Reminder: New California Employment Laws Going Into Effect January 1, 2020

December 17, 2019

Key Points

- Numerous new California laws going into effect on January 1, 2020, will impact employers and employees.
- The most significant laws include a new employee classification law, extension of the statute of limitations for FEHA claims, the banning of mandatory arbitration agreements and the prohibition of "no rehire" provisions in settlement agreements.
- Employers are reminded to carefully evaluate their policies and practices in order to comply with these new laws as they head into the New Year.

As the New Year approaches, California employers are reminded to review their practices to ensure compliance with numerous new California employment laws that will go into effect January 1, 2020. The following is a summary of those laws.

Wage & Hour

- New Employee Classification Law Limits Use of Independent Contractors: AB 5 codifies the California Supreme Court's 2018 decision in *Dynamex Operations West, Inc. v. Superior Court* and makes it difficult for most employers to classify their workers as independent contractors. Please see our previous client alerts on AB 5 for further information.
  - https://www.akingump.com/en/news-insights/california-legislature-passes-landmark-worker-classification.html
  - https://www.akingump.com/en/news-insights/california-governor-signs-worker-classification-bill-into-law.html
- New Minimum Wage: The minimum wage for employers with 25 employees or less will increase from $11/hour to $12/hour, and from $12/hour to $13/hour for employers with 26 or more employees. These changes represent the next phase of the scheduled increases in the California minimum wage first implemented in 2016.
- Penalties for Late Payment of Wages: AB 673 provides that employees can recover penalties for late payment of wages in an administrative proceeding before the Division of Labor Standards Enforcement to recover unpaid wages. The employee

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may recover penalties for a violation under this provision or under the Private Attorneys General Act (PAGA), but not both.

- Restitution for Unpaid Wages: SB 688 provides that if an employer has paid an employee less than the wage set by contract in excess of minimum wage, the Labor Commissioner may issue a citation to the employer to recover restitution of the amounts owed.

Arbitration

- Mandatory Arbitration Agreements Banned: AB 51 effectively outlaws mandatory arbitration agreements for claims brought under the California Fair Employment and Housing Act (FEHA) or Labor Code. The law still allows employees to voluntarily agree to arbitration of FEHA and Labor Code claims as long as it is offered as an "opt in" and not an "opt out" agreement. The law creates a private right of action for employees who are required to sign an arbitration agreement in violation of the law, allowing for injunctive relief and attorney's fees. Although the law purports not to invalidate arbitration agreements that are otherwise enforceable under the Federal Arbitration Act (FAA), it is still widely expected to face challenges based on FAA pre-emption. On December 6, 2019, the U.S. Chamber of Commerce and National Retail Federation filed the first lawsuit seeking to invalidate the law as preempted under the FAA. Until the validity of the law is fully adjudicated, employers should review their arbitration agreements with counsel to assess the impact and potential risks imposed by AB 51.
- Arbitration Initiation Fees: SB 707 requires an employer to pay arbitration initiation fees within 30 days after the due date, or else it is deemed to be in material breach of the arbitration agreement and waives its right to compel arbitration. If the employer breaches, the employee can then proceed in a court of appropriate jurisdiction.

Settlement Agreements

- "No-Rehire" Provisions Void: AB 749 prohibits the use of "no re-hire" provisions in settlement agreements of employment disputes. However, the law does not apply when the employee subject to the "no re-hire" provision has engaged in sexual harassment or assault, or the employer has "a legitimate nondiscriminatory or non-retaliatory reason for terminating or refusing to rehire the person."

Discrimination/Harassment

- Statute of Limitations: AB 9 amends FEHA by extending the statute of limitations for employees to file discrimination, harassment and/or retaliation claims with the Department of Fair Employment and Housing (DFEH) from one to three years. As before, an employee has one additional year to file a civil action in court after receiving a right to sue letter from the DFEH.
- Lactation Accommodation Requirements: SB 142 expands lactation accommodation requirements by mandating that employers provide a lactation room or other suitable location which fulfills that purpose, not just make a reasonable effort to do so. A lactation location must additionally provide access to a sink and refrigerator in close proximity to the employee's workspace, have a place to sit, contain a surface for personal items, provide access to electricity or resources necessary to operate a breast pump and be safe, clean and free of hazardous materials.

- Discrimination Based on Hairstyle: SB 188 expands the definition of discrimination based on race to include traits historically associated with race, including hair texture and protective hairstyles.
- Sexual Harassment Training Extension: SB 778 provides that employers with five or more employees have until January 1, 2021, to complete sexual harassment training of employees, and thereafter must do so once every two years. This bill was effective immediately, and extended the prior deadline by one year.
- Harassment Training in Janitorial Industry: AB 547 requires that janitorial employers institute in-person training on sexual violence and harassment prevention for their janitorial employees.
- Implicit Bias Training: AB 241/AB 242 require doctors, surgeons, nurses, judges, attorneys and court staff to receive implicit bias training.
- DFEH Civil Actions for Discrimination: AB 1820 authorizes the DFEH to bring civil actions for violations of specified federal civil rights and antidiscrimination laws (e.g., Title VII, Title VIII, ADA).

Privacy

- Employee Data Exempt from CCPA: AB 25 provides that until January 2021, the California Consumer Privacy Act (CCPA) generally does not apply to employers collecting the data of its employees and job applicants for purposes solely related to employment. Please see our previous client alerts for further information.
  - https://www.akingump.com/images/content/1/0/v2/108933/Recorder09182019416642Akin.pdf.
  - https://www.akingump.com/en/experience/practices/cybersecurity-privacy-and-data-protection/ag-data-dive/ca-governor-signs-2019-ccpa-amendments-into-law.html.

OSHA

- Workplace Injury Definition: AB 1805 expands the definition of what constitutes “serious injury or illness” for purposes of reporting workplace injuries to the Division of Occupational Safety and Health (OSHA). The law removes the 24-hour minimum time requirement for qualifying hospitalizations, excluding those for medical observation or diagnostic testing, and adds the loss of an eye as a qualifying injury.

Entertainment

- Minors in the Entertainment Industry: AB 267 expands protection for minors working in the entertainment industry from those working on “any motion picture set or location” to cover any type of employment in the entertainment industry.
- Film Production Worker Benefits: SB 271 redefines “employment” for purposes of determining unemployment compensation benefits for motion picture production workers that work outside of California. Workers that perform services entirely outside of California will now still be eligible to receive benefits if the worker is a resident of California, is hired and dispatched from California and intends to return to California to seek reemployment after the conclusion of work outside the state.

Miscellaneous

- Gun Violence Restraining Orders: AB 61 authorizes employers and coworkers to petition a court to issue a gun violence restraining order, which prevents an individual who presents a threat to him/herself or others from "having in [his or her] custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition."
- Employee Flex Spending Accounts: AB 1554 requires employers to notify an employee who participates in a flexible spending account of any deadline to withdraw funds before the end of the plan year. Employers must use any two of the following forms of notice: email, telephone, text message, postal mail or in-person notification.

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