

Buchalter

CLIENT ALERT

January 7, 2020

By: [Dawn M. Knepper](#) and [Michael Weiler](#)

A New Decade Begins! Ensure Your Business Is Up to Speed on California's New Employer Requirements

The close of the decade ended with a flurry of activity on the labor and employment front, creating a number of significant new obligations for employers. As 2020 opens, it is important to ensure that employers of all sizes are up to speed on these new employment obligations, including some that are still in flux due to pending litigation and legal rulings, some of which came down just in the final hours of 2019. Below is a brief summary of some of the noteworthy new laws affecting employers in 2020.

Arbitration Agreements and Separation/Settlement Agreements

AB 51 - Prohibition of Mandatory Arbitration Agreements

Assembly Bill 51 ("AB 51"), the legislation intended to prohibit mandatory arbitration agreements, had an effective date of January 1, 2020, but is one of the laws currently in flux due to a year-end legal ruling. As described below, this is a development that should be carefully tracked by employers that utilize arbitration agreements.

As written, AB 51 seeks to prohibit employers from requiring applicants or employees to agree to arbitrate claims involving violations of the California Fair Employment and Housing Act ("FEHA") or the California Labor Code, as a condition of employment, continued employment, or the receipt of any employment-related benefit. AB 51 also prohibits discrimination and retaliation against an applicant or current employee who refuses to sign an arbitration agreement. AB 51 would also make any violation of AB 51 an unlawful employment practice under FEHA.

While AB 51 does not preclude the use of an employment related arbitration agreement, in order to utilize one after January 1, 2020, an employer would have to establish that it voluntarily entered into the agreement with its employee. The Bill does not affect arbitration agreements entered into before January 1, 2020, post dispute settlement agreements or negotiated severance agreements, and does not invalidate any arbitration otherwise enforceable under the Federal Arbitration Act ("FAA"). However, under AB 51 as written, if parties to an existing arbitration agreement were to revise that agreement or present amended versions, the employer would have to demonstrate that the agreement to arbitrate is voluntary.

In early December, businesses led by the California Chamber of Commerce brought suit in the U.S. District Court for the Eastern District of California to invalidate AB 51, arguing that the FAA preempts AB 51, and

sought a temporary injunction to prohibit AB 51 from going into effect. On December 30, 2019, Federal District Court Judge Kimberly Mueller agreed with the businesses and issued the temporary restraining order halting the enforcement of AB 51. Judge Mueller found that the business have "rais[ed] serious questions" regarding the question of whether AB 51 is preempted by the FAA. The Order precluded enforcement of AB 51, pending ruling on a motion for a preliminary injunction, which if granted, would presumably stay enforcement on the new law until a trial on the merits. The hearing on the preliminary injunction is set for January 10, 2020, so stay tuned for additional developments.

While employers have been granted a brief reprieve from the enforcement of AB 51, employers should carefully consider the use of such arbitration agreements in light of AB 51's current uncertainty.

AB 749 - Ban on No-Rehire Provisions in Settlement Agreements

Employers and their counsel typically include a provision in settlement agreements that prevents the former employee from securing future employment with the employer or its affiliates. Beginning in 2020, under Assembly Bill 749 ("AB 749") a settlement agreement cannot prevent a person who 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" from obtaining future employment with the employer, or any parent company, subsidiary, division, affiliate, or contractor of the employer. Through the newly created Code of Civil Procedure section 1002.5, it makes such provisions in agreements entered into on or after January 1, 2020 void as a matter of law and against public policy.

A settlement agreement can still prevent a former employee from obtaining future employment from the employer if the person engaged in sexual harassment or sexual assault. AB 749 also clarifies that an employer is not required to continue to employ a person, or rehire a person, if there is a legitimate non-discriminatory or non-retaliatory reason for terminating or refusing to rehire the person.

