CALIFORNIA LEGISLATURE ADOPTS SEVERAL NEW EMPLOYMENT LAWS FOR 2020

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Governor Gavin Newsom recently signed a number of bills that will affect California employers in 2020. Most significantly, the new laws codified the ABC test for independent contractors, clarified sexual harassment training requirements and deadlines for employers, and created stricter enforcement of employment arbitration agreements. Other significant laws include:

- Additional penalties for late or incorrect wages
- Expansion of leaves for organ donation and paid family leave
- Prohibition of hairstyle discrimination

Below are summaries of the key aspects of these new laws. All approved bills will become effective on January 1, 2020, unless otherwise noted.

ABC TEST FOR INDEPENDENT CONTRACTORS CODIFIED

With Assembly Bill ("AB") 5, Governor Newsom codified the state's legal test for determining whether a worker is properly classified as an independent contractor rather than an employee. The so-called ABC test will make it significantly more difficult for a worker to qualify as an independent contractor.

Under the test, a worker can only be classified as an independent contractor if:

> (a) the worker is free from control and direction in the performance of services; and
> (b) the worker is performing work outside the usual course of the business of the hiring company; and
> (c) the worker is customarily engaged in an independently established trade, occupation, or business.

AB 5 exempts a long list of occupations and types of service providers from the ABC test (including doctors, lawyers, architects, engineers, insurance brokers, real estate agents, hair stylists and barbers, certain freelancers, etc.), and the old *Borello* test will continue to apply to these exempted workers. In addition, AB 5 exempts business-to-business contractors from the ABC Test as long as they meet a set of 12 criteria to demonstrate that the contractor operates as its own business entity.

Misclassified workers can use the ABC test to classify themselves as employees and make claims against

employers, such as failure to provide accurate and complete wage statements, failure to pay unemployment insurance tax, failure to provide workers' compensation insurance, and more. In addition, the California Attorney General and certain city attorneys will be empowered to pursue injunctions against businesses suspected of misclassifying workers.

The issue of whether AB 5 is retroactive is pending, and the Ninth Circuit Court of Appeals has sent the matter to the California Supreme Court for consideration in the case of *Vasquez v. Jan-Pro Franchising Int'l, Inc.*

For more details on AB 5 and the ABC test, see our prior client alert.

LAWS AFFECTING ARBITRATION AGREEMENTS

Mandatory Employment Arbitration Agreements Banned

AB 51 adds a new Labor Code Section 432.6 that prohibits any person (including employers) from requiring an applicant or employee (as a condition of employment, continued employment, or the receipt of any employment-related benefit) to "waive any right, forum, or procedure" for alleged violations of the entire Fair Employment and Housing Act ("FEHA") and the entire Labor Code. Therefore, AB 51 prohibits mandatory arbitration agreements for any discrimination claims covered under FEHA and for any claims under the Labor Code (including wage and hour and other protections).

The bill also specifically prohibits the use of an "opt-out" as a means of making such arbitration provisions voluntary, as Labor Code Section 432.6 states that requiring an employee to opt out of an agreement to avoid being bound (or to take any affirmative action to preserve his/her rights) is "deemed a condition of employment." Any plaintiff who proves a violation will be awarded injunctive relief and attorney's fees.

Specifically, the law applies to "contracts for employment entered into, modified, or extended on or after January 1, 2020," so contracts prior to the date are not affected.

AB 51 also expressly states that it does not invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act ("FAA"). The FAA states that written, pre-dispute arbitration agreements in transactions involving commerce (including employment) are valid, irrevocable, and enforceable. Under the FAA, a state may not pass or enforce laws that interfere with, limit, or discriminate against arbitration, and such laws are preempted by the FAA. This rationale was the very reason that Jerry Brown, Governor Newsom's predecessor, vetoed similar legislation in previous years, acknowledging that such state legislation would likely not survive a legal challenge. AB 51 is currently facing a legal challenge as to whether it violates the FAA and U.S. Supreme Court precedent applying the FAA to employment arbitration agreements, in a case filed in December 2019 by the U.S. Chamber of Commerce, the California Chamber of Commerce, and additional plaintiffs.

Material Breaches of Arbitration Agreements

Under Senate Bill ("SB") 707, if an employer fails to pay the required fees to initiate or continue arbitration within 30 days of its due date, the employer will be deemed to have materially breached the arbitration agreement. The employee can then either withdraw from arbitration and file the claim in court or compel arbitration under the contract. If the employee proceeds with an action in court, SB 707 provides that the statute of limitations will be tolled.

In addition, the court is required to impose a monetary sanction against the drafting party (usually the employer) who materially breaches an arbitration agreement. The drafting party will be ordered to pay reasonable expenses, including attorney's fees and costs, incurred by the employee as a result of the material breach. As with AB 51, SB 707 may face similar legal challenges on the grounds that it violates the FAA.

