"New Employment Laws for 2019"

Presented by

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Employment Law, Advice, Litigation and Solutions

AB 3109 -Disclosure of Sexual Harassment:

- This bill makes void and unenforceable any provision in a contract or settlement agreement that prevents a party to the agreement from testifying about criminal conduct or sexual harassment in an administrative, legislative, or judicial proceeding.

- Applies to contracts entered into after January 1, 2019.

SB 820 Settlement of Sexual Harassment Claims

- This new law prohibits provisions in settlement agreements that prevent disclosure of factual information pertaining to claims of sexual assault, sexual harassment, gender discrimination, or related retaliation that have been filed in court or before an administrative agency.

- Additionally, at the claimant' 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.

- The new law does not prohibit a provision that prevents the parties to the agreement from disclosing the amount of the settlement.

- Applies to settlement agreements entered into after January 1, 2019.

- New law does not apply to pre-litigation claims/private resolutions.

AB 1619 - Sexual Assault; Statute of Limitations

This new law greatly enlarges the statute of limitations for filing a civil action for damages for sexual assault to 10 years after the alleged assault or 3 years after the plaintiff discovered or reasonably discovered injury as a result of the assault, whichever is later.

AB 2770 – Privileged Communications

- Under this new law, communications regarding sexual harassment claims are "privileged," which means that the person making the statement cannot be sued for defamation of character if the statement is made in good faith and without malice.
- The following communications are privileged:
  - A complaint of sexual harassment by an employee to an employer without malice.
  - Communications between the employer and "interested persons" without malice, regarding a complaint of sexual harassment.
- This new law also allows employers to answer, without malice, whether their decision not to rehire an employee is based upon the employer's determination that the former employee engaged in sexual harassment.

SB 1343 Non-Supervisory Employees Training

- By January 1, 2020, all employers with 5 or more employees must provide at least 2 hours of sexual harassment prevention training to supervisory employees, and at least 1 hour of training to all non-supervisory employees, and once every 2 years thereafter.

- Employers with temporary or seasonal employees (who work less than 6 months) must train their employees within 30 days of hire or within the first 100 hours of work, whichever occurs first.

Other Training Requirements

- Talent Agencies – AB 2338

  Adult artists must receive educational materials on sexual harassment prevention, retaliation, and nutrition and eating disorders within 90 days of engagement. A minor cannot obtain a work permit until parents or legal guardian receives training in sexual harassment prevention, retaliation and reporting.

- Human Trafficking – SB 970

  Hotels and motels must train each employee likely to interact or come into contact with victims of human trafficking for at least 20 minutes before January 1, 2020. New hires must receive such training within 6 months of hire. Thereafter, training on human trafficking awareness must be provided every 2 years.

SB 1300 -FEHA Amendments-Releases and Non-Disparagement

- An employer may not require an employee to sign a release of a claim or waiver of right covering a claim under FEHA as a condition of initial employment or continued employment, or in exchange for a raise or bonus.

- This includes requiring an employee to execute a statement that he/she does not possess any claims or injury against the employer, and the release of a right to file and pursue a claim in court or with an administrative agency.

SB 1300 -FEHA Amendments- Releases and Non-Disparagement

- It also prohibits employers from requiring an employee to sign a non-disparagement agreement that prevents the employee from discussing in the workplace any alleged unlawful acts, including sexual harassment or any other potential “unlawful conduct.”

- Does not apply to a “negotiated” settlement agreement to resolve an underlying FEHA claim filed in court, administrative agency, or internal complaint process. “Negotiated” means the agreement is voluntary, deliberate and informed, provides consideration of value to the employee, and that the employee is given notice and an opportunity to be represented by an attorney.

SB 1300 -FEHA Amendments- Expanded Liability for Third Party Harassment

- Employers already are liable for the acts of non-employees with respect to sexual harassment of employees, applicants, interns or volunteers, if the employer "knows or should have known" of the conduct and fails to take immediate and appropriate action.