Wage-Hour

AB 5 - Worker Classification

The California Supreme Court brought sweeping limitations on an employer's use of independent contractors with the 2018 case, *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*. Demands for legislative relief were made and the response came in the form of Assembly Bill 5 ("AB 5"), which largely codified the *Dynamex* test for use of independent contractors, and created some exemptions for certain workers. Under *Dynamex* and now AB 5, workers are assumed to be "employees" of a business unless the business can establish all three criteria laid out in the following "ABC" test:

- A. The person 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;
- B. The person performs work that is outside the usual course of the hiring entity's business; and
- C. The person is customarily engaged in an independently established trade, occupation or business of the same nature as that involved in the work performed.

As referenced above, due to lobbying efforts from certain industries, AB 5 now provided specific carve outs for various job categories, including physicians, lawyers, engineers, securities brokers/dealers, insurance agents, and architects. While the ABC test will not apply to those that can successfully establish the application of an exemption to particular worker, employers are not necessarily able to assume they can utilize the independent contractor model for that worker. Instead, worker classification in those professions will be determined under the multi-factor *Borello* test, with the primary factor being the degree of control exercised by the hiring entity over the manner and means of the worker's performance.

Since its passage in the fall, AB 5 has been under attack via litigation from multiple industries, including the trucking industry, gig companies, and freelance journalists. Hours before the January 1, 2020 effective date, the trucking industry won a temporary restraining order blocking enforcement of AB 5 against them. A ballot campaign is in the works by the gig economy to exempt those workers.

Nonetheless, despite the ongoing legal battles, to the extent your business utilizes independent contractors, it should carefully consider the application of AB 5 and whether the employer can overcome the heavy presumption that the worker should be classified as an employee, and is entitled to the responsibilities and benefits of employee status.

Increases in the Minimum Wage and Minimum Salary

Effective January 1, 2020, the California minimum wage is increasing to \$13.00 per hour for employers with 26 or more employees and \$12.00 per hour for employers with 25 or fewer employees. In addition, beginning January 1, 2020, the minimum annual salary for any exempt employee under one of the white-collar exemptions – those employees employed in administrative, managerial, executive or professional capacities – will be \$54,080.00 for employers with 26 or more employees and \$49,920.00 for employers with 25 or fewer employees.

Many local ordinances also have minimum wage increases effective on January 1, 2020, which may be higher than the state minimum wage. These local ordinance increases do not affect the state minimum salary requirement. California businesses should ensure their wage policies satisfy these minimum requirements.

Harassment, Discrimination, and #MeToo

AB 9 - Extending the Statute of Limitations for FEHA Claims

Before an employee can file a lawsuit alleging claims under the FEHA, he or she must first file a charge with the Department of Fair Employment and Housing ("DFEH"). Up through last year, he or she had one year from termination (or from the end of the alleged discriminatory conduct) to file the charge. After getting a right-to-sue letter from the DFEH, he or she has one more year to file the lawsuit.

Assembly Bill 9 (“AB 9”) is terribly significant for both employers and employees in that, effective January 1, 2020, it extended the time employees have to file their charge with the DFEH to **three years**. This is three times as long as the original state standard and six times longer than the Federal requirement.

More than ever, it is important to ensure that employers maintain solid documentation related to the activities and management of their employees, as the more time passes, the harder it becomes to explain and defend what are often otherwise legitimate employment decisions. Employers should also review their data and document retention policies (including any auto-delete functions on email systems) and take appropriate steps to ensure that they retain documents and employee files to cover at least four years.

SB 778 – Extension of Deadlines for Sexual Harassment Training

Employers have some relief for sexual harassment training deadlines. Currently, all employers with five or more employees must provide two hours of sexual harassment training to supervisors and one hour to nonsupervisory staff. Current law mandated the training be completed by January 2, 2020. Instead the training is now required by January 1, 2021 and the training must be provided “thereafter once every 2 years.” Thus, employers should ensure that all employees and newly covered supervisors are trained by the end of this year.

