Tucker Ellis LLP

CLIENT ALERT

NEW CALIFORNIA EMPLOYMENT LAWS FOR 2020: WHAT EMPLOYERS SHOULD KNOW

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With the upcoming new year comes a host of new California employment laws that will take effect on January 1, 2020 and beyond.

The new laws address several topics, including:

- Independent Contractor Status
- Statutes of Limitations for Administrative Claims
- Enforcement of Arbitration Clauses
- Employee Accommodations
- Discrimination and Harassment Training
- Payment of Wages
- Mandatory Arbitration Clauses
- Settlement Agreements

All employers with operations in California should be aware of these new laws, understand how these laws may affect their operations, and consult with counsel to address any compliance questions.

Independent Contractor Classification – AB 5. Of all the new laws going into effect on January 1, AB 5 garnered the most attention and likely will have the most wide-ranging repercussions for companies and industries that rely on independent contractors in California. As reported in detail in our previous alert, **Dynamex Is Here to Stay**, AB 5 codifies the California Supreme Court's 2018 ruling in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, that in order for a worker to be properly classified as an independent contractor, the company must be able to answer "yes" to the following three questions:

A. Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?

B. Does the worker perform work that is outside the usual course of the hiring entity's business?

C. Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?

This three-part "ABC" test has and will continue to drastically change the way many companies conduct their business and treat their workers. Therefore, employers must continue to be careful in making the determination that workers are independent contractors, as there are many wage and hour penalties for unpaid wages, unpaid overtime, and missed meal and rest breaks in addition to the large civil penalties under Labor Code section 226.8, which is a fairly recent law that added penalties from $5,000 up to $25,000 for each violation. Employers also will now have to provide unemployment and workers' compensation insurance for employees who were previously classified as independent contractors.

Extension of Statute of Limitations for FEHA Claims – AB 9. Known as the "Stop Harassment and Reporting Extension ('SHARE') Act," this law extends the time within which employees can file a charge of discrimination, harassment, or retaliation with the Department of Fair Employment and Housing from one year to three years. As a result of this change in the law, employers will now potentially face claims long after the events giving rise to them

occurred and could have been dealt with – complicated by the potential for evidence lost over time. AB 9, however, does not revive lapsed claims.

Industry-Specific Discrimination and Harassment Prevention Training – SB 530. SB 530 delays the implementation of mandatory sexual harassment training for seasonal or temporary employees (those hired to work for less than six months) to 2021; however, the bill creates an exemption for employees subject to a multiemployer collective bargaining agreement where the employer can verify the employee has been trained within the past two years by another employer. SB 530 also requires the Division of Labor Standards Enforcement (DLSE) to develop construction industry-specific harassment and discrimination prevention policies and training recommendations.

Sexual Harassment Training Requirements – SB 778. As a result of legislation passed in 2018, California employers who employ five or more employees, including temporary or seasonal employees, were required – by January 1, 2020 and once every two years thereafter – to provide two hours of sexual harassment training to all supervisors and managers and at least one hour of sexual harassment training to all nonsupervisory employees. SB 778 extends the compliance deadline to January 1, 2021. This bill also requires that new nonsupervisory employees be provided the training within six months of hire and new supervisory employees be provided the training within six months of the assumption of a supervisory position.

Lactation Accommodation – SB 142. SB 142 expands an employer's duties and responsibilities in providing lactation accommodation to employees who need to express breast milk. Under the new law, employers must provide a break each time an employee has need to express milk, as well as a clean, safe, hazardous material-free, non-restroom lactation room in close proximity to the work area. The lactation area must include a place to sit, a flat surface for placing items such as a breast pump, and access to electricity. The employer must also provide access to a sink with running water and a refrigerator suitable for storing milk in close proximity to the employee's workplace. If a multipurpose room is used for lactation, then lactation must take precedence over other uses. Employers are required to develop and implement policies regarding employees' rights to lactation accommodation. Denial of a reasonable break time or adequate space to express breast milk is a violation of Labor Code Section 226.7 requiring one additional hour of pay at the employee's regular rate of pay for each workday that a break is not provided, and the Labor Commissioner may impose a civil penalty of $100 for each day an employee is denied adequate break time or space to express milk. Finally, SB 142 makes it unlawful for an employer to discriminate or retaliate against an employee for exercising her rights under this law.

Hairstyle Discrimination – CROWN (Create a Respectful and Open Workplace for Natural Hair) Act – SB 188. Many employers have employee manuals in place that include certain dress, grooming, and hair requirements. The New York Yankees are perhaps the most famous such employer, prohibiting their baseball players' scalp hair from exceeding a certain length and forbidding the display of any facial hair other than mustaches (except for religious reasons).

California employers should review their employee manuals and policies to ensure that their grooming and hair requirements comply with SB 188, which prohibits discrimination based on "traits historically associated with race," such as hair texture and protective hairstyles, but allows employers to continue enforcing dress and grooming policies in place for health, safety, or hygienic reasons. Examples of protected hairstyles include but are not limited to Afros, cornrows, braids, locks, and twists.

SB 188 applies to public schools and public and private employers. While SB 188 does not apply to religious associations and nonprofit organizations, such employers should still take precautions to avoid liability under different legal requirements, such as religious accommodation and race discrimination laws.

Expansion of Appeal and Enforcement Powers of the Labor Commissioner – SB 229. SB 229 expands the appeal and enforcement powers of the California Labor Commissioner. Effective January 1, if the Labor Commissioner cites an employer for violating anti-retaliation provisions, the cited employer may request an appeal hearing within 30 days. If the employer does not request a hearing within 30 days, the citation becomes final, and 10 days after the citation becomes final, the Labor Commissioner applies for entry of judgment via the Superior Court in the employer's county.

