DECEMBER 18, 2019 | LEGISLATIVE & STANDARDS BOARD UPDATES

2020 Legislative Update for California Employers

2019 has produced a long list of new employment laws on a myriad of topics that will bring significant changes for California employers in 2020. Workplace safety laws range from a revamped reporting requirement to a new wildfire smoke regulation. Additional laws affecting employers include a new test for determining independent contractor status, a ban on no rehire agreements and many more. Though many of these laws will add items to the employer to-do list, employers have at least secured a one-year reprieve for completing mandatory harassment prevention training introduced last year.

Key changes affecting private sector employers are summarized below. Unless otherwise indicated, these new laws take effect January 1, 2020.

Cal/OSHA Workplace Safety Laws

Cal/OSHA Revamps Reporting Requirements for Serious Injuries or Illnesses

As we reported in a prior blog, California has enacted major changes to the definition of "serious injury or illness" for purposes of California employers' duty to report certain serious workplace injuries to Cal/OSHA. Pursuant to Cal. Labor Code Sec. 6409.1(b), in every case involving a work related death or a serious injury or illness, the employer must "immediately" make a report to Cal/OSHA. Employers may be cited and subject to penalties for failure to make such reports, and reporting such incidents almost always leads to a site inspection by Cal/OSHA, which in turn most often results in Serious or Serious Accident-Related citations.

Cal/OSHA's prior, longstanding reporting rule defined "serious injury or illness" as any injury or illness occurring in a place of employment or in connection with any employment that requires in-patient hospitalization for a period in excess of 24 hours for treatment other than medical observation, or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement. The old definition excluded injuries or deaths caused by the commission of a Penal Code violation (e.g., an intentional assault and battery), or an auto accident on a public street or highway.

On August 30, 2019, California passed **AB 1805** to revise the definition of a "serious injury or illness" for reporting purposes. The changes appear to be designed to bring Cal/OSHA's reporting requirement more (but not entirely) in line with federal OSHA's hospitalization and amputation reporting rule. Specifically, Cal/OSHA's new reporting requirements:

1. Eliminate the old 24-hour minimum time for a stay at the hospital for an in-patient hospitalization to become reportable;
2. Specify that, for reporting purposes, an in-patient hospitalization must be required for something "other than medical observation or diagnostic testing";
3. Replace "loss of a member" with the term "amputation";
4. Expressly include the loss of an eye as a specific type of reportable injury;
5. Delete the old exclusion for serious injuries or deaths caused by a violation of the Penal Code; and
6. Narrow the exclusion for injuries caused by auto accidents on a public street, so that such accidents that occur in a construction zone are now reportable to Cal/OSHA.

In addition, **AB 1804** modifies the acceptable methods of reporting. The new law amends Labor Code section 1609.1 to remove the option for employers to report serious occupational injuries, illnesses, or deaths by email. Now employers must make such reports by telephone or through an online reporting portal being established by Cal/OSHA. However, because the online reporting portal is not yet operational, Cal/OSHA has specified that, for now, employers may continue making reports via email until the online portal is in place.

AB 1804 does not change the information that an employer must provide if that information if available, namely:

1. Time and date of the accident;
2. Employer's name, address and telephone number;
3. Name and job title, or badge number of the person reporting the accident;
4. Address of the site of the accident or event;
5. Name of the person to contact at the site of accident;
6. Name and address of the injured employee(s);
7. Nature of the injury;
8. Location where the injured employee(s) was (were) moved to;
9. List and identity of other law enforcement agencies present at the site of accident; and
10. Description of the accident and whether the accident scene or instrumentality has been altered.

Construction Contractors Required to Conduct Cal/OSHA Training on Valley Fever

AB 203 requires construction employers engaging in certain work activities or vehicle operation in counties where Valley Fever is highly endemic, to provide effective awareness training on Valley Fever to all employees before they begin work that is reasonably anticipated to cause substantial dust disturbance, and annually thereafter. The training must be first completed by May 2020. The legislation requires the training to cover specific topics and authorizes the training to be included in the employer's Injury and Illness Prevention Program training or as a standalone training program.

