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CHANGES IN EMPLOYMENT LAWS EFFECTIVE JANUARY 1, 2020: HOW THEY MAY AFFECT YOUR BUSINESS

BY GREG J. NORYS

Governor Gavin Newsom and the California Legislature teamed up together in 2019 to create a number of new laws effective January 1, 2020 affecting the employer/employee relationship. This article summarizes a number of these new employment laws which we consider most relevant and impactful to our clients.

MINIMUM WAGE/EXEMPT SALARY INCREASES

Effective January 1, 2020, the California minimum wage will increase once again. Employers with 25 or fewer employees must increase the minimum hourly wage to $12.00 (increased from $11.00 per hour), while employers with 26 or more employees must pay a minimum wage of $13.00 per hour (increased from $12.00 per hour).

The minimum wage is further scheduled to increase on January 1 of 2021-2023 as follows:

EMPLOYERS WITH 25 OR FEWER EMPLOYEES	EMPLOYERS WITH 25 OR FEWER EMPLOYEES
January 1, 2021: $13.00 per hour	January 1, 2021: $14.00 per hour
January 1, 2022: $14.00 per hour	January 1, 2022: $15.00 per hour
January 1, 2023: $15.00 per hour	January 1, 2023: $15.00 per hour

The new law provides that until the minimum wage reaches $15 per hour, the Governor has the authority to suspend annual increases if economic conditions warrant.

Exempt Employee Minimum Salary Increases

Employers should evaluate the minimum salary requirements for its employees; since, as the minimum wage increases, so does the state minimum salary for many exempt employees under California law. Under Industrial Wage Order 4, to satisfy the administrative, executive, professional and some mechanical exemptions, California employers must pay the exempt employee a salary that is at least twice the state minimum wage as summarized below. This also affects employers that require their employees to provide their own tools for the job (i.e., automotive mechanics).

As of January 1, 2020, employers with 25 or fewer employees will be required to pay exempt employees $960 per week/$49,920 annually (increased from $880 per week/$45,760 annually), while employers with 26 or more employees will be required to pay exempt employees $1,040 per week/$54,080 annually (increased from $960 per week/$49,920 annually). There are also specific local minimum wage schedules in a number of different California cities and counties.

City of Los Angeles and Unincorporated Areas of Los Angeles County

As of July 1, 2019, the minimum wage schedule for employees working in the City of Los Angeles and the Unincorporated Areas of Los Angeles County for the next three years is as follows:

EMPLOYERS WITH 26 OR MORE EMPLOYEES	EMPLOYERS WITH 25 OR FEWER EMPLOYEES
July 1, 2019: $14.25 per hour	July 1, 2019: $13.25 per hour
July 1, 2020: $15.00 per hour	July 1, 2020: $14.25 per hour
July 1, 2021: $15.00 per hour	July 1, 2021: $15.00 per hour

Non-profit employers with 26 or more employees may qualify for the deferral rate schedule for employers with 25 or fewer employees.

Other California Cities

A number of other cities will be increasing their minimum wages as of January 1, 2020, including but not limited to Belmont; Cupertino; Daly City; El Cerrito; Los Altos; Mountain View; Oakland; Palo Alto; Petaluma; Redwood City; Richmond; San Mateo; San Diego; San Jose; Santa Clara; and Sunnyvale. There are also a number of other cities including but not limited to Alameda, Berkeley, Long Beach, Malibu, Pasadena, San Francisco, and Santa Monica that enacted local increases effective July 1, 2019.

EXTENSION OF STATUTE OF LIMITATIONS FOR SEXUAL HARASSMENT CLAIMS

Beginning on January 1, 2020, alleged victims of sexual harassment, discrimination, or other civil-rights related retaliations will now have up to three years, rather than currently one, to file complaints. For more information about this new law, please click here to read our prior client alert.

NO LONGER PERMISSIBLE TO REQUIRE AGREEMENTS TO ARBITRATE DISCRIMINATION OR HARASSMENT CLAIMS AS A CONDITION OF EMPLOYMENT (AB 707)

Arbitration Agreements Cannot be Mandatory

Beginning on January 1, 2020, employers will no longer be permitted to require employees or applicants to waive their rights under the Labor Code or the California Fair Employment and Housing Act (FEHA) as a condition of employment. Although the bill does not expressly mention arbitration, it effectively prohibits mandatory arbitration of claims arising out of employment.

Furthermore, while the bill does not invalidate employment arbitration agreements already in effect prior to January 1, 2020, it will apply to contracts for employment that are not just entered into, but also modified or extended on or after that date.