Recovery of Civil Penalties for Unpaid or Unequal Wages – AB 673. This law amends California Labor Code Section 210 to allow employees to recover certain statutory penalties or enforce civil penalties against an

employer for failure to pay equal wages or timely pay wages. Under the Labor Code, employers are prohibited from paying an employee a lesser rate than the rates paid to an employee of the opposite sex, unless there are bona fide reasons or a seniority, merit, or quality or quantity of production system in place. California employers also are required to pay employees wages weekly, semi-monthly, or monthly depending on the type of job and position. Prior law allowed the Labor Commissioner to recover a civil penalty as part of a hearing or in an independent civil action. The amended law allows affected employees to bring their own action to recover statutory penalties against the employer. AB 673 provides that for any initial violation, the employer is subject to a $100 penalty for each failure to pay each employee. For each subsequent violation or any willful or intentional violation, the employer is subject to a $200 penalty for each failure to pay each employee, plus 25% of the amount unlawfully withheld. The employee can either recover the statutory penalty or enforce civil penalties under the Private Attorneys General Act of 2004 (PAGA), but cannot recover both for the same violation.

Exclusion of Employee Data from the California Consumer Privacy Act ("CCPA") – AB 25. The CCPA goes into effect on January 1, 2020 and "grants consumers various rights with regard to their personal information held by businesses, including the right to know, access and request deletion of their data." The most highly anticipated change to the CCPA was the clarification to the definition of "consumer." As originally written, the CCPA indicated that employees could be considered consumers, which would restrict employers' ability to collect personal information from their employees, job applicants, contractors, etc. AB 25 excludes employee data from several rights – opt-out, access, and deletion – while maintaining employers' obligation to disclose what data they collect on employees and employees' private right of action in the event of a data breach. This exception applies only in 2020, as the legislature will revisit these issues in the upcoming term.

Further Limitations on Enforcement of Mandatory Arbitration Clauses – AB 51. This new law prohibits employers from requiring any job applicant or employee to agree to mandatory arbitration clauses, and it will prevent employers from threatening, retaliating, or discriminating against or terminating any job applicant or employee that refuses to agree to a mandatory arbitration agreement. Employers who violate this law may be subject to misdemeanor criminal liability, but this law will not necessarily prohibit employers from enforcing arbitration agreements to which an employee voluntarily agrees.

The practical effects of this law remain to be seen. AB 51 is simply the latest iteration of AB 3080, which former Governor Jerry Brown vetoed in 2018. AB 51 will be subject to legal challenges based on the same reasons Gov. Brown vetoed AB 3080 – in the words of Gov. Brown, it "plainly violates federal law." Specifically, Congress enacted the Federal Arbitration Act (FAA) in 1926 and sought to create a uniform federal scheme favoring arbitration agreements. Most state laws that weaken the enforceability of arbitration agreements are therefore preempted by the FAA.

Employers – particularly large employers operating in multiple states and for whom the efficiencies of arbitration are valuable – should consult legal counsel to determine the most appropriate course of action to take with respect to mandatory arbitration clauses. The FAA arguably preempts at least part of AB 51 (i.e., AB 51 may be found to be unenforceable in the future). Legal challenges are on the horizon.

Due Dates for Fees and Costs Under Arbitration Agreements – SB 707. While we are on the subject of arbitration agreements, companies that include mandatory arbitration agreements in employee contracts will be required to pay their portion of arbitration fees within 30 days of "initiat[ion] of arbitration." This law was enacted because some companies had been accused of stalling in paying fees to frustrate the arbitration process. Failure to timely pay arbitration fees waives the right to arbitrate and allows an employee to proceed in civil court. This may prove problematic for companies with hundreds or thousands of employees because the plaintiff's bar has begun mass filing individual arbitration claims in response to the California Supreme Court upholding the validity of class action waivers in employment contracts.

Ban on No-Hire Provisions in Settlement Agreements – AB 749. This law prevents employers from including no rehire provisions in settlement agreements with employees that leave a company, voluntarily or otherwise.

Agreements that violate this law will be void as a matter of law – that is, an employee is incapable of waiving this right. This is consistent with California's longstanding public policy against contracts that restrict employee movement; however, there are important carve outs. An employer is not required to keep or rehire an employee who was terminated for legitimate business reasons, i.e., a person that proved unqualified for the job. Employers may still

include no rehire language in a separation agreement if there is a determination that the employee engaged in sexual harassment or sexual assault as defined in AB 749 and the California Penal Code.

Minimum Wage Increase. Although not technically a part of 2019 legislation, the minimum wage across California will increase again on January 1, 2020, based on previous legislation signed by Governor Brown in 2015. On January 1, 2020, employers with 26 or more employees must pay $13.00 per hour, and employers with 25 or fewer employees must pay $12.00 per hour. This minimum wage increase is part of California's broader, gradual move toward meeting the goal of a $15.00 per hour minimum wage for large employers by 2022 and all employers by 2023.

Keep in mind that certain cities and counties have minimum wage requirements that exceed the state's minimum wage requirements. For example, the minimum wage in Los Angeles is currently $14.25 per hour and increases to $15.00 per hour on July 1, 2020. In San Francisco, the minimum wage rose to $15.59 per hour on July 1, 2019 and will increase again on July 1, 2020.

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The burdens of employing people in California continue to rise. As a result, it is becoming increasingly important for employers to proactively determine, *before they get sued*, where they are vulnerable. 2020 will be interesting for businesses of all sizes, and Tucker Ellis will continue to carefully monitor the impact of these new laws. Happy 2020!

ADDITIONAL INFORMATION

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