Wildfire Smoke Regulatory Standard

On the regulatory front, on July 18, 2019 the Cal/OSH Standards Board adopted an emergency regulation regarding hazards associated with wildfire smoke. The new standard (Title 8 section 5141.1 of the California Code of Regulations) requires California employers to take steps to protect workers who may be exposed to wildfire smoke.

Under the new regulation, covered employers must take the following steps to protect workers who may be exposed to wildfire smoke:

- Identify harmful exposures to airborne particulate matter from wildfire smoke before each shift and periodically thereafter by checking the Air Quality Index (AQI) for Particulate Matter (PM) 2.5 in regions where workers are located;
- Reduce harmful exposures to wildfire smoke if feasible, for example, by relocating work to an enclosed building with filtered air or to an outdoor location where the AQI for PM 2.5 is 150 or lower; and
- If employers cannot reduce workers' harmful exposure to wildfire smoke so that the AQI for PM 2.5 is 150 or lower, provide respirators such as N95 masks to all employees for voluntary use, as well as training on the new regulation, the health effects of wildfire smoke, and the safe use and maintenance of respirators.

Independent Contractor Status

Assembly Bill (AB) 5 generally imposes steeper hurdles for businesses seeking to classify workers as independent contractors. This extensive piece of legislation codifies and expands the applicability of the ABC test from the California Supreme Court's 2018 *Dynamex* decision (which we reported on in a prior blog) in determining whether a worker is an employee or independent contractor for purposes of the California Labor Code, Unemployment Insurance Code, and the Wage Orders.

The Supreme Court decision in *Dynamex* held that for purposes of the California Wage Orders, a worker who performs services for hire is an employee, rather than an independent contractor, unless the hiring entity establishes each of these three factors:

(A) that the worker is free from the control and direction of the hiring entity in performing the work;

(B) that the worker performs work that is outside the usual course of the hiring entity's business; and

(C) that the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

This ABC test has made it more difficult to properly classify workers as independent contractors than under the previously applicable *Borello* multi-factor test.

AB 5 expands upon *Dynamex* by making the ABC test applicable under the Labor Code and Unemployment Insurance Codes, in addition to the Wage Orders. This means the ABC test also applies for purposes of unemployment benefits claims and wage and hour claims under the Labor Code.

At the same time, AB 5 carves out a number of exceptions from the ABC test that were not specified in *Dynamex*, including, among others:

- Licensed insurance agents;
- Certain licensed health care professionals, including physicians, surgeons, dentists, podiatrists, psychologists, and veterinarians;
- California licensed lawyers, architects, engineers, private investigators, and accountants;
- Registered securities broker-dealers or investment advisers or their registered agents and representatives;
- Direct sales salespersons;
- Commercial fishermen (exemption is applicable only until January 1, 2023);
- Workers providing licensed barber or cosmetology services (exemption for licensed manicurists is applicable only until January 1, 2022);
- Workers performing certain types of marketing, human resources, or travel agent services;
- Graphic designers, grant writers, fine artists, certain tax professionals, payment processing agents, photographers or photojournalists, freelance writers, editors, or newspaper cartoonists;
- California real estate licensees and repossession agencies;
- Business to business contracts;
- Those performing work pursuant to a subcontract in the construction industry; and
- Relationships between referral agencies and service providers.

The exceptions are numerous and each one has different conditions that must be met for it to apply. The conditions touch on everything from specific licensing requirements to whether the service provider is truly free from the control and direction of the contracting business entity. Great care must be taken in reviewing the potential exceptions and analyzing whether they might apply. Some exceptions also alter the test that will apply in determining employee or independent contractor status. For example, AB 5 specifically recognizes that whether real estate licensees and repossession agencies are employees or independent contractors may be governed by other California statutes or standards.

