DrinkerBiddle

Client Alert

October 16, 2018

Summary of Key New California Laws for 2019 (and Beyond): What Employers Should Know

By Pascal Benyamini

In 2018, Governor Brown signed several laws impacting California employers. A summary of some of the key new laws follows. The effective date of each new law is indicated in the heading of the Assembly Bill (AB) and/or Senate Bill (SB).[1] The list below is in numerical order by AB or SB.

AB 1976 – Lactation Accommodation (Effective January 1, 2019)

Under current California law, employers are required to make reasonable efforts to provide an employee who wishes to express breast milk with the use of a room or other location, other than a toilet stall, in close proximity to the employee's work area for the employee to express milk in private for the employee's child. Employers are also required to provide such employees a reasonable amount of break time. The break time shall, if possible, run concurrently with any break time already provided to the employee. Break time for an employee that does not run concurrently with paid rest breaks need not be paid. See Labor Code Section 1030.

AB 1976 replaced the term "toilet stall" with "bathroom." In addition, employers that make a temporary lactation location available to employees shall be deemed to be in compliance if all of the following conditions are met: (1) they are unable to provide a permanent lactation location because of operational, financial or space limitations; (2) the temporary location is private and free from intrusion while an employee expresses milk; (3) the temporary location is used only for lactation purposes while an employee expresses milk; (4) the temporary location otherwise meets the requirements of state law concerning lactation accommodation.

This bill amends Section 1031 of the Labor Code.

AB 2334 – Occupational Injuries And Illness: Employer Reporting Requirements: Electronic Submission (Effective January 1, 2019)

Existing rules require, among other things, that the Division of Occupational Safety and Health ("Division") enforce all occupational safety and health standards and that it issue a citation for employer violations of recordkeeping requirements. Currently, the Division is prohibited from issuing a citation more than six months after the "occurrence" of the violation.

AB 2334 provides, among other things, that an "occurrence" continues until (a) it is corrected, (b) the Division discovers the violation, or (c) the duty to comply with the requirement that was violated no longer exists.

This bill amends Sections 138.7, 3702.2 and 6317 of the Labor Code, and adds Sections 6410.1 and 6410.2 to the Labor Code.

This bill adds Section 12952 to the Government Code and repeals Section 432.9 of the Labor Code.

AB 2587 – Disability Compensation: Paid Family Leave (Effective January 1, 2019)

Paid Family Leave provides benefits to employees who need to take time off work to care for a seriously ill child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered domestic partner. Under Paid Family Leave, benefits are also available to new parents who need time to bond with a new child entering their lives either by birth, adoption, or foster care placement. Prior to January 1, 2018, an employee was eligible for benefits if, among other things, the employee was unable to perform his or her regular or customary work for a seven-day waiting period during each disability benefit period; but the employee was not entitled to payments for benefits during this waiting period. As of January 1, 2018, this seven-day waiting period was eliminated.

Further, currently, an employer is permitted to require an employee to take up to two weeks of earned but unused vacation before, and as a condition of, the employee's initial receipt of benefits under Paid Family Leave, and that portion of the vacation that does not exceed one week can be applied to the waiting period.

AB 2587 deletes the application of vacation to the seven-day waiting period, consistent with the removal of the seven-day waiting period for these benefits that previously went into effect on January 1, 2018. There is otherwise no change and an employer is still permitted to require an employee to take up to two weeks of vacation.

1 As a reminder, the minimum wage in California is increasing to $12 per hour on January 1, 2019, for employers with 26 or more employees, based on previous legislation signed by Governor Brown in 2015. The minimum wage for employers with 25 or fewer employees will increase to $11 per hour on January 1, 2019. Also, please note that various cities and local governments in California have enacted minimum wage ordinances that exceed the state minimum wage.

This bill amends Section 3303.1 of the Unemployment Insurance Code.

AB 2610 – Meal Periods – Commercial Drivers (Effective January 1, 2019)

Currently, in almost all industries, employers are prohibited from requiring an employee to work more than five hours per day without providing a duty-free meal period of not less than thirty minutes. The meal period must commence before the end of the fifth hour of work.

AB 2610 authorizes a commercial driver employed by a motor carrier to commence the meal period after six hours of work under the following conditions: (a) the driver is transporting nutrients and byproducts from a licensed commercial feed manufacturer to a customer located in a remote rural location; and (b) the regular rate of pay of the driver is no less than one and one-half times the state minimum wage and the driver receives overtime compensation in accordance with specific provisions of existing law. "Remote rural location" is not defined.

This bill amends Section 512 of the Labor Code.

AB 2770 – Privileged Communications: Communications By Former Employer: Sexual Harassment (Effective January 1, 2019)

Existing law authorizes an employer to inform a prospective employer whether or not the employer would rehire the employee. Such a communication is deemed privileged and protected from a lawsuit for defamation under Civil Code Section 47 if done without malice.

AB 2770 amends Section 47 to add among those privileged communications the following: (a) complaints of sexual harassment by an employee -- without malice -- to an employer based on credible evidence; (b) communications between the employer and interested persons -- without malice -- regarding a complaint of sexual harassment; (c) communications by the employer -- without malice -- whether the employer's decision to not rehire the employee is based on the employer's determination that the former employee engaged in sexual harassment.