EXPANSION OF LEAVES

Unpaid Leave of Absence after Organ Donation

Existing law permits an employee to take a leave of absence with pay, not exceeding 30 business days in a one-year period, for the purpose of organ donation. AB 1223 requires a private or public employer to grant an employee an additional 30 days of unpaid leave for the purpose of organ donation.

Extension of California Paid Family Benefits from Six to Eight Weeks

For claims that start on or after July 1, 2020, California's Paid Family Leave ("PFL") benefits will extend from six weeks to eight under SB 83. PFL is not a leave entitlement; rather, employees who are eligible to take leave through paid sick leave or the Family Medical Leave Act ("FMLA")/ California Family Right Act ("CFRA"), or who are otherwise granted leave by the employer, are then eligible to apply for wage replacement benefits through PFL.

The San Francisco Paid Parental Leave Ordinance, which requires employers to pay "supplemental compensation" for the full period that a covered employee receives PFL to bond with a child, will extend from six to eight weeks accordingly.

In addition, SB 83 requires Governor Newsom to submit a proposal to increase PFL duration to six months by 2021–2022. However, the proposal will be limited to baby bonding purposes and six months will represent the total duration if two parents claim PFL benefits.

ADDITIONAL PENALTIES FOR LATE OR INCORRECT WAGES

Current Employees Can Seek Penalty for Late Wages

AB 673 allows a current employee to recover penalties for late wages from an employer. Specifically, AB 673 amends Section 210 of the California Labor Code so that the penalty for the late payment of wages can be recovered by the Labor Commissioner (payable to the affected employee) as a civil penalty or by the employee as a statutory penalty. In addition, the affected employee may choose to enforce the penalty through the Private Attorneys General Act ("PAGA") but cannot also recover statutory penalties for the same violation.

The penalty is $100 for an initial violation. For subsequent violations, or any willful or intentional violations, the penalty is $200 for each failure to pay each employee, plus 25% of the amount unlawfully withheld.

The bill also applies to the wages of employees licensed under the Barbering and Cosmetology Act.

Employees Can Seek Penalty for Incorrect Wages

Currently, California Labor Code Section 1197.1 penalizes an employer who pays an employee a wage less than the minimum wage. SB 688 expands Section 1197.1 by also penalizing an employer "who pays or causes [an employee] to be paid a rate of compensation that is less than set by contract." Contract wages are defined in the bill as "wages based upon an agreement, in excess of the applicable minimum wage, for regular, non-overtime hours". Thus, SB 688 uses very broad language for which a penalty can apply to any rate of pay for any contract.

LAWS AFFECTING ALL EMPLOYERS

Sexual Harassment Training Requirements — Compliance Period Extended

Under SB 778, an employer with five or more employees must provide at least two hours of training and education regarding sexual harassment to all supervisory employees and at least 1 hour of training to all nonsupervisory employees by January 1, 2021. Thereafter, the training must be given again once every two years. SB 778 also requires the training be provided within six months of hire or within six months of the assumption of a supervisory position.

SB 778 clarifies that employees who are trained in 2019 do not need to be trained again until two years have passed (sometime in 2021, after the January 1, 2021, deadline). The bill also includes an urgency clause making the legislation effective immediately.

Hairstyle Discrimination Prohibited

Under FEHA, it is unlawful to engage in specified discriminatory employment practices, including hiring, promotion, and termination based on certain protected characteristics, including race. SB 188 includes hair texture and protective hairstyles as a trait historically associated with race. The bill specifies that "protective hairstyles" include, but are not limited to, "such hairstyles as braids, locks, and twists." With the signing of SB 188, California becomes the first state to ban discrimination based on one's natural hair.

Expansion of Lactation Accommodation Requirements

SB 142 requires that employer-provided lactation rooms or locations provide a place to sit, be "safe, clean, and free of hazardous materials," and contain a surface to place a breast pump and personal items. Employers must provide access to electricity or alternative devices, including but not limited to extension cords or charging stations that are necessary to operate an electric or battery-powered breast pump. Employers must also provide access to a sink with running water and a refrigerator (or cooling device or cooler) in close proximity to the employee's workspace.

Employers with fewer than 50 employees may be exempt from these requirements if they can demonstrate undue hardship, in which case they must make reasonable efforts to provide the use of a room or other location, other than a toilet stall, in close proximity to the employee's work area, for the employee to express milk in private.

The denial of a lactation break time or space is a violation under rest period laws, and the employer will be subject to a $100 penalty per violation. Finally, employers are required to develop and implement a policy regarding lactation accommodation and make it available to employees.

