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Client Alert

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New California Employment Law Changes Effective January 1, 2019 and Beyond

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As the New Year approaches, there are several critical changes in California's employment laws set to take effect. Many of these changes were driven by the #MeToo movement, which marked its first anniversary in 2018 and is proving to be more than just a passing fad. It is time to take note of these changes to the legal landscape and make sure that your business will be compliant in 2019. Additional laws were passed in 2018 that will take effect in the future, but should be planned for now.

Minimum Wage Increase

At the outset, a reminder that California's minimum wage increases to $12.00 per hour for employers with 26 or more employees and $11.00 per hour for employers with 25 or fewer employees. California's minimum wage increases will continue at the rate of $1.00 per hour until January 1, 2022 for larger employers, and January 1, 2023 for smaller employers.

Numerous cities and counties throughout California have passed their own minimum wage requirements that exceed California's state-wide requirements and may have different effective dates. Please check your local requirements, or contact labor and employment counsel to ensure you are in compliance.

New Restrictions On Confidentiality Of Sexual Harassment/Discrimination Settlements

Often settlement agreements include broad scope confidentiality provisions that often preclude the claimant from discussing the terms of the settlement and the underlying factual basis of the original claim. Senate Bill 820 added a new section to the Code of Civil Procedure to limit that practice for settlement agreements entered into on or after January 1, 2019. The new Code of Civil Procedure section 1001 prohibits confidentiality or non-disclosure provisions in settlement agreements that prevent the disclosure of factual information involving allegations of sexual misconduct – unless the party alleging the harm desires confidentiality language to protect his or her identity.

The law does not void confidentiality provisions that prevent disclosure of the amount paid in settlement of a claim.

New Restrictions Regarding Preventing Future Testimony

Another piece of legislation that requires a critical look at your settlement agreements is Assembly Bill 3109, which applies to a contract or settlement agreement entered into on or after January 1, 2019. AB 3109 added Section 1670.11 to the Civil Code, which voids provisions in settlements that would prevent someone from testifying about alleged criminal conduct or alleged sexual harassment in an administrative, legislative, or judicial proceeding where the individual is requested to attend the proceeding pursuant to a court order, subpoena or written request from an administrative agency or the legislature.

New Protections Against Defamation Claims for Victims of Sexual Harassment and Employers

Assembly Bill 2770 modifies Civil Code section 47 to add protections for harassment victims who make complaints and for employers who make statements regarding alleged harassment to interested parties like the Department of Fair Employment and Housing or other administrative agencies. Statements are only protected if made without malice and based upon credible evidence.

Current law protects employers, allowing them to inform an applicant's potential future employer whether the employer would rehire an employee without being held liable for defamation. AB 2770 expands that protection to include whether a decision not to rehire is based upon the employer's determination that the employee engaged in sexual harassment.

New Requirements For Sexual Harassment Workplace Training

The legislature passed several bills that radically change the requirements for workplace training. Senate Bill 1343 changes the requirements for workplace sexual harassment prevention training in the #MeToo era. The trainings required by SB 1343 must be provided by January 1, 2020, and the DFEH has taken the position that *everyone* must be trained in 2019, even if properly trained during 2018.

The bill amends California Government Code Section 12950.1 and changes several workplace training requirements, including the following:

Training required by small businesses: Employers with at least 5 employees are now required to provide training to their employees (the previous threshold being 50 employees);

Training is no longer limited to supervisory employees: Employers are now required to provide sexual harassment prevention training to all employees, including non-supervisory employees. Specifically, one hour of classroom or other effective interactive training and education regarding sexual harassment must be provided to all non-supervisory employees, and two hours of the same to supervisory employees.

Training required within six months of job commencement: Employees are currently required to undergo training within six months of starting their jobs. Seasonal or temporary employees (or any employees that will be employed less than six months) need to undergo training within 30 days or 100 hours, whichever comes first.