Generally, however, where the ABC test does not apply, the longstanding multi-factor test from *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relation* will apply to determine employee or independent contractor status. The *Borello* test considers multiple factors such as the right to control, whether the parties believed they were creating an employer-employee relationship, the right to discharge, the distinctiveness of the services provided, the method of payment, and the length of time that services were provided, among others. Not all of these factors have to be met to establish independent contractor status.

Additionally, a separate Assembly Bill, **AB 170,** adds another exemption from the ABC test for newspaper distributors working under contract with a newspaper publisher and newspaper carriers working under contract, either with a newspaper publisher or newspaper distributor. The exemption is applicable only until January 1, 2021.

Employers are encouraged to consult with employment counsel in evaluating whether classifying workers as independent contractors is still proper in light of AB 5.

The Major Bans

Ban on New Mandatory Arbitration Agreements

With the passage of **AB 51**, mandatory arbitration agreements are now banned to the extent they cover any

discrimination claims under the California Fair Employment and Housing Act (FEHA), or any claims under the California Labor Code. Yet, there is a narrow exemption for persons registered with certain securities exchanges and related organizations.

Under this legislation, an applicant or employee cannot, as a condition of employment, continued employment or the receipt of any employment-related benefit, be required to waive any right, forum, or procedure under the FEHA or any other specific statute governing employment. Employers are also prohibited from threatening, terminating or otherwise retaliating against an applicant or employee because of the refusal to consent to a waiver. Violations of these provisions would constitute unlawful employment practices under the FEHA and would be a misdemeanor.

AB 51 applies to contracts entered into or modified or extended after January 1, 2020, so otherwise valid arbitration agreements already in existence appear to be enforceable. This new law does not restrict otherwise valid arbitration agreements, post-dispute settlement agreements or negotiated severance agreements.

For those arbitration agreements that may still be enforceable, **Senate Bill (SB) 707** adds a potentially severe penalty for failure to timely pay costs associated with mandatory arbitration. Citing an effort to curtail an employer's strategic non-payment of fees and costs, SB 707 adds severe limits on the extent to which mandatory employment and consumer arbitration may proceed where fees to initiate or proceed with arbitration are not paid by the party who drafted the agreement within 30 days of the due date. Non-payment of arbitration fees in a mandatory arbitration constitutes a breach of the arbitration agreement and allows the non-breaching party to instead bring the claims in court. In addition, the drafting party may be sanctioned and liable for attorney's fees and costs associated with the abandoned arbitration.

We anticipate that AB 51 and SB 707 will be challenged based on preemption under the Federal Arbitration Act. Stay tuned for additional developments as this legislation is litigated in the courts.

No Rehire Agreements

AB 749 resolves an ambiguity under current case law by generally prohibiting an employer from requiring, in settling an employment dispute, that a current or former employee agree not to obtain future employment with that employer.

As we reported in a prior blog, a similar issue arose last year in *Golden v. Cal. Emergency Physicians Med. Grp.*, in which the Ninth Circuit Court of Appeals ruled that the no hire provision contained in a settlement agreement between a physician and his former employer, a physician medical group, constituted a "restraint of a substantial character" on the physician's medical practice and therefore violated California's non-compete law, Business and Professions Code section 16600. Specifically, the Ninth Circuit found that the agreement's preclusion of the physician from working at "any facility owned or managed by" the employer was lawful, but that it violated Section 16600 to the extent that it permitted the employer to terminate the physician from employment with any medical facility where the employer contracts or may later contract for services.

AB 749 expands on this Ninth Circuit ruling by barring any agreement to settle an employment dispute from containing a provision "prohibiting, preventing or otherwise restricting" the employee from obtaining employment with the employer or "any parent company, subsidiary, division, affiliate or contractor of the employer."

Significantly, the law only applies in circumstances where the current or former employee has filed a claim against the employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process.

