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NEW EMPLOYMENT LAWS FOR 2019

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Once again, the new year means new employment laws affecting California employers. Many of the new laws have arisen from the outcry over sexual harassment in the workplace (#MeToo), while others are designed to clear up ambiguities in prior legislation. Employers should review their policies and practices to ensure ongoing legal compliance and to limit potential exposure. As always, we are here to assist in this regard.

Unless otherwise indicated, all new legislation goes into effect on January 1, 2019.

Increased Harassment, Discrimination and Retaliation Protections

Harassment – Defamation Protection

AB 2770 provides employers and sexual harassment victims with protection from liability for defamation by an alleged harasser after a complaint of sexual harassment has been made. Specifically, the new law provides that:

- Employees who report sexual harassment, based on credible evidence and without malice, won't be liable for injury to the alleged harasser's reputation;
- Communications between the employer and interested persons (including a government agency, outside investigator or potential witness) will be protected; and
- An employer will not be permitted to reveal in a job reference whether an individual is not eligible for rehire because the employer determined that he/she engaged in sexual harassment.

Keep in mind that although the new law provides additional protections for communications regarding sexual harassment, it does not address communications regarding other forms of harassment, such as harassment based on race, religion, national origin, age, and other protected classifications.

Confidentiality Clauses in Settlement Agreements

In any civil or administrative claim in which sexual harassment, sexual assault, gender discrimination or retaliation has been alleged, SB 820 prohibits any settlement agreement from including a confidentiality provision that prohibits disclosure of factual information regarding the claim. Additionally, at the claimant's request, the settlement agreement may include a provision that limits the disclosure of the claimant's identity or of facts that would lead to the discovery of the claimant's identity. Other portions of settlement agreements may remain confidential, including the amount paid in settlement of a claim. Additionally, non-disclosure agreements are permitted where the factual allegations have not been filed in civil or administrative actions (i.e. where claims have only been set forth in a demand letter or an internal complaint).

Sexual Harassment

SB 1300 makes numerous changes to California's Fair Employment and Housing Act ("FEHA") relating to workplace harassment claims as follows:

- Prohibits an employer from requiring an employee to release a FEHA claim in exchange for a bonus, raise or continued employment;
- Expands employer liability for unlawful harassment by non-employees where the employer knew or should have known of the harassment and failed to take appropriate remedial action;
- Prohibits employers from requiring employees to sign non-disparagement agreements preventing the employees from disclosing information about unlawful acts in the workplace, including but not limited to sexual harassment (does not apply to negotiated settlement agreements or severance agreements); and
- Makes it harder for employers to prevail on harassment claims, by including legislative declarations that harassment cases are rarely appropriate for resolution on summary judgment, and that a single act of harassment may suffice to support a finding of a hostile work environment.

This legislation also prohibits a prevailing defendant from being awarded attorney's fees and costs unless specific factors are proven.

Sexual Harassment Training

Current law requires employers with 50 or more employees to provide supervisors with two hours of sexual harassment training. The California Department of Fair Employment and Housing ("DFEH") has clarified that the law requires that all such employees be trained during calendar year 2019. This means that supervisors who were trained in 2018 or before will need to be retrained in 2019.

As of *January 1, 2020*, SB 1343 requires all employers with five or more employees to provide two hours of sexual harassment and abusive conduct prevention training to supervisors, and one hour to non-supervisorial employees, within six months of hire or promotion, and every two years thereafter. Temporary and seasonal employees will be required to be trained within 30 days of hire or 100 hours worked, whichever is earlier. For temporary employees provided by a temporary

services employer, the training must be provided by the temporary services employer, not the client.

Waivers of Right to Testify

Pursuant to AB 3109, any provision in a contract or settlement agreement will be unenforceable if it prohibits testimony about criminal conduct or sexual harassment in an administrative, legislative or judicial proceeding. This applies only to testimony that is required, such as by subpoena or court order, or in response to a written request in an administrative or legislative hearing.

Gender Representation on Boards of Directors

Pursuant to SB 826, any publicly held corporation with principal executive offices in California will be required to place at least one female director on its board by *December 31, 2019*. Boards with five directors will need two female directors, and boards with six directors will need three female members by the end of 2021.

A corporation is not required to replace existing male board members to comply, and may instead increase the number of directors, adding a female board member.

For the purposes of this legislation, a "female" is defined as an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth.

Failure to timely comply with this new law may result in fines up to $100,000 for a first violation.

Leaves of Absence and Benefits

Paid Family Leave

California's Paid Family Leave Program ("PFL") provides partial wage replacement to employees who take leaves of absence for specified purposes. SB 1123 expands the program to allow employees to collect PFL benefits beginning *January 1, 2021*, if they take time off for activities related to the covered active duty status of their spouse, registered domestic partner, child or parent who is a member of the US Armed Forces. These activities are referred to as "qualifying exigencies" and include, but are not limited to, events such as official military ceremonies, briefings, changes to child care/financial/legal arrangements as a result of military service, counseling, or spending time with the covered service member during rest and recuperation leave. While PFL itself does not provide a leave, the federal Family and Medical Leave Act ("FMLA") provides up to 12 weeks of protected leaving for qualifying exigencies.

