IN CASE YOU MISSED IT... NEW EMPLOYMENT LAWS IN EFFECT FOR 2019 (PART 1)

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Employment

The California Legislature is currently working on new laws that will go into effect next year. Indeed, Governor Newsom has already begun to sign some legislation into law (see, for example, the CROWN Act). Before we move on to the year 2020, however, we thought it would be wise to make sure we are all on the same page by recapping the most important employment changes that took place for 2019. Accordingly, in this first of a two-part article, we will outline the key federal and state developments in the areas of harassment, discrimination, and wage and hour laws that employers needed to know for 2019.

1. **Harassment and Discrimination**

- Small Employers Must Provide Harassment Training: Under prior California law, organizations with 50 or more employees or independent contractors had to provide two hours of interactive harassment and abusive conduct prevention training for their managers and supervisors every two years and within six months of placement into a supervisory or management position. SB 1343 extended this same requirement to any employer with at least five employees or independent contractors. The initial training must take place by January 1, 2020.
- Lower Standard for Filing Discrimination and Harassment Claims: Previously, only harassment that was "severe or pervasive" was actionable. SB 1300 significantly lowered that standard by providing that a claimant need only prove "that the conduct would meet the legal standard for harassment or discrimination *if it increased in severity or became pervasive.*" (emphasis added). This creates a basis for a lawsuit against every employer for any vulgar or insensitive comment by employees and even non-employees where the employer knew or should have known of the harassment and failed to address it.
- No Waiver of FEHA Rights in Exchange for Employment Benefit: The same bill, SB 1300, also made it unlawful for an employer to require an employee to waive Fair Employment and Housing Act rights in exchange for a raise or

bonus or as a condition of employment. The prohibition excludes releases that are part of a voluntarily negotiated settlement agreement filed by an employee in court, an alternative dispute resolution forum, before an administrative agency, or through an employer's internal complaint process.

- Limitations on Confidentiality in Sexual Harassment Settlements: Settlements for sexual harassment claims that are entered into after January 1, 2019 that prevent disclosure of the facts of the claim are prohibited and void pursuant to the newly added Section 1001 of the California Civil Code. The new law allows for the confidentiality only of the settlement amount and, if the claimant requests it, the claimant's identity.
- Contract Cannot Prohibit Testimony About Sexual Harassment: Newly added Section 1670.11 of the California Civil Code renders void and unenforceable provisions in contracts or settlement agreements entered into on or after January 1, 2019 that waive a party's right to testify about alleged criminal conduct or sexual harassment when the party has been compelled or requested to do so by lawful process.
- Protection From Defamation Liability for Statements About Alleged Harasser: AB 2770 amended California Civil Code Section 47 to protect workplace harassment complaints as privileged communications and to protect employers when making statements to interested parties, such as the Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission, regarding the complaints of sexual harassment. The protections also apply to employers' responses to prospective employer inquiries to allow the former or current employer to state whether the employer would rehire the applicant and whether the decision is based upon the current or former employer's determination that the applicant engaged in sexual harassment. In all instances, the statements and/or complaints are only protected from liability for defamation if they are made without malice and based upon credible evidence.
- Extended Statute of Limitations for Sexual Assault: AB 1619 added Code of Civil Procedure Section 340.16 to lengthen the statute of limitations for bringing a claim for sexual assault. For claims based on sexual assault occurring on or after a plaintiff's eighteenth birthday, the limitations period is the later of ten years from the date of sexual assault or three years from the date plaintiff discovers or reasonably should have discovered a resulting injury or illness.
- Broader Definition of National Origin Discrimination: California's Fair Employment and Housing Council broadened the definition of "national origin" for its anti-discrimination regulations. "National origin" now includes an individual's actual or perceived (1) physical, cultural, or linguistic characteristics; (2) marriage to or association with a person of a national origin group; (3) tribal affiliation; (4) membership or association with an organization identified with or seeking to promote the interests of a national origin group; (5) attendance or participation in schools, or religious institutions generally used by persons of a national origin group; and (6) name associated with a national origin group. The new regulations also specifically target "English-only rules," stating that they are presumptively illegal unless the employer can meet a three-part test by proving that the rule is justified by "business necessity," is narrowly tailored, and was effectively explained to employees.
- Discharge Protection for Military Service: SB 1500 amended Section 394 of the Military and Veterans Code to prohibit employers from discharging a person from employment because of his/her performance of any ordered military duty or training or because of his/her military membership. The amendment also prohibits business establishments from refusing entrance based on military uniform.