Yet, AB 749 clarifies that the law does not preclude any agreement to end a current employment relationship, or prohibit or restrict the current or former employee from obtaining future employment where the employer has made a good faith determination that the individual engaged in sexual harassment or sexual assault. The law further clarifies that it does not require an employer to continue to employ or rehire a person if there is a "legitimate, non-discriminatory or non-retaliatory reason" for terminating the employment relationship or refusing to rehire the person.

Employers should be mindful of these restrictions when entering into settlement agreements.

Changes to Workplace Discrimination and Harassment Laws

Statute of Limitations Extended for Discrimination Claims

Under existing law, as a condition for filing a civil lawsuit alleging workplace discrimination or harassment under the FEHA, an employee must file a verified complaint with the Department of Fair Employment and Housing (DFEH) within one year from the date upon which the unlawful practice occurred. **AB 9** extends the deadline for filing the complaint from one to three years, and specifies that the operative date of the complaint is the date that the intake form is filed with the DFEH. This new law presents major challenges to employers who face the prospect of employees filing employment discrimination lawsuits years after the underlying events when memories fade and witnesses may no longer be employed by the business.

Employers should revisit their record-keeping policies and practices as a result.

Ban on Hairstyle Discrimination

Under the FEHA, it is unlawful to engage in discriminatory employment practices, including hiring, promotion, and termination based on certain protected characteristics, including race. **SB 188** amends the FEHA to ban workplace dress code and grooming policies that prohibit natural hair, including afros and braids, that have a disparate impact on African Americans. Specifically, the bill defines race to include "traits historically associated with race," such as hair texture, braids, locks, twists and other "protected hairstyles."

Accordingly, employers should review their grooming and dress code policies to ensure that they do not regulate hairstyles that conceivably may be associated with one's race.

DFEH Authorized to Bring Federal Claims

AB 1820 expands the authority of the DFEH to bring civil actions for violations of specific federal civil rights and antidiscrimination laws, including Title VII of the Civil Rights Act of 1964, the federal Americans with Disabilities Act of 1990, and the federal Fair Housing Act.

Additional Enforcement Mechanisms

SB 229 adds mechanisms for assessing, contesting and enforcing penalties issued by the Labor Commissioner for violations of California Labor Code, including procedures for the Labor Commissioner to file the citation with the superior court in the county in which the person assessed has or had a place of business, to obtain an enforceable judgment.

Discriminatory Gender Pricing

Under **AB 1607**, cities and counties that issue business licenses will be required to notify licensees of existing laws regarding gender discrimination in pricing, including prohibitions against discriminatory pricing based on gender and requirements to post signs about pricing. The Department of Consumer Affairs is required to provide an informational pamphlet by October 1, 2020 and cities and counties that issue business licenses must begin notifying licensees of these various requirements by January 1, 2021.

Leave, Accommodations, and Benefits

New Requirements for Lactation Accommodation

Existing law requires that employers provide a reasonable amount of break time to employees desiring to express milk for the employee's infant child. **SB 142** now clarifies that an employer is required to provide a room or other location, subject to specific requirements, where the employee can express milk in private and access to a sink and refrigerator in close proximity to the employee's workspace.

Significantly, the law deems the denial of reasonable break time or adequate space to express milk a failure to provide a rest period in accordance with state law, resulting in liability for premium pay.

The new law also prohibits an employer from discharging, or in any other manner discriminating or retaliating against, an employee for exercising or attempting to exercise rights under these provisions and establishes remedies that include filing a complaint with the Labor Commissioner.

It should be noted that the bill authorizes an employer with fewer than 50 employees to seek an exemption from these requirements if the employer can demonstrate that the requirements pose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business. But an employer who meets the exemption must still make reasonable efforts to provide the employee with the use of a room or other suitable location, in close proximity to the employee's work area, for the employee to express milk in private.

SB 142 also requires employers to develop and implement a policy regarding lactation accommodation that includes the following:

(1) a statement about an employee's right to request a lactation accommodation, and the process by which the employee makes the request;

(2) an employer's obligation to respond to the request for a lactation accommodation; and

(3) a statement about an employee's right to file a complaint with the Labor Commissioner for any violation of a right to a lactation accommodation.