"No Rehire" Clauses in Settlement Agreements Prohibited

Settlement agreements between an "aggrieved person" and an employer can no longer contain a provision that prohibits, prevents, or otherwise restricts an employee from obtaining future employment with that employer. (The same is true for any parent companies, subsidiaries, divisions, affiliates, or contractors.) Through the newly created Code of Civil Procedure Section 1002.5, AB 749 makes such provisions in agreements entered into on or after January 1, 2020, void as a matter of law.

This prohibition only applies to agreements between employers and "aggrieved persons," meaning a person who has filed a claim against the employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process. Therefore, a typical severance agreement offered to an employee upon their termination can still contain a no-rehire provision (so long as the severance is not offered as settlement of an employment dispute). Employers are also free to enter into "no rehire" agreements with employees who engage in sexual harassment or sexual assault. Finally, employers are still allowed to terminate an employee or not rehire them "if there is a legitimate non-discriminatory or non-retaliatory reason for

terminating the employment relationship or refusing to rehire the person."

Immediate Reporting of Serious Occupational Injuries

Employers are now required to report serious occupational injury, illness, or death immediately by telephone or through an online portal to the California Division of Occupational Safety and Health ("OSHA"). Until the online portal becomes available, AB 1804 requires that the employer make the report by telephone or email. Noncompliance carries a $5,000 civil penalty.

This report is in addition to the existing employer requirement to report any workplace injury or illness resulting in lost time beyond the date of the injury or illness, or that requires medical treatment beyond first aid, within 5 days of the employer's knowledge of the injury.

Extension of Deadline for Filing Discrimination Complaints

AB 9 extends the filing period for complaints of unlawful employment practices with the Department of Fair Employment and Housing ("DFEH") from one year to three years. However, the bill does not revive lapsed claims. The extension may put more pressure on employers to preserve evidence for a longer period of time to defend claims that may arise against them in the future.

Expansion of Enforcement Mechanisms for Labor Commissioner Citations

Under existing law, the Labor Commissioner is authorized to investigate and issue citations for workplace retaliation or discrimination. SB 229 clarifies the appeals process in regard to such citations.

Once the citation is issued, if the employer does not request a hearing within 30 days, the citation becomes final. Then, 10 days after the citation becomes final, the Labor Commissioner must apply for entry of judgment. In addition, once a citation becomes final, the employer must transmit both the amount cited and a certification of compliance with any other remedies ordered within 30 days.

SB 229 also clarifies that if, following an informal hearing on the citation, the Labor Commissioner issues an order concerning an amount due, that amount must be paid within 45 days of the mailing date of the written decision.

INDUSTRY-SPECIFIC LAWS

Discrimination and Harassment Prevention Training in the Construction Industry

Under SB 530, the Department of Labor Standards Enforcement ("DLSE") is directed to develop industry-specific harassment and discrimination prevention policy and training standards for employers to use in the construction industry. The bill also delays the training requirement until January 2021 for construction employers and authorizes an employer who employs workers pursuant to a multiemployer collective bargaining agreement to satisfy the training requirement by demonstrating that an employee has received the training within the past 2 years.

Employment Safety Report for Mechanics of Firefighting Vehicles

AB 1400 requires that on or before January 1, 2021, the Commission on Health and Safety and Workers' Compensation ("CHSWC") must submit a study to the Legislature, OSHA Board, and the Los Angeles County Board of Supervisors on the risk of exposure to carcinogenic materials and incidence of occupational cancer in mechanics who repair and clean firefighting vehicles.

California Family Rights Act Applied to Flight Crews

No longer subject to the 1,250 hours of service requirement, flight attendants are now eligible for California Family Right Act (CFRA) leave if they have 12 months or more of service with the employer, have worked or have been paid for 60 percent of the monthly guarantee (or the equivalent annualized over the preceding 12-month period), and have worked or have been paid for a minimum of 504 hours during the preceding 12-month period. With the change, AB 1748 conforms state eligibility requirements to federal FMLA requirements.

Motion Picture Production Workers Working Out of State

SB 271 ensures full access to California's unemployment insurance, state disability insurance, and paid family leave benefits for motion picture production workers who are residents of California and work on out-of-state productions, as long as the employee is hired and dispatched from the state and intends to return to seek reemployment.

Employment of Infants in the Entertainment Industry

Current law requires specified certification from a physician in order for an infant under the age of one month to be employed on any motion picture set or location. AB 267 expands the certification requirements for infants to cover any employment in the entertainment industry and expands the definition of "entertainment industry" to include theater, television, photography, recording, modeling, rodeos, circuses, advertising, and any other performance to the public.