The new bill will force many employers to overhaul their current training protocols in light of the new requirements. The bill also directs the DFEH to create online training modules that employees could take to fulfill the new requirements. However, simply clicking through government-supplied online training may not deliver the right message regarding the employer's commitment to prevent and remedy workplace harassment.

Employers should also note that in a separate bill, Senate Bill 1300, the legislature added a provision to the Fair Employment and Housing Act ("FEHA") that suggests an employer "may also" provide training on how bystanders who witness problematic behaviors may take action to intervene and prevent harassment. While not mandatory, Employers should strongly consider adding this suggested bystander intervention training, particularly for supervisory employees.

Senate Bill 970 and Assembly Bill 2034 require that employers provide at least 20 minute of training regarding human trafficking awareness to employees who are likely to come in contact with human trafficking victims. SB 970 amends FEHA to require training by hotel and motel employers by January 1, 2020. AB 2034 requires employers who operate transportation facilities including rail and bus stations to provide similar training by January 1, 2021.

"Hostile Work Environment" Is Redefined; Release/Non Disparagement Agreements as a Condition of Employment or Promotion Are Banned

Another noteworthy change is the rejection of the standard of what constitutes a hostile work environment, a standard that has been in place for almost two decades. Senate Bill 1300 amends FEHA to decree that a single incident of harassing conduct is sufficient to create a triable issue of hostile work environment if the conduct interfered with a plaintiff's work performance or otherwise created an intimidating, hostile, or offensive work environment. The law explicitly rejects the prior standard for hostile work environment set by the 9th Circuit in *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000), an opinion written by former Judge Alex Kozinski who ironically retired from the court in 2017 amidst allegations of improper sexual conduct while on the bench.

Further, while FEHA already provided personal liability for individuals who engaged in harassing conduct, SB 1300 adds additional personal liability if a harasser engaged in retaliatory behavior against anyone complaining of harassment. This liability extends to retaliation against persons who testified or assisted in any proceeding relating to the harassment.

SB 1300 also makes it unlawful for an employer to require an individual to sign a release or non-disparagement agreement that purports to deny the employee the right to disclose information about unlawful acts in the workplace in exchange for a raise, bonus, or continued employment (however, it does not apply to settlements where the employee is represented by counsel).

Limited the Effect of Offers To Compromise In Employment Cases

In addition to altering the standards for harassment claims, Senate Bill 1300 amended FEHA to provide that statutory offers to compromise under Code of Civil Procedure 998 may not be used to shift the recovery of fees and costs to a prevailing defendant unless the court finds the action was frivolous. In doing so, the legislature resolved a split of authority among

California Courts of Appeal. *See*, *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 19 Cal. App. 5th 525, 554 (4th Dist., Jan 2, 2018) (declining to shift fees in a FEHA case under Section 998, but recognizing split of authority).

The language of Senate Bill 1300 takes away any ambiguity that may have existed following *Arave*. By restricting the effect of offers to compromise, the legislature has significantly curtailed the usefulness of such offers as a tool to recover fees and costs for employers who are ultimately successful in defending FEHA claims. Emphasizing this point, after Senate Bill 1300 was passed, the Court of Appeal in *Huerta v. Kava Holdings, Inc.*, 29 Cal. App. 5th 74 (2nd Dist., Nov. 14, 2018) both applied *Arave* and noted the statutory change to take effect January 1, 2019 to deny fee shifting. *Id*. at 78-79, n11.

Harassment Liability for Non-Employment Relationships

Another change arising from the #MeToo era, Senate Bill 224 expands existing liability for sexual harassment in non-employment relationships where the harasser holds themself out as being able to help the plaintiff establish a business, service, or professional relationship. The statute adds three new categories to its non-exhaustive list of such relationships including an elected official, lobbyist, and director or producer—plainly targeting the political and entertainment industries that have been the subject of many newsworthy sexual harassment revelations in the past year.

