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California Labor & Employment Legislative Update 2019 – Spoiler Alert, Things Have Not Moderated

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Gov. Newsom signed 870 bills into law and vetoed 172. Fortunately, not all of them were labor and employment related. As always, we focus here on what is likely to be important as opposed to everything tangentially employment-related in some way.

Independent Contractors—AB 5

AB 5 was one of the most closely watched and heavily lobbied employment-related bills of the year. Previous GT Alerts about its impact in various industries and the question of the retroactivity of the California Supreme Court decision that provided the bill's genesis can be found here and here.

Briefly, when the California Supreme Court issued its decision in Dynamex Operations West v. Superior Court, 4 Cal.5th 903 (2018), it was a game changer. Over the course of an 82-page opinion, the court developed a new test for determining who is and is not covered by California's Wage Orders issued by the Industrial Welfare Commission (IWC). One would think that was a job for the legislature or the IWC but the IWC has not been funded for more than a decade. The court adopted a California variant on an ABC test. That test has conjunctive requirements. To overcome the presumption of employee status, the business must prove:

A. that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and

B. that the worker performs work that is outside the usual course of the hiring entity's business; and

C. that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

AB 5 expands the applicability of the ABC test across most, but not all, of the Labor Code and Unemployment Code. There are exceptions, and generally if an exception applies, the prior test under S.G. Borello and Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341

(Borello)) applies. The governor signed the bill into law, and it becomes effective Jan. 1, 2020. Stats. 2019, ch. 296, § 1.

Arbitration Agreement Limitation—AB 51

AB 51, vetoed by former Gov. Brown but signed by Gov. Newsom, is one of the more contentious laws passed, as it will be challenged as being preempted by the Federal Arbitration Act. In fact, the bill was designed with that challenge in mind. It does not void any existing agreement, but it does forbid requiring an employee to sign an arbitration agreement as a condition of obtaining or retaining employment, or any term or condition of employment. Retaliation is prohibited, and the traditional approach of including an opt-out clause is ineffective in establishing consent.

The question for the thoughtful employer is whether to create a carve-out from their national agreement and wait out the storm in California, or continue forward as the challenges are litigated.

Independent Contractors—AB 170

Some thought passage of AB 5 could be the coup de grace for the local newspaper industry, with its heavy and traditional reliance on independent contractors for residential delivery. It still might be, but not until 2022, as AB 170 suspends application of the Dynamex presumption and AB 5 for that industry until then.

Safety Training on Valley Fever—AB 203

Valley Fever is a non-contagious affliction caused by inhalation of a microscopic fungus known as Coccidioides immitis, which generally lives in the top soil of desert areas of Arizona, California, and Nevada. Nonetheless, AB 203 adds Section 6709 to the Labor Code and requires training on Valley Fever for all construction employees at risk of prolonged exposure to dust in affected areas by May 1, 2020, annually by that date thereafter, and again before an employee begins work that is reasonably anticipated to cause exposure to substantial dust disturbance.

Employment of Infants in the Entertainment Industry—AB 267

AB 267 addresses the employment of minors and particularly infants. It expands the definition of “entertainment industry” from just a movie set or location to include motion pictures, theater, television, photography, recording, modeling, rodeos, circuses, advertising, and any other performance to the public. Prior law required a general doctor’s certification. Under the new law, the entity engaging the infant’s services must receive – as a prerequisite to employment of an infant under one month of age – a licensed, board-certified pediatrician’s certification that the infant is at least 15 days old, was carried to full term, was of normal birth weight, “is physically capable of handling the stress of working in the entertainment industry,” and has sufficiently developed lungs, eyes, heart, and immune system to withstand the potential risks.

Harassment Training for Janitorial Employees—AB 547

Janitorial employees have been an increasing focus of legislative attention. AB 547 aims to facilitate mandatory sexual assault and harassment training by the Division of Labor Standards Enforcement (DLSE), which is required to develop two types of registration for janitorial companies. The distinction is whether the company has employees. DLSE is also directed to develop a list of preferred training

providers.

Employee Collection of Penalties at the Labor Commissioner—AB 673

Traditionally, Labor Code Section 210 provided for a penalty payable to the Labor Commissioner. AB 673 amends Section 210 so that the employee can claim the penalty in a hearing to recover unpaid wages. The statute is not entirely one-sided, as the employee can collect under Section 210 or the Private Attorney General Act (PAGA) but not both. How this fits in with the California Supreme Court's recent decision in ZB, N.A. v. Superior Court of San Diego County (Lawson) remains to be sorted out. More on that here.

California Family Rights Act and Flight Crews—AB 1748

Government Code Section 12942.5 describes eligibility for California Family Medical Leave (CFRA). The general eligibility threshold is 12 months of employment and 1,250 hours of work. Under the federal Family and Medical Leave Act (FMLA), special rules were developed for flight crews whose schedules are often influenced by FAA regulations. Practically, most of these crew members are covered by collective bargaining agreements. Nonetheless, the legislature set out to harmonize CFRA with FMLA rules.

Cal-OSHA Injury Reporting—AB 1804

Under prior law, employers were required to report on a Cal-OSHA form injuries resulting in lost time beyond the date of the injury or illness, and injuries requiring medical treatment beyond first-aid. A serious injury or an injury involving death was to be immediately reported by email or phone. AB 1804 requires use of an online system that has not yet been built to be used in lieu of email. Until the system is built, employers can continue to call or use email to report.

