LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
THURSDAY, JUNE 5, 2019

The next wave of new California employment laws

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The California State Senate chamber.

California is widely known for its unique employment laws, which seem to increase in number and complexity each year. This year the Golden State is on track to continue that trend, with the state Legislature having introduced several significant employment-related bills on issues ranging from independent contractor classification to expanded paid sick leave and longer statutes of limitations for filing employment-related claims. While bills aiming to expand paid sick leave, expand certain leave of absence rights, and protect the employment of medical marijuana users have failed passage, a number of other significant bills have been passed by their house of origin and appear to be headed toward full approval of the Legislature. These are the most noteworthy bills that have successfully progressed:

Independent Contractor Status

Last year, the California Supreme Court's decision in *Dynamex Operations West v. Superior Court* created a new and very narrow test for determining when a worker qualifies as an independent contractor. That decision elicited quite an outcry from the business community and from many gig economy workers, which led to an effort to propose legislation to either undo the *Dynamex* decision or, at the very least, to narrow its application. Those efforts largely failed, but it appears that some compromise has been reached. AB 5, which passed the Assembly and is now being considered by the Senate, would codify that *Dynamex* remains the law for workers in most industries (including most gig economy workers). However, there are a few negotiated exceptions for insurance agents, hair stylists, certain real estate workers, doctors and surgeons, security brokers/investment advisors, direct salespeople, and certain contract professionals. For these groups (as specifically defined in the bill), the more lenient, pre-*Dynamex* test for independent contractor status would apply.

Employment Arbitration Agreements

Last year, the Legislature sought to largely eliminate the continued use of employment arbitration agreements, but Gov. Jerry Brown vetoed the bill. With a new governor in office, the Legislature is trying again. AB 51, like last year's AB 3080, would prohibit employers from requiring employees to sign pre-dispute agreements to arbitrate most wage and hour disputes and discrimination/harassment/retaliation disputes. These agreements would be prohibited even if employees were allowed an opportunity to opt-out of the agreements. Most defense attorneys strongly believe that this law, if passed, would be invalid for arbitration agreements governed by the Federal Arbitration Act. However, this bill is nevertheless progressing, having passed the Assembly. It is possible that this law validly could prohibit employment arbitration agreements for employers who are not engaged in interstate commerce and whose arbitration agreements, therefore, would not be covered by the FAA.

No-Rehire Provisions in Settlement Agreements

When employers and employees settle employment-related claims, it is fairly common for the settlement agreement to include a provision precluding the employee from seeking re-employment with the employer in the future. AB 749, which passed the Assembly, would prohibit these provisions in settlement agreements. This would be an unwelcome development for employers who would have retaliation concerns any time they have to discipline a rehire who previously sued the company.

Pay Data Reporting

While litigation continues over the federal Equal Employment Opportunity Commission pay data reporting rule and its future remains uncertain, California is on its way to enacting its own similar pay data reporting rule. SB 171, which passed the Senate, would require employers with 100 or more employees to file annual reports, beginning in March 2020, containing pay data and hours worked data for certain categories of employees according to race, ethnicity, and gender. The reports would be filed with the Department of Fair Employment and Housing and would also be made available to the Division of Labor Standards Enforcement upon request.

Longer Statute of Limitations for Discrimination Claims

AB 9, which passed the Assembly, would enlarge the statute of limitations for an employee to file an administrative charge of discrimination, harassment, or retaliation with the Department of Fair Employment and Housing. Under current law, a charge needs to be filed within one year of the alleged unlawful conduct. The proposed new law would allow such charges to be filed up to three years after the conduct at

issue. If signed into law, this bill effectively would allow employment discrimination lawsuits to be filed some four years after the alleged discriminatory action occurred, creating the potential for significant evidence problems associated with employee (witness) turnover, faded memories, and loss of relevant documents.

Special Protections for Victims of Sexual Harassment

Another bill fueled by last year's metoo movement, AB 171, which passed the Assembly, would make it unlawful for an employer to discharge or otherwise discriminate or retaliate against an employee because of the employee's status as a victim of sexual harassment (or stalking, domestic violence, or sexual assault), if the employer knows of the status or the employee notifies the employer of this victim status (including perhaps by filing an internal harassment complaint). Notably, this bill would create a rebuttable presumption of discrimination if an employer takes adverse action against an employee within 90 days of being notified of the employee's alleged victim status.

Also adding protections for alleged victims of sexual harassment, another bill, AB 170, would make employers who use labor contractors jointly liable for harassment suffered by the labor contractors' employees.

More Time to Comply With Expanded Sexual Harassment Prevention Training Requirements

Last year, California passed a law expanding the requirement for employers to provide sexual harassment training to employees. Prior to that change in the law, employers with 50 or more employees were required to provide sexual harassment prevention training to supervisory employees within six months of hire and every two years thereafter. That law was broadened to require employers with five or more employees to require this training and also to provide one hour of training to non-supervisory employees. The new law also expanded the content requirements, primarily to include training on prevention of gender-identity harassment. Under this new law, compliance is currently required by Jan. 1, 2020. However, with pending SB 778, which passed the Senate and appears to be headed for approval by the Assembly, the compliance deadline would be extended to Jan. 1, 2021. This bill is proposed as urgency legislation, meaning that it would take effect immediately upon being signed into law (i.e. on or before Oct. 13, 2019).

Protection for Hairstyles

SB 188, which passed the Senate, would amend the Fair Employment and Housing Act to make clear that the act's prohibition against race discrimination includes discrimination based on traits associated with race, including hair texture and protective hairstyles such as braids, locks, and twists. If passed, this bill would limit employer grooming policies that dictate acceptable and unacceptable hairstyles.

Looking Ahead

Employers and others who are interested in these bills can review the text and monitor their progress at http://leginfo.legislature.ca.gov. The last day for bills to be passed is September 13, 2019. The governor thereafter will have until October 13 to sign or veto bills.

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