- Under the amendment, an employer is liable for any kind of unlawful harassment, on the basis of any protected category, by non-employees.

SB 826 - Gender Composition of Boards of Directors

- Corporations Code - This new law provides for mandatory inclusion of women on corporate boards of directors. Specifically, by the end of 2019, publicly held domestic or foreign corporations with principal executive offices in California must have a minimum of one female director on its board, and by the end of 2021, these corporations must comply with the following:
  - 1) If its number of directors is six or more, the corporation shall have a minimum of three female directors;
  - (2) If its number of directors is five, the corporation shall have a minimum of two female directors;
  - (3) If its number of directors is four or fewer, the corporation shall have a minimum of one female director.

SB 826 - Gender Composition of Boards of Directors

- Secretary of State may impose fines, starting at $100,000, for violations, including for the failure to file timely board member information.

- "Female" means an individual who self identifies her gender as a woman, without regard to the designated sex at birth.

SB 1976 Lactation Accommodation

- Existing law requires employers to make reasonable efforts to provide a location other than a toilet stall to be used for lactation. The new law specifies that the location should be something other than a bathroom, and further specifies that it generally should be a permanent location but that it can be a temporary location if (1) the employer is unable to provide a permanent location due to operational, financial, or space limitations; (2) the temporary location is private and free from intrusion while being used for lactation purposes; and (3) the temporary location is not used for other purposes while being used for lactation.

- If an employer can prove that it is an undue hardship to comply with these requirements, the employer may be able to provide a location (including a bathroom) other than a toilet stall for the employee to use for lactation purposes.

AB 1654 - PAGA Relief for Unionized Construction Employers

- This new law provides that unionized workers in the construction industry are not covered by PAGA (i.e. they cannot bring PAGA claims), provided that the CBA
  - (1) is entered into prior to January 1, 2025;
  - (2) provides for the wages, hours of work, and working conditions of employees, premium wage rates for all overtime hours worked, and for the employee to receive a regular hourly pay rate of not less than 30 percent more than the state minimum wage rate;
  - (3) prohibits all of the violations of the Labor Code that normally would be redressable under PAGA;
  - (4) provides for a grievance and binding arbitration procedure to redress those violations and authorizes the arbitrator to award any and all remedies otherwise available under the Labor Code (except PAGA remedies); and
  - (5) expressly waives PAGA rights.

SB 1252 - Copy of Payroll Records

- Existing law already requires that employees have a right to inspect or copy their payroll records and that they must be allowed to do so within 21 days of such a request.

- This new law clarifies that if an employee requests a copy of the records, the employer must provide the copies (as opposed to requiring employees to copy the records themselves).

AB 2282- Amendment to Salary History Ban

- On 1/1/2018, AB 168 went into effect preventing employers from asking about or relying on an applicant's salary history information when making hiring decisions.

- Clarifications of Terms –
  - AB 168 provides, "employer, upon reasonable request, shall provide the pay scale for a position to an applicant." The term "pay scale" means "a salary or hourly wage range," and the term "reasonable request" means a "request made after an applicant has completed an initial interview with the employer."

  - "Applicant" means an individual seeking employment and not currently employed in any position or capacity.

  - Employer may ask about "salary expectation."

AB 2282- Amendment to Salary History Ban

- AB 2282 also provides that an employer may not have a disparity of pay between sexes unless the employer can show that the disparity is due to one of the following:
  - A seniority system
  - A merit system
  - A system that measures earnings by quantity or quality of production
  - A bona fide factor other than sex

AB 1565 Contractor Liability

- Contracts entered into on or after January 1, 2019- requires a direct contractor to specify in its contract all documents or information that the direct contractor will require the subcontractor to produce before the direct contractor is allowed to withhold payments for disputed sums

- Subcontractors may include the same requirements in their contracts with lower tiered subcontractors

Dynamex Operations West, Inc. v. Superior Court of Los Angeles

What Is an Independent Contractor?