Directly focusing on the entertainment industry, Assembly Bill 2338 requires that a talent agency, as a condition of the requirement that it be licensed with the Labor Commissioner, provide educational materials on sex harassment prevention, retaliation, and reporting resources to its talent (the artists). Failure to comply will result in $100 fines for each violation.

Increased Statute of Limitations For Sexual Assault Cases

Assembly Bill 1619 enlarges the statute of limitations for a civil sexual assault claim up to 10 years after the alleged assault or three years after the victim discovered the injury, whichever is later. Obviously, an employer may be named in such a case if the assault occurred as part of an employment relationship.

Corporate Boards Are Required To Include Women

By the end of 2019, Senate Bill 826 requires that all California publicly held companies have a minimum of one female on their board of directors; and by the end of 2021 a minimum of 2 female directors if 5 total directors, or 3 female directors if 6 or more total directors. Failure to comply will result in significant fines.

Increased Requirements for Lactation Accommodation

Senate Bill 1976 adds requirements to existing lactation accommodation laws. While existing law requires employer to provide a location other than a toilet stall to be used for lactation (or at least make reasonable efforts to do so), SB 1976 requires that the location should be something other than a bathroom. The location should be permanent unless the employer is unable to provide a permanent location and the temporary location is private and not used for other purposes while being used for lactation. The new law provides some flexibility for agricultural employers, allowing them to comply by providing an air-conditioned cab of a truck or tractor.

Expansion of Paid Family Leave

Beginning January 1, 2021, Senate Bill 1123 will expand California's existing paid family leave program to employees who request time off related with their own active duty military service, or that of a close family member. Current law provides partial wage replacement to employees who take off due to the serious illness of themselves or a family member, or to bond with a new child.

Additional Restrictions On Criminal History Inquiries

Labor Code section 432.7 limits an employer's ability to inquire into an applicant or employee's criminal history or use criminal history information in employment decisions, with an exception for requirements imposed by federal or state law. Senate Bill 1412 amends Section 432.7 to limit that exception to situations where the employer is required by law to inquire into a "particular conviction" or where the employer cannot hire someone with a "particular conviction' as opposed to convictions generally. "Particular conviction" is defined as "a conviction for specific criminal conduct or a category of criminal offenses prescribed by any federal law, federal regulation or state law that contains requirements, exclusions, or both, expressly

based on that specific criminal conduct or category of criminal offenses."

Changes to Wage And Hour Liability

Assembly Bill 1066, passed in 2016, takes effect January 1, 2019 for employers with 26 or more employees. AB 1066 eliminated exemptions for agricultural workers relating to overtime and other working conditions. Beginning January 1, 2019, agricultural employees must receive overtime at one and a half times the employee's regular rate of pay for all hours worked in excess of nine and a half hours in one workday or 55 hours in one work week. The overtime threshold is reduced by one-half hour per day or five hours per week every year until January 1, 2022 when the threshold matches the eight hours per day/40 hours per week requirements applicable to most other workers. The double-time threshold is set at 12 hours per day beginning January 1, 2022 The timeline for compliance is delayed by three years for employers with 25 or fewer employees.

Senate Bill 1252 requires that, upon request, the employer is required to provide copies of an employee's payroll records within 21 days of the request. The change is intended to clarify that the employer is required to make and provide the copies itself, as opposed to making the records available for the employee to copy themselves.

Senate Bill 1402 provides that *customers* who use port drayage (short haul transportation services used to move goods from the port to a rail or other long haul carrier) are jointly and severally liable for nonpayment of wages, including expenses, damages, and penalties.

Assembly Bill 1654 exempts unionized construction workers from the Private Attorneys General Act provided they are subject to a collective bargaining agreement entered prior to January 1, 2025 that meets certain requirements including an express PAGA waiver.

Employers should audit their current policies and practices, and make any necessary changes to ensure that they are in compliance with these new laws.

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