While people have interpreted the bill as providing a savings clause that still permits mandatory arbitration agreements that are "otherwise enforceable under the Federal Arbitration Act," this is far from clear and will likely generate substantial litigation before employers get the clarity they need, especially with the popularity of wage & hour class action claims. For now, employers must decide what to do before the new law goes into effect and what to do with offer letters and arbitration agreements once the law goes into effect.

Arbitration Agreements Already in Effect Will Have a Use-it-or-Lose-it Effect

For those employers who already have valid arbitration agreements with employees, AB 707 will require that all arbitration fees be timely paid by the employer in accordance with the arbitration provider's policies. Those employers who fail to do so, either at the commencement of an arbitration case or during the arbitration process itself, will face forfeiture of their right to proceed or continue to proceed in arbitration, at the employee's election, as well as having to reimburse the affected employee for her/his attorney fees and costs incurred in the arbitration prior to transfer to court. For more information about this new law, please click here to read our prior client alert.

ENFORCEMENT of the "CROWN" ACT
Senate Bill 188 ("SB 188") - Creating a Respectful and Open World for Natural Hair

The CROWN Act prohibits employers and public schools from discriminating on the basis of "traits historically associated with one's race, such as hair texture and protective hairstyles." This includes braids, cornrows, dreadlocks, and twists. The California legislature codified SB 188 concluding: "Workplace dress code and grooming policies that prohibit natural hair, including afros, braids, twists, and locks, have a disparate impact on Black individuals as these policies are more likely to deter Black applicants and burden or punish Black employees than any other group.

"Based on this conclusion, Employers should review their Employee Handbooks, as well as hiring, dress, and grooming policies and provide training to those responsible for hiring and recruiting. There are still health and safety limitations, regardless of dress code and grooming practices, if a hairstyle cannot be pulled back and/or placed in a net (hair or beard) and the employee works in a food service or medical industry.

AB 5 – STATE CODIFIES THE "ABC TEST" FOR INDEPENDENT CONTRACTORS

Earlier this year we issued a client alert devoted entirely to the passage of Assembly Bill 5 ("AB 5") adding California Labor Code section 2750.3 to the books, and explained how it will change the employment relationship moving forward. While many of the gig businesses are challenging the new law (i.e., Uber, Lyft, etc.) this new law has far reaching implications for California businesses and becomes effective on January 1, 2020.

Section 2750.3 codifies the portion of the 2018 California Supreme Court decision, Dynamex Operations West v. Superior Court, which held that an individual is presumed to be an employee unless the hiring entity can satisfy all three of the following elements, commonly referred to as the "ABC Test":

- The person must be 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.
- The person must perform work that is outside the usual course of the hiring entity's business.
- The person must be customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Certain licensed professionals and industries are exempt from the "ABC Test." Those licensed professions and industries may classify independent contractors under California's prior independent contractor test known as the "Borello test" if they satisfy various requirements as enumerated in the statute. For more information about this new law, please click here to read our prior client alert.

EXTENSION OF PAID FAMILY LEAVE BENEFITS

Beginning on July 1, 2020, California will extend the maximum duration of California Paid Family Leave ("PFL") from six weeks to eight weeks. PFL is funded entirely through withholdings from employees' paychecks. PFL provides partial pay to employees who need to take time off from work to care for a seriously ill family member (child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered domestic partner) or to bond with a new child entering the family through birth, adoption, or foster care placement.

The PFL program is not a leave right and does not provide job protection, but other state and federal laws such as the federal Family and Medical Leave Act (FMLA), the California Family Rights Act (CFRA) and the New Parent Leave Act can provide such protection for eligible employees.

LACTATION ACCOMMODATION EXPANSION

Effective January 1, 2020, Senate Bill 142 ("SB 142") expands current law (Cal. Labor Code 1030 et seq.), under which employers are required to make reasonable efforts to provide a private location, other than a bathroom, in close proximity to the employee's work area, for employees to express milk in private and to provide reasonable break time to express milk.

SB 142 amends Cal. Labor Code section 1031 to require that the lactation space:

- be close to the employee's work area;
- be shielded from view and free from intrusion;
- be safe, clean and free of hazardous materials;
- contain a surface to place a breast pump and personal items;
- contain a place to sit; and
- have access to electricity or alternative devices (e.g., extension cords or charging stations) needed to operate a breast pump.

The law also requires that there be access to a sink with running water and a refrigerator suitable for storing breast milk close to the employee's workspace.