Lactation Accommodation

California employers currently must provide a private location in close proximity to the employee's work area, other than a toilet stall, for an employee to express breast milk. AB 1976 brings California law into conformity with federal law by requiring that the employer provide a location other than a "bathroom," rather than a toilet stall. The new law provides an undue hardship exemption under limited circumstances.

Hiring Practices

Salary History

AB 2282 clarifies some of the ambiguities in last year's legislation which prohibited inquiries about salary history and requires employers to provide pay scales to applicants upon request. In that regard, the Labor Code will be amended to clarify that:

- The prohibition on the use of salary history information does not apply to current employees, only to external applicants for employment;
- Employers may ask about an applicant's salary expectations for the position being applied for;
- Only external applicants (not current employees) are entitled to a pay scale upon request, and only after completing an initial interview; and
- 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 seniority or a merit system.

Criminal Background Checks

Current law generally prohibits consideration of an applicant's judicially sealed or expunged convictions. SB 1412 will narrow 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.

Wage and Hour

Minimum Wage

On January 1, 2019, the state minimum wage increases to $11 per hour for employers with 25 or fewer employees, and $12 per hour for employers with 26 or more employees. There is a corresponding raise in the minimum salary required to qualify as an exempt employee – as of January 1, 2019, exempt employees must receive an annual salary of at least $49,920 for large employers (26 or more employees), and $45,760 for small employers (25 or fewer employees).

In addition, many California cities and counties have their own minimum wage ordinances which may provide for a minimum wage in excess of the state's minimum wage. These include the cities of Belmont, Berkeley, Cupertino, El Cerrito, Emeryville, Los Altos, Los Angeles, Malibu, Milpitas, Mountain View, Oakland, Palo Alto, Pasadena, Richmond, San Diego, San Francisco, San Jose, San Leandro, San Mateo, Santa Clara, Santa Monica, and Sunnyvale, and Los Angeles County. Be sure to check the local city ordinances in these cities for their minimum wage requirements.

Split Shift Premiums

A recent update on the California Labor Commissioner's website signals a change in interpretation about how employees must be paid when they work a split shift. Historically, the split shift

premium has been based only on the statewide minimum wage; however, the updated information states that the split shift premium owed is *one hour at the state minimum wage, or the local minimum wage if there is one, whichever is greater*. A split shift is any two distinct work periods separated by more than a one hour meal period, unless the split shift is at the request of the employee rather than for the benefit of the employer. If there is more than one hour between shifts, the employee must receive a premium of one hour's pay at no less than the state or local minimum wage rate (whichever is higher) for the time between shifts. However, the split shift premium may be offset for an employee who earns more than minimum wage.

Copies of payroll Records

Existing law allows employees to "inspect or copy" their payroll records within 21 days of such a request. SB 1252 clarifies this to ensure that employers make and provide the copies rather than requiring that employees find ways to make the copies themselves; however, the employer may charge the employee "the actual cost of reproduction" of the records.

IRS Increases Standard Mileage Rates

Under California Labor Code §2802, employers must fully reimburse employees for all expenses actually and necessarily incurred. Although it is optional, many employers typically choose to use the IRS mileage reimbursement rate. The optional standard mileage rate has been increased to 58¢ per mile for business miles driven (up 3.5 cents from the rate in 2018).

Workplace Health and Safety

CA law prohibits the California Division of Occupational Safety and Health ("Cal/OSHA") from issuing a citation more than 6 months after the occurrence of an occupational safety and health standard violation. With regard to citations issued for violations of recordkeeping requirements, AB 2334 clarifies the definition of an occurrence to state that, "an 'occurrence' continues until it is corrected, or the division discovers the violation, or the duty to comply with the violated requirement ceases to exist. Employers are required to maintain injury and illness records for five years. Consequently, AB 2334 extends an employer's exposure to liability for workplace injury reporting violation penalties from 6 months to 5 years.

In addition, there are specific new laws that apply to talent agencies, agricultural employers, the construction industry, the petroleum industry, hotels and motels, feed truck drivers, and employers who hire port drayage motor carriers. If you operate in one of these specific industries, please contact us regarding what additional legislation may apply to your industry.

We look forward to continuing to work with you in 2019, and wish you a prosperous and successful new year.

Laura S. Withrow's practice encompasses all aspects of employment law, including wrongful discharge, discrimination and harassment litigation in both state and federal courts, wage and hour claim defense, representation of employers in hearings before administrative agencies, management training, and counseling employers on issues relating to employment agreements, commission plans, hiring, firings and other personnel matters.