BUCK

US

Celebrating 40 years of FYI®

FYI®
For Your Information®

California employers face new compliance challenges for 2020

Volume 42

Issue 93

November 5, 2019

Authors
Nancy Vary, JD
Abe Dubin, JD

California Governor Gavin Newsom recently signed into law a number of worker-friendly bills that will present new workplace challenges for employers in the coming year. California employers will want to prepare for increased compliance obligations triggered by the newly enacted legislation.

Background

This month, California Governor Gavin Newsom signed into law a number of labor and employment-related bills passed during the legislative session that ended on October 14. Highlighted below are some of the new laws that will have significant implications for employers with operations in the Golden State in 2020.

AB 5: Determining worker status

AB 5 codifies the three-prong ABC test set out in the 2018 *Dynamex Operations West, Inc. v. Superior Court* decision for determining whether workers should be classified as employees or as independent contractors for purposes of California wage orders. It also expands applicability of the test to the California Labor Code and the Unemployment Insurance Code, making it far more difficult for employers to lawfully classify workers as "independent contractors" for overtime, workers' compensation, unemployment, paid sick leave, paid family leave, and wage payment claims. (See our May 23, 2018 *FYI* for more detail on the *Dynamex* decision.)

AB 9: Extending statute of limitations for FEHA claims

AB 9, known as the Stop Harassment and Reporting Extension (SHARE) Act, extends the deadline for employees to file employment discrimination, harassment, and/or retaliation claims under California's Fair Employment and Housing Act (FEHA) with the state's Department of Fair Employment and Housing (DFEH) from one to three years.

AB 51: Restricting mandatory employment arbitration agreements

AB 51 essentially outlaws mandatory arbitration agreements in California and generally prohibits employers from requiring a job applicant or employee to waive any right, forum, or procedure for a violation of FEHA or the Labor Code as a condition of employment, continued employment, or the receipt of employment-related benefits. It also bars employers from threatening, retaliating or discriminating against, or terminating an applicant or employee for refusing such waivers. The prohibitions would apply to arbitration agreements that are entered into, modified, or extended on or after January 1, 2020. They would not apply to agreements that are otherwise enforceable under the Federal Arbitration Act (FAA), to post-dispute settlement agreements, or to negotiated severance agreements. Nor would they bar an applicant or employee from voluntarily agreeing to arbitration.

> **Buck comment.** Despite AB 51's provision stating that it does not invalidate otherwise enforceable written agreements governed by the FAA, the new law is likely to face legal challenge on preemption grounds. A similar New York law was recently held to be preempted in Latif v. Morgan Stanley & Co. LLC, et al.

SB 707 provides that an employer's failure to pay required fees and costs to initiate or continue arbitration proceedings within 30 days of the due date constitutes a material breach of the arbitration agreement, waives the employer's right to compel arbitration, and allows the employee to bring a claim in court.

AB 673: Recovering unpaid wage penalties

AB 673 authorizes an employee to bring an action to recover statutory penalties for unpaid wages. Under the new law, an employee may either recover penalties in such an action under these provisions or enforce civil penalties under the Private Attorneys General Act (PAGA), but not both, for the same violation.

SB 688 amends Labor Code Section 1197.1, which subjects an employer that fails to pay minimum wage to citation by the labor commissioner, a civil penalty, restitution of wages, liquidated damages, and certain other penalties. SB 688 also allows the labor commissioner to issue citations to employers that pay more than minimum wage but less than the wage set by contract to recover restitution of the amounts owed.

AB 749: Restricting "no rehire" settlement provisions

AB 749 generally prohibits a settlement agreement from containing a provision that restricts an employee who has filed an employment-related claim against the employer from working for the employer or its parent company, subsidiaries, affiliates, or contractors in the future. The parties may include a "no rehire" provision if the employee engaged in sexual harassment or assault, the employer has a legitimate nondiscriminatory or nonretaliatory reason for termination, or the severance or separation agreement does not relate to an employment dispute.

