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New 2019 California State Employment Laws

The California Legislature was very active in 2018, passing many new mostly employee-favorable laws (some of which were a direct reaction to the #MeToo movement designed and to strengthen harassment protections, while others clear up ambiguities in laws that were passed in 2017.) As always, legal counsel should be contacted for reviewing how these new laws impact your business, and developing or modifying specific policies and procedures that minimize legal liability arising from these new laws.

SB 1343 - Expanded Harassment Prevention Training.

SB 1343 expands California's harassment prevention training laws. Employers of five or more employees (lowered from California's previous requirements for 50 or more employees) are required to provide 1) at least two hours of sexual harassment prevention training and education to all supervisory employees; and 2) at least one hour of such training to all non-supervisory employees in California. Season and temporary employees are included in the total number of employees. The training must be completed within six months of the employee assuming their position (and once every two years thereafter). SB 1343 also requires the DFEH to make available a one-hour and a two-hour online training course employer may use and to make the training videos, existing informational posters, fact sheets, and online training courses available in multiple languages.

SB 1300 – Expanded Liability for Sexual Harassment Cases.

SB 1300 is a comprehensive and far-reaching piece of legislation, which makes numerous changes to California's Fair Employment Housing Act and creates several new protections for employees

bringing harassment claims beginning January 1, 2019.

First, SB 1300 mandates that an employer may be responsible for the acts of nonemployees to all forms of unlawful harassment, and not just sexual harassment.

Second, SB 1300 also prohibits employers from requiring an employee to sign (as a condition of employment, raise, or bonus): (1) a release of FEHA claims or rights or (2) a document prohibiting disclosure of information about unlawful acts in the workplace (including but not limited, sexual harassment), including non-disparagement agreements. However, this provision does not apply to negotiated settlement agreements to resolve FEHA claims filed in court, before administrative agencies, alternative dispute resolution, or though the employer's internal complaint process. Moreover, the bill prohibits a prevailing defendant from being awarded attorney's fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so. Under the bill, employers may (but are not required to) provide employees with bystander intervention training.

SB 820 – Confidentiality Restrictions for Settlement Agreements Alleging Sexual Harassment.

Effective January 1, 2019, SB 820 will prohibit and make void any provision of a settlement agreement that prevents the disclosure of factual information related to civil or administrative complaints of sexual assault, sexual harassment, and workplace harassment or discrimination based on sex. However, SB 820 expressly authorizes provisions that (1) preclude the disclosure of the amount paid in settlement and (2) protect the claimant's identity and any fact that could reveal the identity, so long as the claimant has requested anonymity and the opposing party is not a government agency or public official (the accused has no such protection).

SB 3109 – No Waivers of Rights to Testify.

After January 1, 2018, SB 3109 voids any provision of any contract or settlement agreement that waives a party's right to testify in a legal proceeding (if required or requested by court order, subpoena or administrative or legislative request) regarding criminal conduct or sexual harassment on

the part of the other contracting party, or the other party's agents or employees.

SB 224 – Additional Prohibitions Against Harassment Regarding Professional Relationships.

SB 224 provides other examples of professional relationships where liability for claims of sexual harassment may arise and authorizes the DFEH to investigate those circumstances. The bill would include an investor, elected official, lobbyist, director, and producer among those listed persons who may be liable to a plaintiff for sexual harassment.

AB 2338 – Sexual Harassment Prevention for Talent Agencies.

This bill requires talent agencies to provide adult artists, parents or legal guardians of minors aged 14-17, and age-eligible minors, within 90 days of retention, educational materials on sexual harassment prevention, retaliation, and reporting resources. Additionally, for adult model artists, the talent agency will be required to provide materials on nutrition and eating disorders. Talent agencies will also have to retain, for three years, records showing that those educational materials were provided. This bill authorizes the Labor Commissioner to assess civil penalties of $100 for each violation.

SB 826 – Representation of Women on California-Based Publicly Held Company Boards.

SB 826 requires California-based publicly held corporations to include at least one female director on their board of directors. "Female" is defined as people who self-identify as women, regardless of their designated sex at birth. The law applies to corporations: (1) whose shares are listed on "a major United States stock exchange," and (2) whose principal executive offices, according to the company's U.S. Securities and Exchange Commission 10-K form, are located in California. The new law applies to corporations not incorporated in California provided they meet the foregoing requirements. Covered companies must comply with the new law by no later than December 31, 2019. By December 31, 2021, covered companies with five directors on their boards will be required to include two female directors, and companies with six or more directors will be required to include three. Importantly, the new law does not prohibit covered companies from increasing the number of seats

on their boards in order to elect additional female directors.

A covered company's failure to comply with the law will result in significant penalties. Specifically, the law authorizes the California Secretary of State to impose the following fines: $100,000 for a first violation and $300,000 for further violations. In addition, covered corporations which fail to timely file board member information with the Secretary of State will be subject to a $100,000 fine. Adds sections 301.3 and 2115.5 to the Corporations Code.

Lastly, although Governor Brown signed the new law he recognized (as part of his signing statement) that there are "potential flaws [in the bill] that indeed may prove fatal to its ultimate implementation." Thus, it is anticipated SB 826 will be challenged on various constitutional grounds, including on Equal Protection grounds.