Employers with fewer than 50 employees may be exempt from these additional requirements. To be exempt, the employer must demonstrate that it would impose an undue hardship when considered in relation to the size, financial resources, nature, or structure of the business.

Denial of reasonable break time or adequate space to express breast milk is deemed a failure to comply with Cal. Labor Code section 226.7, which mandates rest and recovery periods. The penalty is one additional hour of pay at the regular rate of compensation for each workday a rest or recovery period is not provided.

SB 142 also prohibits discrimination or retaliation against an employee for exercising or attempting to exercise any right within Cal. Labor Code 1030, et seq.

Employers are also required to distribute a written policy regarding lactation accommodation requirements to new employees upon hire or a request for parental leave. The policy must, among other things, state that the employer will respond in writing if it is unable to comply with an employee's request for accommodation. The policy must also advise employees of their right to report violations to the California Labor Commissioner.

Further, the penalty for non-compliance also changed from $100 penalty per violation to $100 per day for each day on which an employee is denied reasonable break time or adequate space to express milk.

EXPANSION OF ORGAN DONATION LEAVE

Under the current law, employers with 15 or more employees already have to provide up to 30 business days of paid leave for organ donation and up to 5 business days of paid leave for bone marrow donation in a one-year period.

Effective January 1, 2020, section 1500 of the Labor Code is amended to require employers to give eligible employees an additional 30 business days of unpaid leave in a one-year period to an employee who requires leave to donate an organ to another person.

Consistent with the current law, an employee may still be required to provide written verification that he or she is an organ donor and there is a medical necessity for the organ donation.

Time spent by employees on leave under this statute does not constitute a break in service, and employers are required to maintain and pay for health insurance coverage on the same terms as the employee had prior to the leave.

The law also has strict anti-retaliation provisions.

Employers should keep in mind that employees who need to take time off to donate an organ may also be protected under state and federal laws against disability discrimination and association with a disabled person.

"NO-REHIRE" PROVISIONS NO LONGER PERMITTED IN SETTLEMENT AGREEMENTS

Beginning on January 1, 2020, it is prohibited in California for an agreement that settles an employment dispute to have a provision that prohibits an employee from working for the employer again (with limited exceptions).

The prohibition applies to settlements at any stage of dispute or in any venue, including an employer's internal grievance process, mediation, arbitration, court lawsuits, and government agencies.

It applies not only to the employer, but also the employer's parent company, subsidiary, division, affiliate, or contractor.

The prohibition applies to any no re-hire provision included in a settlement agreement on or after January 1, 2020. If such a prohibited provision is included, that provision is rendered void.

However, the law is not intended to infringe on certain rights of employers, including:

1. the employer's right to end a current employment relationship;
2. the employer's right to restrict a settling employee from being rehired, if the employer makes a good faith determination that the settling employee engaged in sexual harassment or assault; or
3. the employer's right to not continue to employ, or not to rehire an employee if there is a legitimate nondiscriminatory or non-retaliatory reason for terminating the employee or refusing to rehire the person.

EXTENSION OF SEXUAL HARASSMENT TRAINING DEADLINES

Before 2018, the law required that companies with 50 or more employees provide sexual harassment training to employees in supervisory positions every two years. In 2018, California passed a law amending Government Code section 12950.1 requiring employers with five or more employees to provide, by no later than January 1, 2020 (and every two years thereafter), at least two hours of sexual harassment training to all employees in a supervisory position and at least one hour of sexual harassment training to all nonsupervisory employees.

The new 2018 law required that new employees (regardless of position) receive sexual harassment training within six months of being hired. Also, seasonal and temporary employees, or any employee hired to work less than six months, need to receive the training within 30 calendar days after the hire date, or within 100 hours worked, whichever occurs first.

In 2019, the 2018 law was amended to change the deadline by which employers must comply with the new training requirements. The 2019 amendment extended the deadline from January 1, 2020 to January 1, 2021. The main reason for this amendment was so that employers who provided training to their supervisors in 2018 did not need to retrain them the next year, in 2019, rather than in two years.

Amended provides:

- All employers now have until January 1, 2021, to implement one hour of training for nonsupervisory employees and two hours of training for supervisory employees (if the employer was not previously training supervisors).
- If an employer provided training in 2018, they should do so again in 2020.
- If an employer provided training in 2019, they can wait to do so again until 2021.
- Employers should provide the training within six months of employees being hired.

