

Carmel & Naccasha LLP

2020 Employment Law Update

Overview

- Big year for legislation.
- Over 820 bills (not all employment related) signed into law by Governor Newsom.
- **BIG ISSUES**
 - The “employment relationship”
 - Privacy
 - Arbitration Agreements
 - Harassment and Discrimination
- **CONSIDERATIONS**
 - Big win for the plaintiff’s bar as attorney’s fees are generally recoverable in most employment law matters.
 - Some bills are retroactive and may mean that once barred actions may now be permitted, potentially expanding liability for employers.

AB 5 – Independent Contractor

- Effective: January 1, 2020
- Codifies *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*
- **ABC Test** – Presumption of employee/employer relationship
 - **A** – The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under contract for the performance of the work and the work in fact;
 - **B** – The worker performs work 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.
- **Exceptions** – 7 groupings covering around 50 industry-specific spaces
 - Doctors, dentists, psychologists, insurance agents, stockbrokers, lawyers, accountants, engineers, real estate agents, etc.
 - Often the exemption is conditional with multifactor criteria that must be met in order for the exemption to apply.

AB 9 – Employment Discrimination

- Effective: January 1, 2020
- Extends an employee's time to file complaints with California's Department of Fair Employment and Housing (DFEH) from **1 year** to **3 years**.
- Impacts record retention requirements for employers.
- DOCUMENT, DOCUMENT, DOCUMENT

AB 51 – Arbitration Agreements

- Effective: January 1, 2020
 - California is waging a war on Arbitration Agreements in the employment context.
- Bans mandatory arbitration agreements and prohibits employers from making them a condition of employment.
- Prohibits any opt-out of a waiver provision or any requirement for an employee to take any affirmative action in order to preserve a right.
- Prohibits retaliation, discrimination, threats, termination or any other forms of harassment against an applicant for employment or any employee if they refuse to consent to any waiver of any right, forum, or procedure for a violation of specific statutes governing employment.
- Not retroactive
- Bill is expected to be challenged – likely preempted by the Federal Arbitration Act

AB 203 – OSHA – Valley Fever

- Effective: January 1, 2020
- Requires certain construction employers in certain affected counties (including San Luis Obispo) to provide effective awareness training to all employees annually and before an employee begins work involving substantial soil disruption.
- May be included in the employer's injury and illness prevention program training or presented as a standalone training.
- Employers are not required to provide the training in the first year that the county is listed as highly endemic, but must provide the training in each subsequent year.

AB 673 – Wage and Hour

- Effective: January 1, 2020
- Bill allows employees to bring an action to recover statutory penalties against an employer for unpaid wages.
- Initial violations carry a \$100 penalty for each failure to pay each employee.
 - Subsequent violations, or any willful or intentional violations face a penalty of \$200 for each failure to pay each employee, and 25% of the amount unlawfully withheld.
- Employee cannot recover statutory penalties and enforce civil penalties, must choose one.

AB 749 – Settlement Agreements

- Effective: January 1, 2020
- Prohibits “no-rehire” clauses in settlement agreements related to an employment dispute.
- Includes any employee who files a claim against their employer in court, before an administrative agency, in an alternative dispute resolution forum, or through an internal complaint process.
- No-hire clause may still be included in settlement agreements with an employee that has committed sexual harassment or sexual assault, and in severance or separation agreements unrelated to employment disputes.
- Employer is not required to rehire a former employee if the employer had a legitimate nondiscriminatory or non-retaliatory reason for terminating the employee’s employment.

AB 1223 – Organ Donation Leave of Absence

- Effective: January 1, 2020
- Requires private employers with 15 or more employees to permit an employee to take a paid leave of absence, not exceeding 30 business days in one year, for the purpose of organ donation.
- Employers are required to extend that leave of absence for an additional 30 business days in one year.
 - Extension is unpaid

AB 1554 – Notice to Employees

- Effective January 1, 2020
- Employers are required to notify any employee who participates in a flexible spending account of any deadline to withdraw funds.
- Notice requirement allows for a broad use of mediums:
 - Email
 - Phone
 - Telephone
 - Text
 - Mail
 - In-person

AB 1768 – Prevailing Wages: Public Works

- Effective January 1, 2020
- Expands the definition of public works to include any work conducted during a site assessment or feasibility study.
- Includes design and land surveying.
- Applies regardless of whether any further construction work is conducted.