Paid Family Leave Enhancements—SB 83

SB 83 is a lengthy statute, with more than 45 subsections on a variety of topics. We focus here on the private sector and a few developments signaling what's to come. Paid Family Leave is provided through the Employment Development Department (EDD). It is funded through employee contributions deducted from paychecks. The contribution rate is determined as an expression of the claims paid. Prior to SB 83, the rate was 1.45 times the amount of claims paid minus the amount in the fund at year's end. After SB 83, the rate drops to 1.3 times claims paid. So, the first development is that the legislation lowers the contribution rate a bit. That is interesting, because the second development is that the maximum paid leave benefit increases from six weeks to eight weeks in July 2020. That change is designed to match the level of the San Francisco paid leave ordinance.

Thus, the value of claims will rise, against which the lowered rate will apply, and the net amount in the fund will probably decrease. You'd need actuaries to sort out the net impact on deducted premiums and that is not the point. The third development is that a task force will study how to increase the child bonding leave benefit so that employees taking the leave can get six months of benefit, equating to close to full wages for lower income workers. That task force report is due November 2019. Tripling the length of the leave will have a fiscal impact.

Things to watch for include an adoption of San Francisco's funding mechanism under which the employer pays the difference between what EDD pays to reach fully paid leave and an expansion to

six months of CFRA's job leave protection for child bonding.

Lactation Accommodation—SB 142

SB 142 is modeled after and makes San Francisco's workplace lactation accommodation applicable state-wide. The law provides additional detail on what is required. In general, the lactation space must not be a bathroom and must be near where the worker works. In addition, a lactation room or location shall comply with all the following requirements:

1. Be safe, clean, and free of hazardous materials, as defined in Labor Code Section 6382.
2. Contain a surface to place a breast pump and personal items.
3. Contain a place to sit.
4. Have access to electricity or alternative devices, including, but not limited to, extension cords or charging stations, needed to operate an electric or battery-powered breast pump.

The employer is also required to provide access to a sink with running water and a refrigerator suitable for storing milk in close proximity to the employee's workspace. If a refrigerator cannot be provided, an employer may provide another cooling device suitable for storing milk, such as an employer-provided cooler. If a multipurpose room is used for lactation, among other uses, the use of the room for lactation shall take precedence over the other uses, but only for the time it is in use for lactation purposes.

Sexual Harassment Training—SB 177

Notwithstanding the EEOC's Select Task Force on the Study of Harassment in the Workplace 2016 finding that "empirical data does not permit us to make declarative statements about whether training, standing alone, is or is not an effective tool in preventing harassment," California expanded the requirement to non-supervisory personnel. Government Code 12950.1. Non-supervisors are required to have one hour of training every two years. The new training obligation was to be effective Jan. 1, 2020. The original enactment had a number of flaws, resulting in some confusion as to who had to be trained when and how often, which SB 177 seeks to correct.

The new law was passed as urgent legislation and is effective now. Employers with five or more employees must now provide the training and education by Jan. 1, 2021, and thereafter once every two years. New non-supervisory employees are to be provided training within six months of hire, and new supervisory employees are to be provided training within six months of the assumption of a supervisory position. An employer who has provided this training and education in 2019 is not required to provide it again until two years thereafter.

Hair Style Discrimination—SB 188

SB 188, or the CROWN Act, expands the California Fair Employment and Housing Act's (FEHA's) definition of race to include traits historically associated with race, such as hair texture and "protective hairstyle" (e.g., braids, locks, and twists).

Retaliation Enforcement at The Labor Commissioner—SB 229

SB 229 provides for administrative enforcement of citations for unlawful retaliation in an expedited procedure. Once the citation is issued, 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.

The Photoshoot Pay Easement Act—SB 671

The issue here is that California law requires payment of final wages on the day of termination and imposes penalties when that does not happen. Photoshoot employment is inherently transitory and invariably ends the moment the shoot is over. Generating the final paycheck accurately and before everyone scatters and moves on to the next job has been challenging. Under new Labor Code 201.6, the employer can pay a Print Shoot employee by mail on the employer's next regular pay day. "Print shoot employee" means an individual hired for a period of limited duration to render services relating to or supporting a still image shoot, including film or digital photography, for use in print, digital, or internet media.

Expanded Labor Commissioner Enforcement Authority—SB 688

From inception, the Labor Commissioner and the DLSE were limited to enforcing the Labor Code. Failure to pay minimum wage or overtime, reimbursement of expenses under Labor Code Section 2802 were commonly litigated issues, but DLSE did not get into contract disputes above the minimum wage level. This legislation authorizes adjudication of disputes before the Labor Commissioner where the issue is whether the contracted-for wage was paid.

Arbitration—Employer Pays—SB 707

Often a consumer products or employment agreement will provide for the business to pay arbitration costs and fees in excess of what the consumer or employee would have paid in a court case. This legislation confirms that a business that includes such a clause and then does not pay the fees is in material breach of the agreement and waives arbitration.

Settlement Agreement Limitations on Future Employment—SB 749

As of Jan. 1, 2020, a provision in a settlement requiring the employee to refrain from re-applying will be void and contrary to public policy. Code of Civil Procedure Section 1002.5. The employee is known as an "aggrieved person," defined as "a person who has filed a claim against the person's employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process."

The prohibition is followed by a list of things the statute does not do:

1. that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and

    A. End a current employment relationship.

B. Prohibit or otherwise restrict the settling aggrieved person from obtaining future employment with the settling employer, if the employer has made a good faith determination that the person engaged in sexual harassment or sexual assault.

2. Require an employer to continue to employ or rehire a person if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person.

Conclusion

This was an unusually active legislative year. Gov. Newsom’s high sign/veto ratio is not unusual in a one-party-rule setting. 2020 will be interesting for a number of reasons

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