This bill amends Section 47 of the Civil Code.

AB 3109 – Contracts: Waiver Of Right of Petition Or Free Speech (Effective January 1, 2019)

In a series of new laws stemming from the #MeToo movement,[2] AB 3109 makes a provision in a contract or settlement agreement which waives a party's right to testify in an administrative, legislative or judicial proceeding concerning alleged criminal conduct or sexual harassment, void and unenforceable.

This bill adds Section 1670.11 to the Civil Code.

SB 224 – Personal Rights: Civil Liability And Enforcement (Effective January 1, 2019)

The California Fair Employment and Housing Act (FEHA) protects against discrimination or harassment on account of various personal and protected characteristics. Currently, the Department of Fair Employment and Housing (DFEH) is the state agency charged with enforcing California's civil rights laws. Moreover, FEHA makes it an unlawful practice for a person to deny or to aid, incite or conspire in the denial of certain civil rights.

SB 224 makes, among other things, the DFEH responsible for the enforcement of sexual harassment claims and makes it an unlawful practice to deny or aid, incite or conspire in the denial of rights of persons related to sexual harassment actions.

This bill amends Section 51.9 of the Civil Code and Sections 12930 and 12948 of the Government Code.

SB 820 – Settlement Agreements: Confidentiality (Effective January 1, 2019)

SB 820 makes a provision in a settlement agreement, entered into on or after January 1, 2019, preventing the disclosure of the factual information relating to the following civil and/or administrative claims, void as a matter of law and against public policy: (a) sexual assault; (b) sexual harassment; (c) workplace harassment or discrimination based on sex; (d) failure to prevent an act of workplace harassment or discrimination based on sex; (e) retaliation against a person for reporting harassment or discrimination based on sex; (f) harassment or discrimination based on sex; or (g) retaliation against a person for reporting harassment or discrimination based on sex.

This bill expressly allows: (1) at the request of the claimant, that the settlement agreement include a provision that shields the identity of the claimant and all facts that could lead to the discovery of his or her identity, including pleadings filed in court as long as the opposing party is not a government agency or public official; and (2) that the settlement agreement include a provision that shields the disclosure of the amount paid in settlement of a claim.

This bill adds Section 1001 to the Code of Civil Procedure.

SB 826 – Corporations: Boards of Directors (Effective January 1, 2019)

As highly publicized in the news across the nation and first of its kind, SB 826 requires, among other things, that by December 31, 2019, a publicly held corporation (whether domestic or foreign)

2 *See* also below in connection with the following Senate Bills: 224, 820, 970, 1300 and 1343.

whose executive offices are located in California (according to the corporation's SEC 10-K form) to have a minimum of one female director on its board of directors. Subsequently, no later than December 31, 2021, this bill increases that required minimum number to two female directors if the corporation has five directors or to three female directors if the corporation has six or more directors.

This bill also requires that by July 1, 2019, the California Secretary of State publish a report on its website documenting the number of corporations that have at least one female director. Further, this bill requires that by March 1, 2020, and annually thereafter, the Secretary of State publish a report on its website regarding at least the following: (a) the number of corporations subject to this section that were in compliance with the requirements of this section during at least one point during the preceding calendar year; (b) the number of publicly held corporations that moved their United States headquarters to California from another state or out of California into another state during the preceding calendar year; (c) the number of publicly held corporations that were subject to this section during the preceding year, but are no longer publicly traded.

This bill also provides that the Secretary of State may adopt regulations to implement this section and may impose hefty fines for violations as follows: (a) $100,000 for failure to timely file board member information with the Secretary of State; (b) $100,000 for a first violation; and (c) $300,000 for a second or subsequent violation.

This bill adds Sections 301.3 and 2115.5 to the Corporations Code.

SB 970 – Human Trafficking Awareness: Hotel And Motel Employers (Effective January 1, 2020)

Under FEHA, employers with 50 or more employees must provide at least two hours of training and education regarding sexual harassment to all supervisors and managers every two years or within six months of the employee being promoted to a supervisory position.

SB 970 amends FEHA to require employers in the hotel and motel industry (excluding bed and breakfast inns) to provide at least 20 minutes of training and education regarding human trafficking awareness to employees who are likely to interact or come into contact with victims of human trafficking. The schedule for compliance begins on January 1, 2020, and continues every two years thereafter.

This bill adds Section 12950.3 to the Government Code.

SB 1123 – Disability Compensation: Paid Family Leave – Military Service (Operative January 1, 2021)

Operative on January 1, 2021, SB 1123 expands the scope of Paid Family Leave, also known as California's disability insurance program, to include time off to participate in a qualifying exigency related to the covered active duty, or call to covered active duty of the individual's spouse, domestic partner, child or parent in the armed forces of the United States.

This bill makes various modifications including adding sections, repeal and amendments to the Unemployment Insurance Code. The sections affected are Sections 3301, 3302.1, 3302.2, 3303, 3303.1 and 3307 of the Unemployment Insurance Code.