The employer must distribute this policy to new employees upon hiring and when an employee makes an inquiry about or requests parental leave. Further, if an employer cannot provide break time or a location that complies with this policy, the employer must provide a written response to the employee.

Employers should ensure their employee handbooks and other written policies comply with these requirements. In addition, employers should be mindful of potential rest period violations and may need to make premium payments where employee are not provided the opportunity for a lactation accommodation in accordance with SB 142.

Flex Spending Accounts

AB 1554 requires an employer to notify an employee who participates in a flexible spending account of any deadline to withdraw funds before the end of the plan year.

Leave for Organ Donation

Existing law requires a private employer to permit an employee to take a leave of absence, not exceeding 30 business days in a one-year period, for the purpose of organ donation. **AB 1223** requires such an employer to grant leave of up to an additional 30 business days to an employee who has exhausted all available sick leave and is an organ donor for the purpose of donating the employee's organ to another person.

Employers should update their policies and procedures to comply with this added requirement.

California Family Rights Act – Amendment Applicable to Air Carriers

The California Family Rights Act (CFRA) makes it an unlawful employment practice for an employer to refuse to grant a request by an eligible employee to take up to 12 workweeks of unpaid protected leave during any 12-month period to bond with a new child or care for themselves or a family member, as defined. Existing law makes this leave available to an employee with more than 12 months of service with the employer and at least 1,250 hours of service with the employer within the last 12 months.

AB 1748 amends the 1,250 hours of service requirement as applied to an individual employed by an air carrier as a flight deck or cabin crew member in a manner consistent with the federal Family and Medical Leave Act. The bill authorizes the DFEH to adopt regulations to calculate leave available to flight crew employees under this amendment.

Paid Family Leave Update

SB 83 allows workers paying into the State Disability Insurance Program to claim up to eight weeks in paid Family Leave benefits starting July 1, 2020. This is an increase from six weeks previously. Employers may need to update their handbook and other written policies/notices to reflect this change.

Beginning January 1, 2025, **AB 406** requires the Employment Development Department (EDD) to make the application for family temporary disability insurance benefits available in all non-English languages spoken by a substantial number of non-English-speaking applicants served by the EDD.

Industry Specific Employment Law Developments

Healthcare

Existing law provides for licensing and regulation of health facilities by the State Department of Public Health. Health facilities are prohibited from discriminating or retaliating against certain individuals for complaining or participating in an investigation related to the quality of care, services, or conditions at the facility. A person who willfully violates these provisions is guilty of a misdemeanor and subject to a civil penalty. **SB 322** provides protection from discrimination or retaliation for an employee or employee's representative who discusses possible regulatory violations or patient safety concerns with the inspector privately during the course of an investigation or inspection by the Department.

Entertainment

Employment of minors under age 16 in the entertainment industry currently requires written consent of the Labor Commissioner. In order for an infant under the age of one month to be employed on any motion picture set or location, the employer must obtain certification from a licensed physician and surgeon who is board-certified in pediatrics that certain conditions have been met. **AB 267** expands the certification requirements for infants to cover *any employment in the entertainment industry*, not just employment on motion picture sets or locations.

Wage and Hour

Under **SB 688**, the Labor Commissioner can now issue citations to an employer to recover restitution for paying less than a contract provides, even if such contractual wages are in excess of minimum wage.

Under **AB 673**, employees will now be able to recover civil penalties for late payment of wages through a Private Attorneys General Act (PAGA) action. The legislation also clarifies that employees cannot recover both PAGA penalties and statutory penalties for the same violation.

Under existing law, workers employed on public works projects must be paid no less than the prevailing wage. **AB 1768** expands the definition of "public works" to include work conducted during site assessment or feasibility studies. AB 1768 also specifies that preconstruction work, including design, site assessment, feasibility studies, and land surveying, are deemed to be part of a public work, regardless of whether any further construction work is actually conducted.