Payment of Wages for Print Shoot Employees

Employers of print shoot employees (defined as an individual hired for a period of limited duration to render services relating to or supporting a still image shoot, including film or digital photography, for use in print, digital, or Internet media) may now furnish unpaid wages to the employee by the next regular payday, rather than the last day of employment. SB 671 includes an urgency clause, making it effective immediately.

SB 671 addresses the unique circumstances surrounding the print media industry where nearly all contracts are generally meant for short-term employment. (Motion picture employees currently have the same exception.) Due to the short time length of these contracts, employers often need time to verify that correct payments are made to those involved without being subject to late wage penalties.

Expansion of "Public Works" for Prevailing Wages

Under AB 1768, the definition of "public works" for which prevailing wages, regulations of working hours, and securing workers' compensation apply now includes work performed "during the design, site assessment, feasibility study, and other preconstruction phases of construction," regardless of whether any further construction work is conducted.

Although the California Labor Code already defined "construction" to include "work performed during the design and preconstruction phases, including but not limited to, inspection and land surveying work," AB 1768 eliminates the ambiguity as to what is considered preconstruction work to which prevailing wage requirements apply.

Valley Fever Awareness and Training

Under AB 203, construction employers in highly endemic counties of valley fever — including Fresno, Kern, Kings, Madera, Merced, Monterey, San Joaquin, San Luis Obispo, Santa Barbara, Tulare, and Ventura — must provide effective valley fever awareness and prevention training to employees (such as recognizing symptoms, risk factors, and the importance of reporting symptoms to an employer and seeking medical attention).

Implicit Bias Training in the Medical Field

AB 241 requires continuing education courses for physicians and surgeons to include curricula on implicit bias and bias-reducing strategies. The bill also requires the Board of Registered Nursing and the Physician Assistant Board to adopt regulations mandating implicit bias training for all nurses and physician assistants. The implicit bias training will provide employees with the tools to understand and override their biases on their personal and professional decisions.

Janitor Survivor Empowerment Act

Janitorial employers are required to provide biennial, in-person sexual violence and harassment prevention

training for janitorial workers from a list of qualified organizations and trainers. Employers must also lodge a report with the Department of Labor Standards Enforcement (DLSE) within 48 hours of the training. AB 547 also directs the DLSE to develop and maintain a list of the qualified organizations and peer trainers.

Student Athlete Contracting Rules

Under AB 1518, student athletes are authorized to enter into a contract with an agent without losing their status as student athletes if the contract complies with the policy of the student's educational institution and the bylaws of the National Collegiate Athletic Association ("NCAA"). The contract between the agent and student terminates if the student chooses not to become a professional athlete and instead returns to school, and an agent who provides money or any other thing of value to a student athlete must file an itemized report of those payments with the school.

In addition, SB 206 allows college athletes in California to sign endorsement deals; earn compensation based on the usage of their name, image, and likeness; and sign all types of licensing contracts that would allow them to earn money. SB 206 becomes operative on January 1, 2023.

OCTA Added to PERB Jurisdiction

Employers and employees of the Orange County Transportation Authority ("OCTA") are now required to adjudicate complaints of unfair labor practices before the Public Employment Relations Board ("PERB") under AB 355.

Last year, Governor Brown vetoed the bill that would have added the OCTA to PERB's jurisdiction, noting that PERB's jurisdiction has steadily increased over the years while its funding has not. With the passage of this bill, other transit agencies may seek to be added to PERB's jurisdiction in the coming years.

Reporting of Lead Poisoning

Workers who are exposed to high levels of lead poisoning (at or above 20 micrograms per deciliter) are required to be reported to OSHA. AB 35 requires OSHA to conduct a workplace safety investigation to determine the cause of lead exposure and help businesses correct the issue. The bill also requires any citations and fines imposed by OSHA to be made public each year.

Medical Evidentiary Examinations for Sexual Violence Victims

Sexual violence victims must often travel long distances to access qualified healthcare providers who are trained to conduct medical evidentiary examinations. AB 538 expands the types of professionals who can perform the examinations to not only physicians, surgeons, and nurses, but also to currently licensed nurse practitioners and

physician assistants who undergo specified training.

Co-Workers, Teachers, and Employers Can File for a Gun Violence Restraining Order

Co-workers, employers, and teachers and employees of schools may file a petition of an ex parte temporary gun violence restraining order ("GVRO") against an individual under AB 61. The coworker must have had substantial and regular interactions with the subject of the petition for at least one year and have obtained the approval of the employer. The teacher or employee of a secondary or postsecondary school must be at a school where the subject has attended in the last six months and have obtained the approval of the school administration staff.

Eliminating Bias in Civil Damage Awards

The estimation, measure, or calculation of damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death is prohibited from being reduced based on race, ethnicity, or gender. SB 41 addresses how marginalized groups, such as women and people of color, have historically earned less than others, resulting in substantially lower awards of damages.

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