- Clarification on the Salary History Ban: In 2018, a law went into effect that attempted to reduce discrimination resulting from perpetuating lower pay rates for certain groups by banning employers from asking about or relying on an applicant's salary history and requiring employers to provide the position's "pay scale" to an applicant upon "reasonable request". However, the legislation raised several questions among employers, especially regarding key terms that were undefined and vague. Accordingly, a follow-up measure, AB 2282, was signed into law effective January 1, 2019, to clarify the following: (1) the "pay scale" that the employer must provide upon request is the salary or hourly wage range; (2) a "reasonable request" means a request made by the applicant after completion of the initial interview; (3) the employer may ask the applicant about his/her wage or salary expectations; and (4) an "applicant" is not a current employee.
- Justification for Certain Wage Differentials: The same law described above, AB 2282, also provides a carve-out for an employer to justify compensation decisions based on an *existing* employee's (not an applicant's) current salary if any wage differential resulting from that compensation decision is justified by one or more specified factors, including a seniority system, merit system, a system that measures earnings by quantity or quality of production, or a bona fide factor other than race or ethnicity, such as education, training, or experience.
- Female Quota for Corporate Boards: Pursuant to SB 826, publicly traded corporations with principal executive offices in California must appoint women to their boards of directors or face fines of $100,000 for the first violation and $300,000 for subsequent violations. Specifically, by the end of 2019, each board of directors needs to have at least one female, and by the end of 2021, each board must have three females if the board consists of six or more directors, two females if the board consists of five directors, and one if the board consists of four or fewer directors.

1. **Wage-and-Hour**

- Limits on "De Minimis" Doctrine: Last summer, the California Supreme Court issued a decision in *Troester v. Starbucks Corporation* (July 2018) which held that employers must track and pay for employees' time spent on regularly occurring tasks, even if those tasks take just a few minutes (*e.g.*, locking up the store each night). Accordingly, employers must ensure that their timekeeping procedures track small time increments.
- Overtime Must Include Certain Bonuses Per DLSE Method: Last year, the California Supreme Court clarified in *Alvarado v. Dart Container Corporation of California* (March 2018) that flat-sum, non-discretionary, non-production-related bonuses must be included in the regular rate for purposes of calculating overtime. More specifically, for calculating the effect of the bonus on the regular rate of pay, the court rejected the Fair Labor Standards Act method (divide total compensation by total hours worked) and applied the Department of Labor Standards Enforcement method (divide total compensation by only non-overtime hours worked). The *Alvarado* decision applies retroactively to all California employers.
- Minimum Wage Increases: On January 1, 2019, the California minimum wage increased to $12.00 for employers with 26 or more employees and to $11.00 for employers with 25 or fewer employees. Effective July 1, 2019, Los Angeles, Santa Monica, Malibu, and unincorporated Los Angeles County increased their minimum wages to $14.25 for employers with 26 or more employees and to $13.25 for employers with 25 or fewer employees. Northern California locations, including San Francisco, Berkeley, Palo Alto, and San Jose, also had

increases to the minimum wage.

- Neutral Rounding Is Permissible: Last summer, a California Court of Appeal held in *AHMC Healthcare, Inc. v. Superior Court of Los Angeles County* (June 2018) that neutral rounding (in this case, rounding up or down to the nearest quarter hour) was permissible as long as it does not systematically undercompensate. The effect of the rounding policy in *AHMC* was that employees were compensated for more time than they had actually worked.
- Back of House Employees May Share in Tip Pools: The federal Consolidated Appropriations Act of 2018 changed tip sharing rules to permit employees to share tips with back of house employees. Other tip pool requirements under the Act are as follows: (1) no management personnel may participate in the pool; (2) the percentages must be reasonable; and (3) other personnel who participate must be appropriate participants. California employers must bear in mind that, unlike federal law, California law does not permit using tips as credit against minimum wage.
- New Mileage Rates: As of January 1, 2019, the standard IRS mileage rates for employees' use of a car (also vans, pickups, or panel trucks) are: 58 cents per mile for business miles driven (up three and one-half cents from 2018); 20 cents per mile driven for medical or moving purposes (a two cent increase over 2018); and 14 cents per mile driven in service of charitable organizations.

1. **PAGA**

- PAGA Representative Only Needs to Suffer One Violation: In *Huff v. Securitas Security Services USA, Inc*. (May 2018) a former employee sought penalties against his former employer under California's Private Attorneys General Act (PAGA) for numerous alleged violations of the Labor Code. The California Court of Appeal held that as long as he was affected by one violation, then he could recover PAGA penalties for all violations.

In Part 2 of this article, we will address new developments in employee classifications, privacy rights, leave laws, alternative dispute resolution, post-employment restrictions, and other areas vital to California Employers.

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