Lastly, under existing law, employees who quit must be paid within 72 hours of giving notice that they are leaving. Additionally, employees who are terminated must be paid on the same day as the termination (subject to certain exceptions). **SB 671**, which took effect on September 5, 2019, establishes a new exception allowing print shoot employees to be paid by the next regular payday following termination.

California Extends Deadline to Comply with New Anti-Harassment Training Requirements and Addresses Industry-Specific Requirements

Last year, California broadly expanded the harassment training requirements to small employers and, for the first time, required training of non-supervisory employees. Specifically, by January 1, 2020 employers with 5 or more

employees were required to provide sexual harassment training of at least two hours to supervisory employees, and of at least one hour to all non-supervisory employees. Providing some relief to employers, however, the Governor has signed into law **SB 778** extending the compliance deadline for this newly mandated anti-harassment training from January 1, 2020 to January 1, 2021. This extension takes effect immediately.

Notably, this extension of the harassment training deadline does not affect the training requirements applicable to seasonal, temporary or other employees hired to work for less than six months, or to migrant and seasonal agricultural workers. Those industry-specific workers must receive training within 30 calendar days after their hire date or within 100 hours worked, whichever occurs first.

In addition, **AB 547** was passed, requiring the Director of the Department of Industrial Relations to convene an advisory committee to refine the recommendations on in-person sexual violence and harassment prevention training requirements for janitorial employers and employees. As for the construction industry, **SB 530** instructs the Division of Labor Standards Enforcement to develop an industry-specific harassment and discrimination prevention policy for the construction industry, and allows employers of multiemployer collective bargaining agreements to satisfy anti-harassment training by verifying that employees have received the requisite training.

Minimum Wage Ordinances

As of January 1, 2020, the state's minimum wage will be $12 for employers with 25 or fewer employees and $13 per hour for employers with 26 or more employees. In addition, the following municipalities have enacted minimum wage ordinances that exceed the state minimum:

City	Standard Minimum Wage Effective 1/1/20 unless otherwise noted
Alameda	$13.50 (July 1, 2020)
Belmont	$15.00
Berkeley	$15.59 (current rate; Consumer Price Index ("CPI") increase July 1, 2020)
Cupertino	$15.35

Daly City	$13.75
El Cerrito	$15.37
Emeryville	$16.30 (CPI increase July 1, 2020 estimate $16.42)
Fremont	$13.50 (25 or fewer employees); $15.00 (26 or more) (effective July 1, 2020)
Long Beach	Follows state minimum wage, but expected increases for hotel and concessionaire workers in July 2020 (currently $14.97 and $14.72, respectively)
Los Altos	$15.40

Los Angeles	$14.25 (25 or fewer employees); $15.00 (26 or more) (effective July 1, 2020); $16.63 (current for hotels w/ 150 or more rooms; increase July 1, 2020)
Malibu	$14.25 (25 or fewer employees); $15.00 (26 or more)(effective July 1, 2020)
Menlo Park	$15.00
Milpitas	$15.00 (current rate; CPI increase July 1, 2020)
Mountain View	$16.05
Oakland	$14.14
Palo Alto	$15.40

Pasadena	$14.25 (25 or fewer employees); $15.00 (26 or more employees) (effective July 1, 2020)
Petaluma	$14.00 (25 or fewer employees); $15.00 (26 or more employees)
Redwood City	$15.38
Richmond	$15.00
San Diego	$13.00
San Francisco	$15.59 (current rate; CPI increase July 2020)
San Jose	$15.25
San Leandro	$15.00 (effective July 1, 2020)
San Mateo	$15.38
Santa Clara	$15.40

Santa Monica	$15.00 (26 or more employees; effective July 1, 2020); $14.25 (25 or fewer employees; effective July 1, 2020); $16.63 for hotel workers (current; with changes aligned to Los Angeles July 1, 2020)
Sonoma	$12.50 (25 or fewer); $13.50 (26 or more)
South San Francisco	$15.00
Sunnyvale	$16.05

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