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2020 laws all California employers should know

The new laws, most of which take effect Jan. 1, 2020, cover a wide area from wage and hour and work classification to hairstyle discrimination to workplace violence. Here is a brief summary.

By Kate McGuigan and Michael Schlemmer

The California Legislature had a busy 2019. Policymakers passed close to two dozen new employment-related laws, most of which were not employer-friendly. Employers are well-advised to review these laws and study how they will affect businesses in California. The new laws, most of which take effect Jan. 1, 2020, cover a wide area from wage and hour and work classification to hairstyle discrimination to workplace violence. We've provided a brief summary of some of these laws and their impact on California employers.

WAGE AND HOUR

Wage and hour issues continue to be a hotbed of, and the source of most employment-related litigation in California. The California courts and Legislature continue to review, change, and interpret these issues, generally in favor of employees and workers, and 2019 was no exception.

Independent Contractor Status (AB 5): In passing AB 5, the Legislature adopted and expanded the California Supreme Court's 2018 decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*. For the last 30 years, California courts have addressed employee/independent contractor classification disputes by using a test first articulated in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989). Under the *Borello* test, the distinction between employees and independent contractors hinged on a number of factors centered generally on control of the worker, but also considered a number of additional factors. The *Dynamex* court largely uprooted the *Borello* test and replaced it — with respect to the application of California's Industrial Welfare Commission Wage Orders — with a newly articulated ABC test. Under the ABC test, workers are presumed to be employees of the hiring company unless all three of the following conditions are met and the worker:

A. Is free from the control and direction of the hirer in the performance of the work, both under the contract for the performance of the work and in fact (similar to *Borello*);

B. Performs work that is outside the usual course of the hirer's business; and

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

With the passage of AB 5, the Legislature extended the ABC test to the California Labor Code and Unemployment Insurance Code (in addition to the Wage Orders) and empowered the California attorney general and city attorneys of cities with populations of more than 750,000 to seek injunctive relief to force the reclassification of workers. AB 5, however, also introduced several exceptions to the ABC test, where the *Borello* test will still continue to apply to covered workers — meaning that it will be less challenging to treat those workers as independent contractors. These exceptions include doctors, dentists, and veterinarians; lawyers, architects, engineers, private investigators, and accountants; securities broker-dealers and investment advisers; insurance agents; human resources administrators; travel agents; marketers, graphic designers, grant writers, fine artists, and certain photographers or photojournalists; and certain freelance writers and editors. There are also exceptions that carry certain conditions that must be satisfied for the *Borello* test to apply, such as for business-to-business contracting relationships and very limited categories of relationships between a referral agency and a service provider.

Failure to Pay Wages (AB 673): Labor Code Section 210 permits the Labor commissioner to assess penalties against an employer for failure to pay wages on regular paydays. Under current law, employees can pursue associated Labor Code Private Attorneys General Act penalties. As of Jan. 1, 2020, employees have a private right of action to pursue such penalties. This statute is an alternative to PAGA. The employee may seek civil penalties under this statute, or under PAGA, but may not pursue both avenues for the same violation. This statute encourages further litigation for failure to pay proper wages by providing statutory penalties similar to PAGA, to be paid directly to employees in addition to wages.

HARASSMENT AND DISCRIMINATION

Following the #MeToo movement, activists pursued changes in the law and how settlements, particularly of sexual harassment and gender bias cases, are handled. The Legislature addressed many of these issues in 2019 with the passage of amendments and changes to existing statutes.

Fair Employment and Housing Act Administrative Exhaustion Extension (AB 9): Concerned about the short (one-year) statute of limitations for an employee to file a discrimination, harassment,

or retaliation claim with the California Department of Fair Employment and Housing, the Legislature extended the limitations period to three years. As a result, employers should maintain records of any incident, complaint, or investigation into harassment, discrimination, or retaliation for at least three years.

Hairstyle Discrimination (SB 188): SB 188 expands the definition of "race" under the California Fair Employment and Housing Act to include traits historically associated with race, including hair texture and "protective hairstyles." "Protective hairstyles" include but are not limited to braids, locks, and twists. Other traits associated with race may also fit within this new protected category. Grooming policies must not ban, limit, or otherwise restrict natural hair or hairstyles that have historical associations with race. Uniformly applied grooming policies, imposed for valid, nondiscriminatory reasons and that have no disparate impact, remain lawful. For example, requiring all employees to secure their hair for bona fide safety or hygienic reasons would not violate the FEHA. Neutral policies requiring "professional" hair or "clean and tidy" hair are also lawful so long as these definitions do not categorically ban "protective hairstyles" for necessarily failing to meet these standards.

WORKPLACE ACCOMMODATION AND LEAVES

Lactation Accommodation (SB 142): Effective Jan. 1, 2020, it expands existing Labor Code requirements for employee lactation accommodations; Labor Code Sections 1030, et seq., required employers to make "reasonable efforts" to provide a private location, other than a bathroom, in close proximity to the employees' work area, for employees to express milk in private and to provide reasonable break time to express milk. SB 142 amends Labor Code Section 1031 to require specific setups for private lactation spaces, including a place to sit, access to a plug, a nearby refrigerator or cooler, and a sink with running water. An employer with fewer than 50 employees may be exempted from these requirements if the employer can demonstrate that it would impose an undue hardship when considered in relation to the size, financial resources, nature, or structure of the business. Employees may report violations directly to the Labor Commissioner with a civil penalty of up to $100 per day for each day on which an employee is denied reasonable break time or adequate space to express milk. Previously, the law permitted a $100 penalty per violation.

VIOLENCE

Workplace and School Gun Violence Restraining Orders (AB 61): Existing law authorizes immediate family members, roommates, and law enforcement to petition the court for an ex parte gun violence restraining order. Effective Sept. 1, 2020, AB 61 expands the types of individuals that can file a gun violence restraining order, subject to some conditions: an immediate family member of the subject of the petition; an employer of the subject of the petition; a co-worker of the subject of the petition; an employee or teacher at a secondary or postsecondary school that the subject has attended in the last six months; and a law enforcement officer. AB 61 was passed in conjunction with AB 12, and together these laws extend the length of a gun violence restraining order from one year to between one and five years. ■

This article is provided as a general informational service and it should not be construed as imparting legal advice on any specific matter.

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