AB 1804 – OSHA Reporting

- Effective: January 1, 2020
- Requires that any injury, illness, or death be reported to the Department of Occupational Safety and Health through an online reporting system
- Intended to replace email reports.
- **System does not exist.**
- Employers should continue to communicate required injuries, illnesses and death via email or telephone.
- Keep monitoring!

SB 83 – Paid Family Leave (PFL)

- Effective: July 1, 2020
- Increases eligibility for PFL (reduces contribution rate from 1.43 to 1.3)
- Extends paid benefits from 6 to 8 weeks.
- No clear method to address potential fiscal gaps.
- Includes a Task Force to determine how to increase fully paid child bonding leave up to 6 months.
- Funding may be based on San Francisco model:
 - Employers may be required to pay the difference between what the Employment Development Department pays in order to reach a fully paid leave for six months for child bonding.
- Potential for huge fiscal impact for private employers.

SB 142 – Lactation Accommodation

- Effective: January 1, 2020
- Applies San Francisco's workplace lactation accommodation model statewide.
- Lactation space must not be a bathroom and must be in proximity to where the employee works, the employer must provide a reasonable amount of break time for "each time" the employee needs to express breast milk for the employee's infant child and the employer must also provide access to a sink with running water and a refrigerator suitable for storing milk in close proximity to the employee's workspace.
- **Lactation room requirements:**
 - Be safe, clean, and free of hazardous materials, as defined.
 - Contain a surface to place a breast pump and personal items.
 - Contain a place to sit.
 - Have 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.
- Employers with less than 50 employees may seek an exemption

SB 188 – Race Discrimination

- Effective: January 1, 2020
- Expands the definition of “race” under FEHA
- Definition now includes traits historically associated with race.
- Includes, but is not limited to, hair texture and protective hairstyles:
 - Braids
 - Locks
 - Twists
 - Etc.

SB 229 – Discrimination Hearings

- Effective: January 1, 2020
- Expands the appeal and enforcement powers of the California Labor Commissioner.
- Deals with citations for an employer's violation of anti-retaliatory provisions.
- Expedited procedure allows for:
 - An employer may request a hearing within 30 days of receiving a citation.
 - If employer does not request a hearing, the citation becomes final.
 - 10 days after the citation become final, the Labor Commissioner can apply for an entry of judgment.

SB 688 – Wage and Hour

- Effective: January 1, 2020
- Significant change in the Labor Commissioner's authority.
- Previously the only disputes that could be adjudicated before the Labor Commissioner were for failure to pay minimum wage or overtime, and reimbursement of expenses under Labor Code 2802.
- Bill allows the Labor Commissioner to adjudicate disputes regarding whether the contracted-for wage was paid.

SB 707 – Arbitration Agreements

- Effective: January 1, 2020
- Deals with payment obligations of the employer under any arbitration agreement.
- If costs or fees are not paid within 30 days of being due, then the employer is in material breach of the agreement.
- Employers who fail to pay may lose their right to compel arbitration.
 - Employee can immediately file a lawsuit.
- If litigation is already pending, then the statute of limitations is tolled for all claims relating to the claims brought in arbitration.
- Monetary sanctions against the employer are required.

SB 778 – Sexual Harassment Training

- Effective: August 30, 2019
- Extends the deadline for non-supervisory sexual harassment training to January 1, 2021.
- Employers with five or more employees, including temporary or seasonal employees, are required to provide two hours of sexual harassment training to all supervisors and managers, and at least one hour of sexual harassment training to non-supervisory employees.
- Requires that the training be provided to a supervisor within six months of assuming a supervisory role, and to a non-supervisor within six months of hire.
- Employers who have already complied with the training requirements in 2019 do not need to provide additional training until 2 years thereafter.

Minimum Wage Increases

- Effective: January 1, 2020
- \$13 an hour for employers with 26 or more employees.
- \$12 an hour for employers with fewer than 26 employees.
- Local minimum wages, if applicable, may be higher.

Conclusion

- Employers need to pay close attention to the applicability of these new laws and their practical implications.
- 2020 UPDATE:
- Review and update employee handbooks;
- Evaluate workforce to ensure proper classification of employees/contractors;
- Review mandatory arbitration agreement and consider whether revisions are required; and
- Ensure that record-retention, personnel file management, and corresponding policies and procedures relating to investigations, counseling, write-ups, performance reviews and termination documents are well kept and preserved for at least four years.

Contact Us:

If you have any questions on the material, or would like assistance in assessing whether and how these new laws apply to your work force, we are here to help.

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THANK YOU!