2019 Employment Law Update

California Law Updates: *In the wake of #MeToo, California has enacted a number of new laws taking effect in 2019 related to protecting victims of sexual harassment in the workplace. These laws, along with other newly enacted state and federal employment laws and recent court decisions, are summarized below.*

New Sexual Harassment Laws:

Harassment Liability

Senate Bill 1300 amends the California Fair Employment and Housing Act ("FEHA") in several key ways:

1) Employers may now be held liable under FEHA for any type of prohibited harassment (rather than just sexual harassment) by non-employees against employees, contract workers, applicants or volunteers if the employer knows or should know about the harassment and fails to take immediate corrective action.
2) Employers may not require employees, as a condition of employment or in exchange for a bonus or a raise, to release any claims under FEHA or to sign a non-disparagement agreement that precludes the employee from discussing unlawful acts in the workplace such as, but not only, sexual harassment.
3) Employers are not permitted to recover costs or fees for lawsuits (even where there was a 998 offer) unless the action was frivolous, unreasonable or groundless.
4) Employers are permitted (but not required) to offer bystander intervention training to their employees, which includes information and practical guidance on how to recognize potentially problematic behavior and to motivate bystanders to take action when they observe such behavior.
5) Actionable harassment is anything that makes an employee's job more difficult—thus, a hostile work environment exists if it "disrupt[s] the victim's emotional tranquility in the workplace, affect[s] the victim's ability to perform the job as usual, or otherwise interfere[s] with and undermine[s] the victim's personal sense of well-being."
6) Now a single incident of harassment is sufficient to create a triable issue of fact regarding the existence of a hostile work environment, a single discriminatory remark is relevant circumstantial evidence of discrimination, and a hostile work environment is determined by examining the totality of the circumstances.
7) The legal standard does not vary by type of work or workplace, and the statute explicitly notes that harassment cases are rarely appropriate for summary judgment.

(See Cal. Gov't Code §§ 12923, 12940, 12950.2, 12964.5, and 12965.)

Sexual Harassment Settlement Terms and Testimony Waiver

Senate Bill 820, which adds section 1001 to California's Code of Civil Procedure, provides that it is now unlawful to include in a settlement agreement for claims brought relating to sexual assault, sexual harassment, or discrimination or retaliation based on sex any provision that would prevent the claimant from disclosing or discussing the factual information or allegations involved. In other words, a settlement agreement may not preclude a claimant from discussing their allegations publicly. However, the agreement may provide for the confidentiality of facts that would identify the claimant, if the claimant so desires. But the amount of settlement may be confidential, and these provisions do not apply to pre-litigation settlements.

In addition, Assembly Bill 3109, which adds section 1670.11 to the California Civil Code, provides that any contract or settlement provision that waives a party's right to testify in a legal proceeding regarding criminal conduct or sexual harassment on the part of the other contracting party is unenforceable.

These laws apply to any agreements entered into on January 1, 2019, or after.

(See Cal. Civ. Proc. Code § 1001 and Cal. Civ. Code § 1670.11.)

Sexual Harassment Prevention Training

Senate Bill 1343 amends the state's sexual harassment prevention training requirements found in California Government Code section 12950. Now, by January 1, 2020, all employers with ***at least five employees*** (rather than those with 50 or more employees as was previously required) must provide ***two hours*** of sexual harassment prevention training to all supervisory employees and at least ***one hour*** of sexual harassment prevention training to—for the first time—***non-supervisory employees***. In addition, employers must provide sexual harassment prevention training to ***temporary or seasonal employees*** within 30 calendar days of their hire or within 100 hours worked. This training must be offered within six months of hire (or promotion to supervisor) and every two years after that. California's Department of Fair Employment and Housing is working to develop one- or two-hour online videos (that will likely be free) to use for these trainings.

(See Cal. Gov't Code § 12950.)