AB 2610 – Meal Period Exception – Commercial 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, to take a meal period after the sixth hour if their regular rate of pay is at least one and a half times the state minimum wage and the driver is subject to overtime pay. Drivers must still be provided a second meal period at the tenth hour. The bill does not define "remote, rural areas," but bill sponsors point to factors such as road conditions – narrow, twisting, in higher elevations or mountainous regions; limited rest stops, closed rest stops, or lack of road space to safely take a meal period; and low average speeds (e.g., 40-50 mph).

SB 1412 – Criminal Background Checks.

Existing law prohibits consideration of an applicant's judicially sealed or expunged convictions. (See Labor Code § 432.7.) However, Section 432.7 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 confirms that employers are not prohibited from seeking or receiving 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. Amends section 432.7 of the Labor Code.

AB 2282 – Salary History – Clarification.

Last year's law banning inquiries about salary history and requiring employers to provide pay scales to applicants upon request (known as the California Equal Pay Act) contained some ambiguities that are addressed in this year's legislation. AB 2282, which will take effect on Jan. 1, 2019, adds to and amends the Labor Code in three ways: (1) employers can ask about an applicant's salary expectations for the position being applied for; (2) only external applicants (not current employees) are entitled to a pay scale upon request, and only after completing an initial interview; and (3) the pay scale provided only needs to include salary or hourly wage ranges. In addition, compensation decisions based on a current employee's existing salary, such as for giving raises or bonuses, will be permissible if justified by factors such as a seniority or merit system.

Proposition 11 – Ambulance Employees Paid On-Call Breaks, Training, Mental Health Services Initiative.

California Proposition 11, the Ambulance Employees Paid On-Call Breaks, Training, and Mental Health Services Initiative, was on the ballot in California as an initiated state statute on November 6, 2018. The measure was approved. The initiative, sponsored by the private ambulatory industry, was another response to the *Augustus v. ABM Security Services, Inc*. (2016) 2 Cal.5th 257 decision where the California Supreme Court held that on-duty break time for security guards violates state labor laws. Now with the passage of Proposition 11, private paramedics and emergency medical technicians can be required to remain on call during breaks provided they are paid at their regular rate. Proposition 11 also requires employers to provide additional training for EMTs and paramedics

and to provide EMTs and paramedics with some paid mental health services.

Increase in State Minimum Wage.

On January 1, 2019, the state minimum wage increases to $11 per hour for employers with 25 or fewer employees and to $12 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. In addition, remember to determine if any local (i.e., City) minimum wage ordinances apply to your business.

SB 1252 – Right to Receive Pay Statement.

Existing law allows employees to "inspect or copy" their payroll records. SB 1252 clarifies that an employee has the right "to receive" a copy of his/her pay statements. Minor amendment to section 226 of the Labor Code.

AB 1565 – General Contractor Liability – Construction Industry.

In 2017 the California Legislature enacted Labor Code Section 218.7, which holds direct contractors liable, under certain types of construction contracts, for unpaid wages, benefits, or contributions that a subcontractor owes to its workers. Labor Code Section 218.7 allows direct contractors to require subcontractors to provide certain payroll records so that the direct contractor can evaluate the subcontractor's compliance with wage and hour laws. The direct contractor may withhold payments until the subcontractor provides those records.

AB 1565 is clarifying legislation and amends Labor Code Section 218.7 and provides that for contracts entered into after January 1, 2019, the direct contractor must now specify what documents and information the subcontractor must provide in order to withhold a disputed payment. AB 1546 also repeals a prior provision in Labor Code Section 218.7 that the direct contractor's liability for unpaid wages or benefits is in addition to any other existing rights and remedies.

AB 1654 – Construction Industry PAGA Prohibition.

Under AB 1654 construction industry workers will be prohibited from pursuing a Private Attorneys General Act ("PAGA") claim provided the worker is covered by a collective bargaining agreement (CBA) provided that the CBA: (1) is entered into prior to January 1, 2025; (2) provides for the wages, hours of work, and working conditions of employees, premium wage rates for all overtime hours worked, and for the employee to receive a regular hourly pay rate of not less than 30 percent more than the state minimum wage rate; (3) prohibits all of the violations of the Labor Code that normally would be redressable under PAGA; (4) provides for a grievance and binding arbitration procedure to redress those violations and authorizes the arbitrator to award any and all remedies otherwise available under the Labor Code (except PAGA remedies); and (5) expressly waives PAGA rights. The new law will remain in effect until January 1, 2028.

SB 1402 – Port Trucking Companies.

SB 1402 will impose joint liability on client employers who hire port drayage motor carriers (i.e., trucking companies that transport of goods over a short distance) with certain unpaid employment-related judgments, affecting businesses such as retailers, agriculture and auto dealers who rely on port truckers to transport products from ships. The Division of Labor Standards Enforcement will list on its website any port drayage motor carrier which has an unsatisfied final judgment for taxes, various wage and hour violations, unreimbursed expenses, failure to provide workers' compensation coverage, or independent contractor misclassification. The bill adds section 2810.4 to the Labor Code.

Questions? Concerns? Contact:

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