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Calif.'s Top Employment Law Developments In 2018

By **Mellissa Schafer** (December 17, 2018, 2:16 PM EST)

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California had an influx of new employment laws that were enacted in 2018. California employers, once again, have their work cut out for them in addressing and complying with the new laws that mostly take effect on Jan. 1, 2019. Many of the new laws passed appear to have roots in the #MeToo movement, which has filled our news feeds throughout the year. As we look back on what has occurred in the employment arena during 2018, one thing is certain: California employers are continually kept on their toes. Whether it is with updating and adding training, or updating employee handbooks, human resources personnel for California employers will stay busy.

The California Legislature proposed a variety of bills addressing sexual harassment in addition to codifying recent laws passed in 2017. As noted, many of the laws passed seem to relate to the #MeToo movement. All in all, it was a very busy year for labor and employment.

New Diversity Mandates and Anti-Harassment Legislation

Multiple bills were signed dealing with sexual harassment as well as equalizing the rights between men and women. SB 826 has been detailed as one of the most controversial during the year. It requires publicly held corporations, both domestic and general or foreign, who have their principal executive offices per their U.S. Securities and Exchange Commission 10-K form in California to include women directors on their boards. This is a novel and aggressive approach, but one that is designed to increase diversity and equality. The law basically has a two-tiered system. The first tier or requirement under SB 826 requires covered corporations to have at least one female director by the end of the 2019 calendar year. The second (and third) tier requires covered corporations that have five or more directors on the board to include at least two female members by the end of 2021 and covered corporations with six or more board seats to have at least three women by the end of 2021. The penalties are steep. First time offenders are penalized at $100,000 and penalties rise to $300,000 for subsequent violations.

Previously, California has required employers with 50 or more employees to provide supervisors with two hours of sexual harassment training within six months of assuming a supervisory role or every two years. In 2017, California added harassment training based on gender identity, gender expression and sexual orientation. Gov. Jerry Brown has now signed SB 1343, which provides for even greater requirements for anti-harassment training. These new requirements are quite significant. Sexual harassment training now applies to employers with five or more employees. Small employers, who may or may not have employment counsel, will be held to the same standard as larger employers. The most noteworthy part of this bill requires employers with five or more employees to provide at least one hour of training to all nonsupervisory employees by Jan. 1, 2020 and every two years thereafter. Training of nonsupervisory employees is a first. Since anti-harassment training became a requirement in the California employment world, it has only applied to supervisory positions. Now, it seems to apply to every employee if you have five or more employees. In fact, even temporary or seasonal workers are required to have this training.

The expansion of the harassment training is likely to create additional burdens for small employers as well as for employers who hire on a seasonal or temporary basis. It appears the Legislature realized this possibility as the state has tapped the Department of Fair Employment and Housing to develop one- and two-hour online training courses to be posted on their website for employers to utilize at what appears to be no cost.

Lactation laws, while newer, have been in place for a few years. However, they have consistently been developing. AB 1976 now requires employers to make reasonable efforts to provide a room, other than a bathroom, to accommodate employees expressing breast milk. Previously, the law required an employer to provide a room other than a toilet stall. Now, a community bathroom with a private area for lactation is insufficient and an employer cannot simply provide a bathroom for lactation use. It should be pointed out that Brown vetoed another bill that would have taken lactation rights/privacy even further requiring a sink and refrigerator in a private room that is located in close proximity to the mother. Employers should note that under AB 1976 they are allowed to make a temporary private location if the employer is unable to provide a permanent location due to operational, financial or space limitations. There is also a narrow undue hardship exception to take into account the employer's nature of business and size. Employers should be reminded that they are still required to grant a reasonable amount of break time to accommodate any employee desiring to express breast milk for a child.

In the wake of the #MeToo movement as well as the gymnastics scandal that rocked Michigan State University and USA Gymnastics, it was not surprising to see SB 820 pass. This law prohibits the terms of a settlement agreement preventing the disclosure of factual information relating to claims of sexual assault, sexual harassment, harassment, or discrimination based on sex, or retaliation for filing a claim of sexual harassment. It also precludes courts from restricting the disclosure of such facts in civil proceedings. The one notable exception is that the amount of the settlement is allowed to be confidential. Thus, if an employer settles a litigated sexual harassment or discrimination claim, the facts/allegations are free to be discussed and disseminated and an employer cannot require the employee to keep the facts, other than the amount of the settlement, confidential. This applies to any and all settlement agreements entered into after Jan. 1, 2019. However, SB 820 does not apply to settlement agreements entered into pr-litigation. In addition, a claimant may request confidentiality on his/her identity, which is allowed, unless a governmental entity or person is involved and a party to the agreement.