Defamation Protection

Under Assembly Bill 2770, which amends California Civil Code section 47, an employee who makes credible allegations of harassment and employers who communicate with relevant parties about those allegations are shielded from defamation liability. Further, when an employer is contacted about a prior employee, the employer may reveal whether the employee is eligible for rehire based on the allegations of sexual harassment.

(See Cal. Civ. Code § 47.)

Personal Liability for Sexual Harassment

Senate Bill 224 amends who may be held personally liable for sexual harassment and now includes additional individuals such as an "investor, elected official, lobbyist, director and producer," who is in a "business, service, or professional relationship" with the plaintiff.

(See Cal. Civ. Code § 51.9 and Cal. Gov't Code §§ 12930, 12948.)

Other New Key Workplace Laws:

Lactation Accommodation

Assembly Bill 1976 amends section 1031 of the California Code to require employers to make reasonable efforts to provide nursing mothers with a location or room, "other than a bathroom," near the employee's working area for the mother to express milk. Previously, employers were required only to provide a space "other than a toilet stall." There is an exception if providing such a space would impose an undue hardship for the employer based on its size, nature, or the structure of the employer's business.

(See Cal. Lab. Code § 1031.)

Female Representation on Boards of Directors

Senate Bill 826 creates section 301.3 of the California Corporations Code and requires every publicly held corporation whose principal offices are located in California to have, at minimum, one female on its board of directors by the end of 2019. By the end of 2021, there must be two females on the board. Noncompliant corporations face fines of $100,000 initially and $300,000 for further violations.

(See Cal. Corp. Code § 301.3.)

Payroll Records

Senate Bill 1252 amends California Labor Code section 226 and expands the requirement that employers keep payroll records and allows an employee to inspect those records upon request. Employees are now also entitled to receive a copy of those records from the employer.

(See Cal. Lab. Code § 226.)

Wage and Salary Laws:

Local Minimum Wage Updates

As of January 1, 2019, the state's minimum wage increased to $12.00 per hour for employers with 26 or more employees. Oakland's minimum wage increased to $13.80 per hour, and San Jose's increased to $15.00 per hour.

Minimum Wage Updates for Exempt Employees

Beginning January 1, 2019, for employers with more than 26 employees, in order to qualify under the administrative, professional, or executive exemptions to California's overtime requirements, employees must earn a salary of at least $960 per week. Employers with fewer than 26 employees must pay a minimum salary of $880 per week to qualify for these exemptions.

(See Cal. Lab. Code § 515(a).)

Salary History

Assembly Bill 2282 clarifies last year's Assembly Bill 168, which prohibited employers from asking about or relying upon an applicant's salary history information when making hiring decisions, and amends California Labor Code sections 432.3 and 1197.5. It provides as follows:

1) The law applies only to outside applicants seeking employment with the company, not internal candidates.
2) An applicant may not request pay scale information until after he or she has completed an initial interview and "pay scale" means a salary or hourly wage range.
3) An employer may still ask an applicant about his or her salary expectations.

Following the Ninth Circuit's decision in *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018) (en banc), under the federal Equal Pay Act, an employer may not use an employee's prior salary (alone or in combination with other factors) to justify a wage differential between men and women. Assembly Bill 2282 applies this holding to California law as well.

(See Cal. Lab. Code §§ 432.3, 1197.5.)

Miscellaneous

- Talent agencies must provide education materials regarding sexual harassment to their clients *(Assembly Bill 2338; Cal. Lab. Code § 1700.50-.54.)*
- The Private Attorneys General Act does not apply to construction workers *(Assembly Bill 1654; Cal. Lab. Code § 2699.6.)*
- Some commercial drivers may begin their lunch breaks within their sixth hour of work (rather than within their fifth hour as is standard) under certain conditions *(Assembly Bill 2610; Cal. Lab. Code § 512.)*
- Hotel and motel employers as well as mass transit employers must provide training regarding slavery and human trafficking by January 1, 2020 *(Senate Bill 970/Assembly Bill 2034; Cal. Gov't Code § 12950.3.)*
- An employer may inquire about an applicant's criminal history only if a "particular conviction" is relevant to the position being applied for *(Senate Bill 1412; Cal. Lab. Code § 432.7.)*
- Attorneys must get written acknowledgement regarding mediation confidentiality from their clients before participating in mediation, though failure to comply does not require a settlement be set aside *(Senate Bill 954; Cal. Evid. Code §§ 1122, 1129.)*

