THAKUR LAW FIRM, APC

2019 California Employment Law Update: The Employer's Survival Guide

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California lawmakers were very busy last year, passing an assortment of new workplace-related laws that will affect California employers in 2019 and beyond. Most prominently are laws that followed the outcry over workplace-related sexual harassment, also known as the #MeToo movement. Additional new laws include increased minimum wage, new requirements for employee and management harassment prevention training, lactation accommodations, pay equity and much more.

The following is a summary of what employers need to know about new laws that will take effect in 2019. Employers should review their policies and practices to ensure ongoing legal compliance and to limit potential exposure. Be sure to consult with legal counsel as to any questions.

Anti-Harassment Training Requirements Expanded
On September 30, 2018, Governor Jerry Brown approved SB 1343, greatly expanding the requirements for providing anti-harassment training. Previously, only supervisors were required to be trained and only for companies with 50 or more employees. However, the new law requires that both supervisors and employees be trained every two years for any company with five or more employees.

Highlights of the new law include:

- By January 1, 2020, California employers with five or more employees are required to provide: (1) at least two hours of classroom or other effective training and education regarding sexual harassment prevention to supervisory employees; and (2) one hour of sexual harassment prevention training and education to nonsupervisory employees. New employees must be trained within six months of hire.

- On or after January 1, 2020, in addition to regular employees, employers will also be required to provide temporary or seasonal employees with sexual harassment prevention training within 30 calendar days after the hire date or within 100 hours worked, if the employee is expected to work for less than six months. If the temporary employee is provided by a temporary services employer, training must be provided by the temporary services employer, not the client.

Employer "Takeaway":
According to the Department of Fair Employment and Housing's (DFEH) current interpretation of the new law, all covered employers are required to provide training in calendar year 2019, on or before January 1, 2020, even if training was provided in 2018. Thereafter, anti-harassment training must be provided once every two years.

New Limitations on Confidentiality in Connection with Sexual Harassment Claims
Several new bills were enacted to respond to assertions that sexual harassment victims often feel as though they have been improperly silenced by virtue of settlement agreements and/or concerns about defamation claims that might be asserted against them if they were to raise complaints. To address these issues, the following bills were passed:

- SB 820 provides that effective January 1, 2019, settlement agreements involving civil or administrative claims of sexual assault, sexual harassment, gender discrimination or retaliation may not include a non-disclosure provision as to the underlying factual allegations of the complaint. Under CCP § 1001, any such non-disclosure provisions of factual information will be deemed void as a matter of law and against public policy.

Although underlying factual allegations cannot be subject to non-disclosure provisions, certain portions of settlement agreements may remain confidential, including the amount paid in settlement of a claim.

- AB 3109 makes unenforceable any provision in a contract or settlement agreement (such as a confidentiality provision), entered into after January 1, 2019, that waives a party's right to testify regarding criminal conduct or sexual harassment.

Employer "Takeaway":
Under a new law, confidentiality clauses that prohibit the disclosure of factual information other than the claimant's identity are prohibited in any settlement agreement in a case where sexual harassment, assault or discrimination has been alleged.

Protections for Victims and Employers from Defamation Claims Related to Sexual Harassment Complaints
AB 2770 aims to protect victims and employers from defamation claims related to making complaints or communicating information about alleged sexual harassers to others. The law adds two new categories of communications protected from defamation claims. First, it protects an employee's complaints of sexual harassment to an employer based on credible evidence, made without malice. Second, it protects communications between an employer and interested persons regarding a sexual harassment complaint. Such communications could include those between an employer and a government agency like the DFEH or Equal Employment Opportunity Commission (EEOC), or those between an employer and an outside investigator or potential witness.

AB 2770 also provides employers with additional protection in reference check situations, expressly authorizing an employer to answer whether it would rehire an employee and whether or not that rehire decision is based on its determination that the former employee engaged in sexual harassment. The intent of this provision of AB 2770 is to allow former employers to warn potential employers about an individual's alleged conduct in the workplace without the threat of a defamation lawsuit.

Employers should note that, while AB 2770 provides additional protections for communications regarding sexual harassment, it does not address communications regarding other forms of harassment, such as harassment based on race, religion, national origin, age, and other protected classifications.

Employer "Takeaway":
The law provides (1) employees who report harassment won't be liable for injury to the alleged harasser's reputation; (2) communications between the employer and victims/witnesses will be protected; (3) an employer is permitted to reveal in a job reference whether the individual is not eligible for rehire because the employer determined that the individual engaged in sexual harassment; and (4) employees who report harassment, based on credible evidence and without malice, won't be liable for injury to the alleged harasser's reputation.

Statute of Limitations for Claims of Sexual Assault Extended
AB 1619 extends the time for a victim of sexual assault to bring a cause of action. The new statute of limitations will be 10 years from the date of the last act of violence, or three years from the date the victim knew or should have known that an injury or illness resulted from an act of sexual assault.