MANDATORY IMPLICIT BIAS TRAINING AND TESTING FOR CERTAIN INDUSTRIES

Several bills passed in 2019 take aim at tackling implicit bias and will require additional mandatory training, including implicit bias training and testing for many professions. SB 464 and AB 241 require eight hours of implicit bias training every two years as well as two years of obtaining their licenses for perinatal healthcare providers and licensed medical professionals, including doctors, surgeons, physician assistants and nurses.

AB 242 requires implicit bias training every two years for judges, court personnel and attorneys. Court personnel must complete the training by January 1, 2022. Lawyers will have to meet the requirement after January 31, 2023.

EMPLOYING MINORS IN THE ENTERTAINMENT INDUSTRY

Current law regulates the employment of minors in the entertainment industry. It requires the written consent of the Labor Commissioner for a minor under 16 years of age to take part in certain types of employment and requires specified certification from a physician and surgeon in order for an infant under the age of one month to be employed on any motion picture set or location.

Effective on January 1, 2020, AB 267 expands the certification requirements for infants to cover any employment in the "entertainment industry," which the bill defines broadly to include any type of motion picture using any format (film, commercial, documentary, or television program), by any medium (theater, television, photography, recording, modeling, publicity, musical performances, advertising, and "any other performances where a minor performs to entertain the public").

CHANGE IN DOMESTIC PARTNERSHIP ELIGIBILITY DEFINITION

On July 30, 2019, Governor Newsom signed SB 30, a new law eliminating the limitations on who may form a domestic partnership. SB 30 changes how California law defines "domestic partnership." Under current law, a domestic partnership could only be entered into by either two adults of the same sex, or two adults of the opposite sex who were over the age of 62. SB 30 eliminates those requirements, allowing any two adults over the age of 18 to enter into a domestic partnership.

AIR QUALITY PROTECTION FOR EMPLOYEES

Effective on July 29, 2019, the Occupational Safety and Health Standards Board issued an emergency regulation intended to protect employees from wildfire smoke. While this emergency regulation is set to expire on January 18, 2020, it is subject to two possible 90-day extensions and a permanent rule is anticipated in 2020.

General Requirements

Employers need to monitor the Air Quality Index (AQI) at their worksites for fine particulate matter (PM 2.5). If the AQI for PM 2.5 is greater than 150 and the employer "reasonably anticipates" that employees will be exposed to wildfire smoke, then employers must reduce exposure to the smoke.

- Relocating them to enclosed buildings with filtered air (the engineering control method);
- Relocating them to another outdoor location where the AQI for PM 2.5 is 150 or lower (the administrative control method); or
- If neither of the above methods are possible, then employers must give employees the option to use air respirators.
- If the AQI >500, then respirator use is mandatory. Employers must also comply with Section a5144 of the regulations, including fit testing and medical evaluation requirements.

Finally, employers must establish a system to communicate to employees about AQI levels, including:

- Relaying information about available protective measures;
- Encouraging employees to inform them of worsening air quality and any adverse symptoms resulting from smoke exposure; and
- Providing training on the new regulation, including information about:
  - the effects of wildfire smoke;
  - how to obtain medical treatment;
  - how to obtain AQI information;
  - methods to protect employees from wildfire smoke; and
  - how to safely use respirators

Affected and Exempt Workplaces

Outdoor occupations and industries, including agriculture, construction, maintenance, and landscaping, are primarily affected.

Certain workplaces are exempt:

- Enclosed buildings;
- Vehicles that have air filter systems;
- Firefighters engaged in firefighting; and
- Employees with only short-term exposure to the smoke (less than one hour).

All employers with a worker who could spend a cumulative hour or more outside during a shift (including intermittent exposure) must comply with the regulations. This could affect:

- Certain warehouse jobs where employees might move in and out of doors or delivery jobs; and
- High traffic indoor worksites such as restaurants or banks where doors are consistently opened and allow in outside air.

FINAL IRS 2020 W4 FORM RELEASED

On December 5, 2019, the Internal Revenue Service (IRS) released the final 2020 Form W-4, Employee's Withholding Certificate. Existing employees will not be required to complete a new Form W-4 for 2020. Employers will continue to observe the withholding allowances and filing status elected by employees who completed a pre-2020 Form W-4. For newly hired employees after 2019, and for all existing employees who wish to adjust their withholding after 2019, the 2020 version will be the only valid Form W-4.

CONTACT US

We encourage you to reach out to Greg Norys, David Weiland, or any member of our Labor & Employment Practice Group with any questions or concerns.

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