Key Federal Law Updates:

- Congress amended the Fair Labor Standards Act to expressly prohibit employers (including managers and supervisors) from keeping any portion of an employee's tips. *(See 29 U.S.C. § 203(m).)*
- The Department of Labor intends to (but has not yet) update the current regulation regarding "joint employer liability," i.e., when multiple businesses share legal responsibility for wage and hour violations.
- In June 2019, the Equal Employment Opportunity Commission ("EEOC") plans to issue new rules regarding implementing workplace wellness programs. In 2016, the EEOC said businesses could encourage participation in workplace wellness programs with incentives worth up to 30% of the cost of self-only health insurance. A court found the rule unlawful and required the EEOC to draft a new rule. There is currently limited guidance for employers who wish to enact workplace wellness programs.

2018 Key Employment Law Cases:

- *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903 (2018)

  This year, the California Supreme Court held that, for purposes of wage and hour laws, employees should be *presumed* to be employees, rather than independent contractors, unless they satisfy the "ABC test." The ABC test requires an employer to show that the worker (A) is not controlled or directed by the hiring entity in his performance of work, (B) performs work outside the usual course of the hiring entity's business, ***and*** (C) is usually engaged in an independently established business or trade of the same type as that of the work being performed. It can be very difficult to prove a worker is a contractor under this test.
- *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)

  The U.S. Supreme Court held that class and collective action waivers in arbitration agreements are lawful.

Upcoming High-Profile 2019 Employment Law Cases:

- *Lamps Plus, Inc. v. Varela*, No. 17-988 (*argued* Oct. 29, 2018)

  The U.S. Supreme Court will consider whether an ambiguous arbitration agreement provision was sufficient to waive an employee's right to bring a class action in arbitration.

- *Title VII Cases*

  The U.S. Supreme Court may choose to consider a number of cases from around the country that have disagreed as to whether Title VII of the Civil Rights Act of 1964 prohibits sexual orientation discrimination.

- *Oman v. Delta Air Lines, Inc.*, 889 F.3d 1075 (9th Cir. 2018)

  The Ninth Circuit Court of Appeals certified questions to the California Supreme Court regarding whether California employment laws apply to mobile employees (like pilots) who work both in and out of the state.

Employer To-Do List:

Here are some steps to take to ensure your company is in compliance with these new legal developments:

- ✓ Update policies to provide that the company will ***undertake corrective action*** if an employee suffers ***any kind of unlawful harassment*** (by an employee *or* non-employee) while at work
- ✓ Remove any requirement that employees ***release FEHA claims*** or sign a ***non-disparagement agreement*** from handbooks and employment agreements
- ✓ Provide ***one hour*** of sexual harassment prevention training to ***non-supervisory and temporary or seasonal*** employees before January 1, 2020
- ✓ If your company has five or more employees, provide ***two hours*** of sexual harassment prevention training to your ***supervisory*** employees before January 1, 2020
- ✓ Create or designate a space, ***other than a bathroom***, for nursing mothers to express milk
- ✓ If you are a publicly traded company headquartered in California, at least one woman must be seated on your board of directors by the end of the year
- ✓ Ensure exempt employees still qualify under the new salary requirements
- ✓ Update policies to permit providing pay scale information to applicants that request it
- ✓ Carefully consider whether independent contractors are correctly classified under *Dynamex*'s ABC test

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