SB 1252 – Wages: Records: Inspection And Copying (Effective January 1, 2019)

This bill requires that employers provide employees the right to "receive a copy" of employment records and not just the right to "inspect or copy records" as currently required under Labor Code Section 226.

This bill amends Section 226 of the Labor Code.

SB 1300 – Unlawful Employment Practices: Discrimination And Harassment (Effective January 1, 2019)

By way of background, under FEHA, employers may, among other things, be responsible for the acts of nonemployees, with respect to sexual harassment of employees, and others including applicants, unpaid interns and volunteers, if employers, or their agents or supervisors, knew or should have known of the wrongful conduct and failed to take immediate and appropriate corrective action.

Under SB 1300, employers can now be responsible for the acts of nonemployees with respect to any other harassment activity prohibited by FEHA, i.e., harassment based on other protected characteristics including, but not limited to, race, religious creed, color, national origin and ancestry.

This bill also prohibits employers, in exchange for a raise or bonus, or as a condition of employment, from: (1) requiring the execution of a release of a claim or right under FEHA, or (2) requiring an employee to sign a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment. Under SB 1300, an agreement or document in violation of either of prohibitions (1) and (2) above is contrary to public policy and unenforceable.

In addition, this bill authorizes (but does not require) employers to provide bystander intervention training to their employees, i.e., training that would include information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe these behaviors.

Finally, SB 1300 affirms, disapproves or rejects several court decisions as follows:

- Affirms the standard set forth by Justice Ruth Bader Ginsburg in her concurrence in *Harris v. Forklift Systems*, 510 U.S. 17 (1993), that in a workplace harassment suit "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job." (*Id.* at 26)

- Rejects the decision of the United States Court of Appeals for the Ninth Circuit's opinion in *Brooks v. City of San Mateo*, 229 F.3d 917 (2000), and in doing so, provides that a single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile or offensive working environment. Further, the Brooks opinion is not to be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a violation of FEHA.

- Affirms the decision in *Reid v. Google, Inc.*, 50 Cal.4th 512 (2010), in its rejection of the "stray remarks doctrine," and in doing so, provides that the existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a non-decisionmaker, may be relevant, circumstantial evidence of discrimination.

- Disapproves of any language, reasoning or holding to the contrary in the decision *Kelley v. Conco Companies*, 196 Cal.App.4th 191 (2011), and in doing so, provides that the legal standard for sexual harassment should not vary by type of workplace.

- Affirms the decision in *Nazir v. United Airlines*, Inc., 178 Cal.App.4th 243 (2009), and its observation that hostile working environment cases involve issues "not determinable on paper." SB 1300 specifically provides that harassment cases are rarely appropriate for disposition on summary judgment.

This bill amends Sections 12940 and 12965 of the Government Code and adds Sections 12923, 12950.2 and 12964.5 to the Government Code.

SB 1343 – Sexual Harassment Training: Requirements (Effective January 1, 2020)

As mentioned above under SB 970, under FEHA, employers with 50 or more employees must provide at least two hours of training and education regarding sexual harassment to all supervisors and managers every two years or within six months of the employee being promoted to a supervisory position.

SB 1343 expands sexual harassment training requirements to employers who employ five or more employees, including temporary or seasonal employees. By January 1, 2020, and once every two years thereafter, such employers are required to provide at least two hours of sexual harassment training to all supervisors and managers, and at least one hour of sexual harassment training to all non-supervisory employees.

This bill also requires the DFEH to: (a) develop or obtain one-hour and two-hour online training courses on the prevention of sexual harassment in the workplace and to post the courses on the DFEH's website; and (b) make existing informational posters and fact sheets, as well as the online training courses regarding sexual harassment prevention, available to employers and to members of the public on the DFEH'S website.

This bill amends Sections 12950 and 12950.1 of the Government Code.

SB 1412 – Applicants For Employment: Criminal History (Effective January 1, 2019)

Under current law, employers are prohibited, among other things, from asking an applicant for employment to disclose from seeking from any source, or from utilizing as a factor in determining any condition of employment, information concerning participating in a pretrial or post-trial diversion program or concerning a conviction that has been judicially dismissed or ordered sealed.

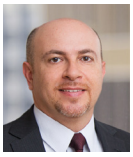
This bill specifies that employers are not prohibited from asking an applicant about, or seeking from any source information regarding, a particular conviction of the applicant if: (1) employers are required to obtain information regarding the particular conviction of the applicant, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation; (2) the applicant would be required to possess or use a firearm in the course of his or her employment; (3) an individual with that particular conviction is prohibited by law from holding the position sought, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation; or (4) employers are prohibited by law from hiring an applicant who has that particular conviction, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.

This bill amends Section 432.7 of the Labor Code.

The foregoing new laws will require employers to revise their policies and procedures. Accordingly, employers should consult with legal counsel to ensure their policies are compliant and their employee handbooks are up to date.

Labor and Employment Group

Primary Contacts



Pascal Benyamini
Partner
Los Angeles
(310) 203-4050
pascal.benyamini@dbr.com