6 California Legislative Issues for Employers and HR to Watch

By June Bell
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A number of bills making their way through the California Legislature would affect workers and employers in the Golden State, which means that HR professionals will feel the impact if they become law.

Several bills that address workplace training to prevent sexual harassment are on the table, as is legislation about salary reporting. If 2018 was the year of #MeToo, then the California Legislature's current session might be dubbed #MeToo Part II, said Michael Kalt, government affairs director for the California State Council of the Society for Human Resource Management and a partner at Wilson Turner Kosmo in San Diego.

Some workplace bills that fizzled out last year are back as a Democratic supermajority (https://www.latimes.com/politics/la-pol-ca-democrats-supermajority-california-legislature-20181112-story.html) in the state Senate and Assembly continues to flex its political muscle. A supermajority gives the party enough voting power to override a veto.

[SHRM members-only resource: California Labor and Employment Law Overview (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/xperthr/pages/california-labor-and-employment-law-overview.aspx)*]*

The state's new governor, Gavin Newsom, is also a Democrat, but, because he's a business owner, some employers hope he will be sympathetic to employers (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/california-new-governor-gavin-newsom-workplace-bills.aspx). Still, his top priorities, according to his website, include "standing up for California values that are under attack from Washington—from civil rights to immigration."

Here are some of the top employment-related bills that employers and human resource professionals should be watching this session.

1. #MeToo, Redux

A Senate bill (https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB778) that seeks to clear up some murky aspects of the state's sexual-harassment-prevention training requirements has no opposition and therefore is likely to sail through the legislature.

California requires businesses with at least five employees to provide harassment training to workers and managers (www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/pages/hr-professionals-gear-up-for-mandatory-anti-harassment-training.aspx) every two years, but the 2018 law, which took effect in January, raised questions about the deadlines for doing so.

The pending legislation sets a Jan. 1, 2021, deadline and explains that employers that conduct training in 2019 don't have to repeat the training for two years thereafter. The clarification is helpful, but it doesn't alter what HR professionals and business leaders should have already been doing to comply with the current law, said Heather Sager, an attorney with Vedder Price in San Francisco.

For example, employers should ensure that the training meets the new requirements and includes "classroom or other effective interactive training and education" or uses an interactive online training program created by the state's Department of Fair Employment and Housing.

2. Independent-Contractor Test

The California Supreme Court's *Dynamex* decision (https://cases.justia.com/california/supreme-court/2018-s222732.pdf?ts=1525107724) last year unnerved many employers that rely on independent contractors. The court created a three-pronged "ABC" test to determine whether workers should be classified as employees or independent contractors. The 9th U.S. Circuit Court of Appeals recently held that the new test—which makes it difficult to classify workers as contractors—applies retroactively (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/california-strict-independent-contractor-test-applies-retroactively.aspx).

More than 8 percent of California workers (http://laborcenter.berkeley.edu/pdf/2017/What-Do-We-Know-About-Gig-Work-in-California.pdf) were classified as independent contractors in 2016, according to a UC Berkeley Labor Center analysis.

AB 5 (https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5) seeks to turn the *Dynamex* test into law, while AB 71 (https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB71) would apply a more flexible standard. Many gig workers who pick up jobs through smartphone apps and other online technologies—such as those who drive for ride-hailing services—are classified as independent contractors. But if gig workers don't meet the ABC test, they should be classified as employees and paid at least minimum wage and overtime premiums.

In the past, legislators could not have anticipated a business model that allows passengers to use a phone app to hire and pay a driver, Kalt said, so they are playing catchup to regulate taxi-like enterprises such as Uber and Lyft. "Technology is outpacing the law," he said.

In contractor-classification matters, Sager said, "nine times out of 10, both employees and employers are happy with the situation and don't want to change it." Astute HR professionals, however, should proactively conduct internal reviews of employee classifications. If necessary, they should make adjustments to protect their employer from potential litigation, she said.

3. Arbitration Agreements

The purpose of AB 51 (https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB51) is to prevent businesses from silencing workers who have experienced discrimination and colleagues who have witnessed the misconduct. The bill states that employers cannot require employees to "waive any right, forum or procedure" for employer violations of the California Fair Employment and Housing Act (FEHA).

"It's a really broad bill that would severely restrict the use of arbitration agreements in California," said Robin Largent, an attorney with Carothers DiSante & Freudenberger in Sacramento. Former Gov. Jerry Brown vetoed a similar bill last session, noting that it is pre-empted by the Federal Arbitration Act. Should Newsom sign it, a court challenge would certainly follow, Largent said.

4. Pay-Data Reports

If SB 171 (https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB171) becomes law, California employers with at least 100 workers would have to submit reports to the state detailing workers' earnings and job categories identified by race, ethnicity and sex starting in 2021. Similar legislation fizzled out last year, but a battle over pay-data collection has been brewing in Washington, D.C.: A

federal judge recently ordered employers to report (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eeo-1-pay-data-report-2017-2018.aspx) expansive EEO-1 pay data by Sept. 30. The dispute headed to court after the current administration nixed the Obama-era requirement.

Proponents of the California bill say pay-data reports force businesses to confront and correct disparities based on race, ethnicity and sex. Opponents say the numbers can be easily manipulated to bolster unsubstantiated claims of pay inequities.

"From a political standpoint, it seems like valuable data to gather," Largent said. "But do state agencies have the ability to provide meaningful analysis and reporting to make it useful? Are they really going to be able to synthesize it in a useful way?"

5. Statute of Limitations

Many employers didn't like AB 1870 (https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB1870), which was vetoed last year, and they feel the same way about an identical bill this year, AB 9 (https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB9). The legislation would extend the statute of limitations from one year to three years for workers to file a FEHA claim. Similarly, AB 403 (https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB9) would give workers three years—rather than the current six months—to sue for alleged violations of the California Labor Code.

A robust economy and a greater willingness among younger workers to change jobs complicates efforts to track down witnesses, and recollections about motivations or actions from years ago can be murky at best, Sager said. Under the proposed limitations periods, it would be "very, very difficult to have reliable evidence at your fingertips," she added.

6. Expanded Family Leave

Jennifer Siebel Newsom, the governor's wife, has shown support (https://www.latimes.com/politics/la-pol-ca-jennifer-siebel-newsom-family-leave-20190401-story.html) for SB 135 (https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB135), which would allow workers at companies with at least five employees to take up to 12 weeks of unpaid leave to care for sick relatives. Current federal and California laws provide such benefits only to employees at businesses with at least 50 workers. And California's New Parent Leave Act protects baby-bonding leave for employees at businesses with at least 20 workers.

The California Chamber of Commerce has opposed the bill. Compliance could be a challenge for small businesses, where a lengthy absence by a single worker can significantly affect operations, Kalt noted.

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