AB 1223: Extending leave for living organ donation

Existing law requires employers with at least 15 employees to provide a paid leave of absence of up to 30 business days in a one-year period for the purpose of organ donation. AB 1223 requires employers to grant an additional 30 business days of unpaid leave in a one-year period for that purpose. The bill would also require an insurer, with respect to any health condition other than being a living organ donor, to subject a living organ donor to the same actuarial or other standards as non-donors.

AB 1554: Requiring FSA notifications

AB 1554 requires employers to notify California employees who participate in a health, dependent care, or adoption assistance flexible spending account (FSA) of any deadline to withdraw funds before the end of the plan year. Notice must be made in at least two different ways, one of which may be electronic. Notice may be made by email, phone, text message, mail or in person.

AB 1748: Amending CFRA eligibility requirements for airline flight crews

AB 1748 amends eligibility requirements for airline flight deck and cabin crew employees under the California Family Rights Act (CFRA) to take up to 12 workweeks of unpaid protected leave during any 12-month period to bond with a new child or care for themselves or a family member. The new law would amend the 1,250 hours of service requirement as applied to these employees in a manner consistent with the federal Family and Medical Leave Act of 1993.

AB 1820: Expanding DFEH authority

AB 1820 authorizes the Department of Fair Employment and Housing (DFEH) to bring civil actions for violation of certain federal civil rights and antidiscrimination laws such as Title VII, ADA and FEHA.

SB 83: Increasing paid family leave benefits

SB 83 increases wage replacement benefits under California's Paid Family Leave (PFL) program for workers who take time off to care for a seriously ill family member or to bond with a minor child within one year of birth or placement. The maximum PFL benefit would increase from six to eight weeks, beginning July 1, 2020.

SB 142: Expanding lactation accommodation requirements

SB 142, modeled after a San Francisco ordinance, expands California's current lactation accommodation requirements and requires employers to develop, implement, and distribute an appropriate policy to employees. In addition to providing a room or location that is "safe, clean and free of hazardous materials," employers must provide a surface to place a breast pump and personal

items, a place to sit, electricity or alternative devices to operate an electric or battery-powered breast pump, and access to a sink with running water and a refrigerator (or other cooling device or cooler) in close proximity to the employee's workspace. Employers will also be required to provide a reasonable amount of break time "each time" the employee needs to express milk. SB 142 subjects employers that fail to comply with these requirements to Labor Code penalties.

SB 188: Prohibiting hairstyle discrimination

SB 188, the CROWN Act, expands FEHA's definition of "race" to include traits historically associated with race, including, but not limited to, hair texture and "protective hairstyles" such as braids, locks, and twists. The expanded definition would prohibit discriminatory employment practices on the basis of natural hair and protective hairstyles. The new prohibition will impact dress codes and grooming standards. (See our October 28, 2019 *FYI* for more on the CROWN Act.)

SB 778: Extending sexual harassment training deadlines

SB 778 extended the deadline for employers with at least five employees to provide sexual harassment training from January 1, 2020 to January 1, 2021, and once every two years thereafter. The new law bill would also require new nonsupervisory employees to be provided the training within six months of hire and new supervisory employees to be provided the training within six months of assuming a supervisory position. The bill made clear that an employer who provided this training and education in 2019 is not required to provide it again until two years thereafter.

SB 530 extended the deadline for employers of seasonal, temporary, or other employees hired to work for less than six months to begin providing sexual harassment training for one year — from January 1, 2020 to January 1, 2021.

In closing

Following an active legislative session in 2019, California employers will see significant changes in the legal landscape in 2020. With little time to prepare, California employers and out-of-state employers with operations in California should review their current policies and practices to ensure compliance with a slew of new worker-friendly laws.

Produced by the Knowledge Resource Center

The Knowledge Resource Center is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, surveys, training, and knowledge management. For more information, please contact your account executive.