The governor also signed SB 3109, which makes any 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 void and unenforceable. This law applies to all contract or settlement agreements entered into on Jan. 1, 2019 and thereafter.

New Restrictions on FEHA Claim Waivers

SB 1300 prohibits an employer from using nondisparagement clauses and certain waivers for claims asserted under the California Fair Employment and Housing Act, or FEHA. An employer cannot require an employee to sign a release covering claims against an employer, for the right to file and/or pursue a civil action or the ability to notify any court, law enforcement or governmental agency in exchange for a raise or a bonus or as a condition of employment or continued employment. It further prohibits any other agreement that would deny the employee the right to disclose information about unlawful acts in the workplace.

Under FEHA, an employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, if the employer knows or should have known of the conduct and fails to take immediate and corrective action. SB 1300 specifies this responsibility and applies this provision to any type of harassment prohibited under the FEHA. Thus, it no longer applies solely to sexual harassment.

Lastly SB 1300 delineates that a prevailing defendant is prohibited from being awarded fees and costs (even if there was a CCP 998 settlement offer) unless the court finds the action to be frivolous, unreasonable or groundless when brought or if the plaintiff continued to litigate after it clearly became so.

Wage and Hour Changes, Plus New Human Trafficking Training Requirement

The Legislature also spent time clarifying recently passed laws. California's salary history ban took effect on Jan. 1, 2018. It prohibited employers from asking job applicants for salary history information and required employers to provide applicants with a pay scale for the position being sought upon reasonable request. AB 2282 clarified certain terminology. Specifically, an applicant refers to an individual who is seeking employment and not a current employee. Pay scale is defined as a salary or hourly rate range exclusive of bonuses or equity-based compensation. Finally, a reasonable request means a request after applicant has completed an initial interview. AB 2282 further establishes that an employer may inquire regarding an applicant's salary expectation and that employers are not prohibited from making a compensation decision based on a current employee's existing salary so long as any wage differential result can be justified by one of the Equal Pay Act factors.

Last year, California passed a human trafficking law requiring certain types of employers to post notices regarding slavery and human trafficking. Human trafficking laws have now been expanded to include training for certain types of industries under SB 970. Pursuant to SB 970, all hotel and motel employers must provide at least 20 minutes of classroom or interactive training and education regarding human trafficking awareness, which must be completed by Jan. 1, 2020. The idea is to provide training to the people who may come into contact with victims of human trafficking. This could include a hotel/motel receptionist, housekeeper, a bell person or luggage assistance employees, or shuttle drivers. Similar to anti-harassment training, training must be done every two years.

AB 2034 mandates the same human trafficking training requirements as SB 970 for mass transit employers including those who operate inner-city passenger, rail, light rail or bus facilities. Training would be required for employees who interact with victims. This training must be completed by Jan. 1, 2020 and be done every two years as well.

In 2017, AB 1701 was passed making direct contractors liable under certain situations for unpaid wages, benefits or contributions that a subcontractor owed for labor connected to a contract. It also required subcontractors to provide required payroll records upon a direct contractor's request. AB 1701 was clarified with the passing of AB 1565. AB 1565 struck down language providing that the direct contractor's liability for unpaid wages or benefits was in addition to any other existing rights or remedies. The bill further noted that in order for a direct contractor or a higher-tiered subcontractor to withhold disputed sums for a subcontractor's failure to provide information, the contractor must specify in the relevant contract the documents and information that must be provided on request. This law went into effect immediately upon signing and is already enforceable.

It is common practice that an employee is entitled to a lunch break within five hours of beginning work. SB 2610 creates a small exception to this requirement. SB 2610 applies to commercial drivers who are employed by a motor carrier transporting nutrients and byproducts from a commercial feed manufacturer subject to Section 15051 of the Food and Agricultural Code to a customer located in remote rural location. If this exception is met, the driver may begin his/her meal period within the sixth hour of work. If this is allowed, the employee's regular rate of pay must be no less than 1.5 times the state minimum wage rate and the driver must receive overtime compensation.

Noteworthy Mentions

Finally, there are a few other noteworthy mentions. The Private Attorneys General Act does not apply to construction workers (AB 1654). Talent agencies must provide educational materials regarding sexual harassment to their clients (AB 2338). Attorneys must obtain written acknowledgment from their client before the client agrees to mediation (SB 954). And remember, the California Consumer Privacy Act will take effect on Jan. 1, 2020 (AB 375; SB 1121).

There you have it — a summary of some of the most important additions in what was a busy, very busy, year in California employment law.

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