SB 142 – New Requirements for Lactation Accommodation

On September 11, 2019, the California Legislature passed Senate Bill 142 (“SB 142”), which significantly expands lactation accommodations and protections for working mothers effective January 1, 2020. Among other things, SB 142: (1) clarifies employer obligations to provide breaks to nursing/pumping mothers; (2) requires employers to provide safe and sanitary lactation rooms for employees wishing to express milk; (3) increases penalties for non-compliance; (4) prohibits discrimination and retaliation against employees who exercise or attempt to exercise their right to lactation accommodations; and (5) requires that employers implement lactation accommodation policies.

SB 142 comes on the heels of last year’s Assembly Bill 1976, which required that employers “make reasonable efforts” to provide a lactation room other than a bathroom. Under SB 142, employers must provide such a room, subject to a limited undue hardship exemption, as described below. In particular, employers must provide a lactation room or location, not a bathroom, that:

1. Is in close proximity to the employee’s work area,
2. Free from intrusion while the employee is expressing milk,
3. Shielded from view,
4. Safe, clean and free of hazardous materials,
5. Contains a surface to place a breast pump and personal items,
6. Contains a place to sit, and
7. Has access to electricity or alternative devices.

The employer must also provide access to a sink with running water and a refrigerator for storing milk in close proximity to the employee's working space. SB 142 provides additional guidance for non-traditional work environments, including multitenant buildings or multiemployer worksites.

A business with 50 or fewer employees may be exempted from these requirements if the business can demonstrate that implementation would impose an "undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business."

We expect additional developments in this area as Governor Gavin Newsom has indicated his support for the expansion of paid family leave and increased worker protections. Employers are advised to ensure appropriate facilities are provided and that a compliant policy is in place, which may require revisions to your handbook. Note that other lactation requirements apply under the Federal Fair Labor Standards Act and also under certain local laws, including in San Francisco.

SB 188 – Protection for Certain Hairstyles

Also known as the CROWN Act (which stands for Creating a Respectful and Open Workplace), Senate Bill 188 ("SB 188") precludes discrimination against natural hair, making California the first state to take such a step. Specifically, SB 188 amends the definition of race under California's Education and Government Codes and, therefore, amends the protections against racial discrimination under FEHA. The Bill expands the definition of race to include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles."

The amended definition means that the hiring, promotion, and termination of employment and other employment practices must not be made based on such hairstyle traits "unless based on a bona fide occupational qualification or applicable security regulations." Businesses should carefully consider their workplace dress code and grooming policies as SB 188 specifically mentions afros, braids, twists, and locks as important racial hairstyles.

Consumer Law

AB 25 - Clarification of the California Consumer Privacy Act

The California Consumer Privacy Act of 2018 ("CCPA"), grants consumers various rights with regard to their personal information held by businesses, including the right to request a business to disclose specific pieces of personal information it has collected and to have information held by that business deleted. The CCPA has sent many businesses scrambling to interpret its onerous obligations and the timelines for same. Note that the CCPA applies to certain covered businesses, so the first step would be to ensure that the requirements extend to your business.

For those covered businesses, Assembly Bill 25 ("AB 25") is intended to provide some additional clarification on CCPA's requirements. First, AB 25 confirms that disclosures extend to personal information

collected from job applicants, employees, or contractors. Second, AB 25 postpones by one year, until January 1, 2021, all the CCPA's requirements pertaining to employee data except for two: (1) ensuring the business has implemented reasonable security measures to safeguard the personal information of employees and job applicants, and (2) disclosing of the categories of personal information collected about employees and job applicants and the business purposes for which the information is used.

As to that second requirement, the disclosure must be made before or at the time the employer receives personal information of any employee or job applicant. The disclosure need not list every piece of information the business collects about the employee, but rather only the categories of information.

In conclusion, the legislation that just came into effect for 2020 definitely creates new challenges for employers. Employers should audit their current policies and practices and make any necessary changes to ensure that they are in compliance with these new laws.



Dawn Knepper is a Shareholder of Buchalter's Labor & Employment Group in the Orange County office. She can be reached at DKnepper@buchalter.com or 949.224.6258.



Michael Weiler is an Attorney at Buchalter's Litigation Group in the Orange County office. He can be reached at MWeiler@buchalter.com or 949.224.6451.