Generally, an independent contractor is a worker who:

- Is not an employee
- Is "any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished" (Labor Code §3353)

What Is an Independent Contractor?

An independent contractor typically does not:

- Maintain timesheets
- Receive company-sponsored benefits, such as paid vacation, health insurance, or retirement benefits
- Perform the same work as the company's employees
- Have the "indicia" of an employee, such as company uniforms, name badges, or business cards

Classification: Overview

- Simply referring to a worker as an independent contractor, even if they agree to that designation, is not enough. Do not rely on title.
- Classification depends on:
  - The specific facts/duties of each case
  - Application of the appropriate independent contractor tests- The Economic Realities Test (federal); The Control Test (IRS); State law tests, i.e. the California ABC Test
  - Differences in how courts and government agencies interpret those tests

State Law Tests / California "ABC Test"

- State independent contractor tests can impose a more narrow definition than the federal equivalent
- California - Dynamex Operations West, Inc. v. Superior Court of Los Angeles- April 30, 2018
- Burden on any entity classifying an individual as an independent contractor of establishing that such classification is proper
- Person performing work for another will be presumed to be an employee

State Law Tests / California “ABC Test”

- Under the ABC test, a worker will be deemed to have been “suffered or permitted to work,” and thus, an employee for wage order purposes, unless the putative employer proves that:
  - (A) The worker has been and will continue to be free from control or direction over the performance of their work, both under the contract for the performance of the work and in fact;
  - (B) that the worker performs work that is outside the usual course of business of the hiring entity’s business;
  - (C) The worker is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as the work performed.

- Note that each of these requirements need to be met in order for the presumption that a worker is an employee to be rebutted, and for a court to recognize that a worker has been properly classified as an independent contractor.

Best Practices

Best Practices

- To ensure the independent contractor classification requirements are satisfied:
  - Careful analysis of the specific facts/duties of the services being provided and application of ABC Test
  - Use an independent contractor agreement to establish the terms of the working relationship
  - Avoid using former employees as independent contractors and having independent contractors do the same work as employees
  - Avoid using independent contractors to perform work that is integral to the business
  - Require independent contractors to complete a Form W-9, Request for Taxpayer Identification Number and Certification
  - Keep independent contractor files with vendor files, not employee files

Best Practices

- Do not invite contractors to employee-only events or meetings.
- Do not provide contractors with company business cards.
- Do not give independent contractors job titles.
- Deal with performance problems as contract modification or breach issues, not as disciplinary issues. Do not conduct performance evaluations for independent contractors. Do not involve Human Resources in the business relationship with independent contractors.
- Determine if the company's competitors classify similar workers as employees instead of independent contractors.
- Regularly audit the company's independent contractor arrangements and template agreements.
- Do not control the details of how the independent contractor performs the work. Focus on the end result rather than the details.

De Minimis – Troester v.
Starbucks

De Minimis Doctrine AFTER Troester v. Starbucks

- De minimis doctrine holds that some work time is so small that it need not be recorded and paid. Reason: administratively difficult to record the work time.
- In Troester, Troester sued Starbucks for work time of 4-10 minutes in a day for the time he spent closing the store after clocking out. Over a period of 17 months, he had approximately 12 hours of work and the amount of unpaid wages was $102.67.

De Minimis Doctrine AFTER Troester v. Starbucks

- In Troester v. Starbucks Corporation, the California Supreme Court held that the federal de minimis doctrine did not apply to Troester's claims, because Starbucks could record the time and it was not administratively difficult to do so.
- According to this court decision, California employers should not require employees to work off-the-clock without compensation, even if only for a few minutes.

Rounding – Legal or Not?

- Is rounding of time no longer legal?
  The Troester v. Starbucks decision favorably cites a well-established decision involving See's Candy, which held that neutral rounding policies are permissible provided they do not result in a disadvantage to employees.
- The problem is that, in practice, it is very difficult to predict in advance whether a neutral rounding policy will disadvantage employees.

Questions and Answers

Any Questions?

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