

SEPTEMBER 28, 2016 | STATE & LOCAL TRENDS

More New Laws for California Employers

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Following a flurry of activity in the final days of California's legislative session, this past month Governor Jerry Brown has signed into law various employment bills addressing everything from state employee pensions to expanding overtime eligibility and regulating employment agreements. This continues the tide of new employee-friendly laws in the Golden State. Below is a summary of the major new state laws impacting private sector employers.

In Monumental Shift, California Bars Employers from Selecting Out-of-State Forums for Resolving Employment Disputes

Historically, employers have had the option of writing into an employment agreement the requirement that disputes arising from that agreement be litigated in an out-of-state court provided that there is some connection to that state forum by, for example, the employer maintaining a corporate headquarters there. However, in enacting Senate Bill (SB) 1241, California has by legislative fiat barred employers from requiring that California employees litigate any resulting disputes out of state.

Specifically, SB 1241 prohibits any contract entered into, modified or extended on or after January 1, 2017 from requiring an employee who *primarily resides and works in California* to litigate or arbitrate outside of California "a claim arising in California." Employers are also prohibited from using such contracts to deprive employees of any substantive protection under California law.

A significant concern is that SB 1241 authorizes employees to bring lawsuits to bar enforcement of voidable agreements due to forum selection and choice of law provisions, and in doing so may recover attorney's fees. Accordingly, it is imperative that employers ensure that, as of the first of the year, any such agreements entered into with employees, including confidentiality, executive and severance agreements, not require litigation or arbitration of disputes outside of the state, or the waiver of California employment law protections. Just as significant, an employer's attempt to enforce such an unlawful contract may place it in the defensive position of battling a lawsuit by a plaintiff's attorney whose motivation is the recovery of attorney's fees.

There is one notable exception, however. SB 1241 exempts from its provisions any contract with an employee who is individually represented by legal counsel in negotiating the terms of the agreement. Consequently, if employers are negotiating a severance or settlement with a current or former employee represented by counsel,

it is important that this representation be memorialized in the agreement should the employer consider selecting another state's forum or laws for any resulting dispute. It should be noted here that this law does not impact existing California law that requires the application of California substantive law to employment disputes where there is an important public policy interest at issue.

Limitation on Criminal Background Inquiries Now Includes Juvenile Court Proceedings

California Labor Code section 432.7 prohibits an employer from asking an applicant for employment to disclose, or from using as a factor in determining any condition of employment, information concerning an arrest or detention that did not result in a conviction, a referral or participation in any pre-trial or post-trial diversion program, and a conviction that has been judicially dismissed or ordered seal. AB 1843 amends this law to prohibit as well any inquiry into "an arrest, detention, processing, diversion, supervision, adjudication or court disposition that occurred while the person was subject to the process and jurisdiction of *juvenile court law*."

Expanded Overtime Eligibility to Certain Classes of Employees

Governor Brown just signed into law several bills that expand overtime eligibility for certain categories of employees. Under existing law, California's agricultural workers are entitled to overtime wages when they work more than 10 hours in a work day or more than 60 hours in a work week. Assembly Bill (AB) 1066 incrementally lowers the threshold hours for qualifying for overtime wages so that they are consistent with California's standard overtime rule.

Beginning January 1, 2019, agricultural workers will be eligible for overtime after nine and a half hours worked in a work day, or work in excess of 55 hours in a work week. Beginning January 1, 2020, that overtime threshold will be reduced to nine hours in a workday or 50 hours in a work week. The following year, that number will be reduced to eight and a half hours in a work day or 45 hours in a work week. Eventually, effective January 1, 2022, the overtime basis will be in line with state law, *i.e.*, eight hours in work day or 40 hours in a work week.

To address the concerns of small, independent farms, for businesses with 25 or fewer employees the multi-year phase in is deferred until 2022. The new law also vests with the Governor authority to temporarily suspend the scheduled implementation of the overtime requirements provided that implementation of the scheduled state minimum wage increase is suspended as well.

Similarly, California has expanded overtime protections for teachers employed by private elementary and secondary schools. Existing law exempts from overtime those private school teachers earning at least twice the state minimum wage for full-time employment and meeting other criteria. AB 2230 revises the earning standard for this exemption effective July 1, 2017. On or after that date, the law provides that the overtime exemption applies to private school teachers earning: 1) no less than 100 percent of the lowest salary offered by any school district; or (2) no less than 70 percent of the lowest salary offered by the school district or county in which the private elemental or secondary academic institution is located. In either instance, the comparable position must require a valid California teaching credential and not be pursuant to an emergency permit, intern permit or waiver.

Another new employment law impacts domestic workers. Specifically, SB 1015, removes the sunset provision to the Domestic Worker Bill of Rights, which granted overtime protections to California's privately hired domestic

workers. Thus, this bill has made the law's provisions permanent.

New Disclosures Required Regarding Protected Leave

AB 2337 requires that California employers provide specific written disclosures to employees upon hire concerning the existing entitlement to leave due to domestic violence, sexual assault or stalking under Labor Code section 220.1. The bill tasks the California Labor Commissioner with developing a form that employers may elect to use to comply with this provision.

Takeaways for Employers

As a result of these developments, we recommend that California employers update their template employment agreements to ensure that the forum selection and choice of law provisions are compliant. It is also important that any existing employment agreements modified or extended on or after January 1, 2017 be similarly updated.

California employer should modify their job applications to make clear that any inquiry into an applicant's criminal background excludes juvenile court proceedings, among other categories of prohibited inquiry under existing law. In addition, employers are advised in light of AB 2337 to update their employee handbooks to ensure that employees are notified of their right to leave due to domestic violence, sexual assault or stalking, as well as protection from retaliation for exercising those rights.