Employers must provide an employee who participates in a flexible spending account with at least two different notices of any deadline to withdraw funds before the end of the plan year.

Action item: Employers should ensure that appropriate notice mechanisms are in place so that at least two notices are given to the affected employees reasonably in advance of the deadline. Although not required, employers also should consider undertaking a reasonable effort to check whether notice was received (recognizing there may be pros and cons).

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