Clarification Provided on Pre-Employment Salary History Inquiries
AB 2282 expressly defines "applicant" as "an individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position." Therefore, prohibitions on the use of salary history information do not apply to current employees. The new law also expressly clarifies that employers may ask an applicant about their "salary expectation," directly addressing employer concerns about the ability to offer competitive salaries without violating the law.

After banning inquiries to job applicants about salary history, the Legislature amended the law to clarify that (1) employers can ask about an applicant's salary expectations for the position being applied for; (2) external applicants, but not internal applicants, are entitled to a pay scale for the position applied for; (3) the pay scale only needs to include salary or hourly wage ranges; and (4) compensation decisions based on a current employee's existing salary may be permissible if justified by factors such as a seniority or merit system.

Employer "Takeaway":
All human resources personnel and individuals involved in applicant interviews should be educated and trained on these clarified requirements and restrictions regarding salary history inquiries.
Women Required On Boards of Public Companies
By no later than December 31, 2019, publicly-held corporations whose principal executive offices are located in California must have a minimum of one female on their boards of directors. A corporation is not required to replace existing male board members to comply and may instead increase the number of directors, adding a female board member. By the close of the 2021 calendar year, the required minimum number of female board members increases to two if the corporation has five directors, or to three if the corporation has six or more directors. Failure to timely comply with this new law may result in fines up to $100,000 for a first violation.

Employers Must Make Reasonable Efforts To Provide A Private Lactation Location
Existing law requires every employer to provide a reasonable amount of break time to accommodate an employee desiring to express breast milk and requires an employer to make reasonable efforts to provide the employee with 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. AB 1976 amends Section 1031 of the Labor Code and now requires an employer to make reasonable efforts to provide an employee with use of a room or other location, other than a bathroom. An exemption applies in limited circumstances if the employer can prove an undue hardship.

Employer "Takeaway":
An employer must provide a location other than a toilet stall for an employee to express breast milk. The location must be private and in close proximity to the employee's work area.

Clarification of Employees' Right to Receive Copy of Pay Statements
An employer's obligation regarding pay statements has long included a duty to allow employees to inspect or copy their pay statements within 21 days of such a request. The California Legislature, in SB 1252, has "clarified" that employees' rights to review and copy pay statements also includes the right to receive a copy of the records from the employer. The employer is permitted to charge the employee "the actual cost of reproduction" of the records, as set forth in Labor Code Section 226.

Employer "Takeaway":
Employees do not just have a right to inspect their payroll records, but now have the right to receive copies of their payroll records

Limitations on Use of "Particular Convictions" in Criminal Background Checks
Under the Labor Code, employers may not consider a job applicant's expunged or judicially-sealed convictions until a conditional offer of employment has been extended. The law carves out exceptions, however, for certain sensitive jobs, such as with a school, where the criminal information is needed pursuant to state or federal law. SB 1412 was an effort to limit employer's use of these exceptions. SB 1412 dictates that an employer can only consider "particular convictions" when rejecting applicants. It defines "particular conviction" as "a conviction for specific criminal conduct or a category of criminal offenses prescribed by any federal law, federal regulation, or state law that contains requirements, exclusions, or both, expressly based on that specific criminal conduct or category of criminal offenses."

Employer "Takeaway":
The Legislature has amended the "Ban the Box" law to narrow an employer's ability to consider sealed or expunged convictions to only those circumstances where a particular conviction would legally prohibit someone from holding that job.

"Employee" or "Independent Contractor"?
On April 30, 2018, the Supreme Court handed down its long-awaited decision in Dynamex Operations West, Inc. v. Superior Court, addressing the test for determining whether an individual worker should properly be classified as an employee or, instead, as an independent contractor. In determining whether a worker is an employee or an independent contractor for purposes of the worker's eligibility for overtime wages, minimum wages, meal breaks and rest breaks, the worker is presumed to be an employee unless the employer can show (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

Employer "Takeaway":
The Dynamex decision may open the door to an increase in lawsuits by current and former workers, challenging their classification as independent contractors. Therefore, employers are encouraged to review their current contracts with those whom they are classified as independent contractors to ensure they can meet the requirements of the new "ABC test."

California Minimum Wages Increases for 2019
Effective January 1, 2019, California employers must comply with mandated minimum wages increases. The wage increases are in accordance with the 2016 legislation signed by Governor Jerry Brown to put California's minimum wage on track to reach $15 per hour by 2022.

On January 1, 2019, California employers with 25 employees or fewer will now be required to pay their employees a minimum wage of $11.00 per hour. On January 1, 2019, California employers with 26 employees or more will now be required to pay their employees a minimum wage of $12.00 per hour.

Several cities and counties are also increasing their minimum wage in 2019, including Berkeley, Cupertino, El Cerrito, Los Angeles County, Malibu, Mountain View, Palo Alto, Richmond, San Diego, San Francisco, San Jose, San Leandro, San Mateo, Santa Clara and Sunnyvale.

Please contact us if you need more information.
The employment law attorneys at Thakur Law Firm, APC are knowledgeable in the latest employment law compliance issues, and they can assist your business in ensuring you do not run afoul of the ever-changing contours of California employment law.