2019 Employment Law Update

Newsletter from The Maloney Firm, APC

A number of new and noteworthy employment laws will go into effect on January 1, 2019, and beyond.

Much of the legislation stems from the *#MeToo* movement, strengthening harassment and discrimination protection, imposing broader training obligations, updating lactation accommodations, and mandating female presence on boards of public companies.

Other significant new laws concern wage and hour and related personnel issues and important clarifications due to ambiguities in laws that were passed last year, including the ban on asking about an applicant's salary history and criminal history.

NEW LEGISLATION

Sexual Harassment

SB 1343 – Sexual Harassment: Company Training Requirements Expanded

SB 1343 expands the sexual harassment prevention training requirement to encompass employers with ***five*** or more employees (including temporary or seasonal employees) and to cover both supervisory and non-supervisory employees. This "interactive" training (one hour for all employees/two hours for supervisors) must be completed by January 1, 2020 and repeated every two years.

SB 820 – California Limits Sex Harassment Settlement Agreement Confidentiality Provisions

SB 820 prohibits and renders void provisions in settlement agreements entered into on or after January 1, 2019 that prevent disclosure of factual information related to civil or administrative complaints of sexual assault, sexual harassment, and workplace harassment or discrimination based on sex.

The law does not apply to provisions that:

(1) protect the claimant's identity at the claimant's request, provided the defendant is not a government agency or public official; or

(2) prohibit disclosure of settlement payment amounts.

AB 2770 – New Protections Against Defamation Suits By Alleged Harassers

AB 2770 protects sexual harassment victims and their employers against lawsuits for defamation by:

(1) ensuring victims of sexual harassment and employers are not sued for defamation by the alleged harasser when a complaint of sexual harassment is made and the employer conducts its internal investigation; and

(2) allowing an employer to state on a reference check that the alleged harasser is not eligible for rehire based upon the employer's "determination that the former employee engaged in sexual harassment."

The new law also amends Section 47 of the California Civil Code, which relates to privileged communications, to make the conduct described above "privileged," and therefore protected from defamation claims.

New Legislation - Continued on Page 2

California Case Law Update

SUPREME COURT REJECTS STARBUCK'S GRAN-DE MINIMUS ARGUMENT

Troester v. Starbucks (2018) 5 Cal.5th 829

The California Supreme Court held that the FLSA *de minimus* doctrine is not applicable in California - employers must compensate hourly employees for off-the-clock work that occurs on a daily basis, even if that work only lasts a few minutes per day.

NO SHOES, NO SHIRT, NO SOLICITATION

AMN Healthcare Inc. v. Aya Healthcare Services, Inc. (2018) 28 Cal.App.5th 923

The California Court of Appeal held that employee non-solicitation agreements - even if reasonable and narrowly tailored - are void, unless they fall within one of the narrow statutory exceptions specifically pertaining to the sale of a business or improper use of the employer's trade secrets.

California Case Law - Continued on Page 4

New Legislation - Cont.

SB 224 – Strengthening Prohibitions Against Harassment with Respect to Professional Relationships

SB 224 expands the type of professional relationships where liability for claims of sexual harassment may arise and authorizes the DFEH to investigate those circumstances. The bill amends California Civil Code Section 51.9 to expressly include an investor, elected official, lobbyist, director, and producer among those listed persons who may be liable to a plaintiff for sexual harassment.

AB 3109 – Contracts: Waiver of Right of Petition or Free Speech

This bill makes unenforceable any provision in a contract or settlement agreement entered into on or after January 1, 2019 that waives a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or alleged sexual harassment when the party has been required or requested to attend the proceeding pursuant to a court order, subpoena, or written request from an administrative agency or the legislature.

AB 1619 – Sexual Assault Statute of Limitations

This new law, AB 1619, greatly enlarges the statute of limitations for filing a civil action for damages for sexual assault to 10 years after the alleged assault, or three years after the plaintiff discovered or reasonably discovered injury as a result of the assault, whichever is later.

SB1300 –Claims of Workplace Harassment in California to Receive Greater Protections under New Law

SB 1300 makes it easier for employees to assert sexual harassment claims by affirming and denying rulings from prior courts. Specifically, it adopts the standard that a sexual harassment plaintiff "need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job." It also provides that a "single incident of harassment is sufficient to create a triable issue of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment."

The statute further declares the Legislature's intent to reject the "stray remarks doctrine" and affirms the California Supreme Court's opinion in *Reid v. Google, Inc.*, 50 Cal.4th 512 (2010), which found isolated remarks, if viewed in light of other circumstances, can be evidence of severe and pervasive harassing conduct. In addition, SB 1300 expressly rejects the view that workplaces can be held to different standards regarding sexual harassment. Further, the Legislature declared these matters are often nuanced and factually intensive.

SB 1300 mandates that an employer may be responsible for the acts of nonemployees with respect to any type of harassment (not just sexual harassment) against employees and other nonemployees working as interns, volunteers or service contractors. The bill also prohibits a prevailing defendant from being awarded fees and costs unless the court finds the action was frivolous when brought, or that the plaintiff continued to litigate after it clearly became so.

In addition, SB 1300 places limitations on use of releases and non-disparagement agreements. It prohibits employers, in exchange for a raise or bonus or as a condition of employment or continued employment, from requiring: (1) a release of FEHA claims or rights; (2) execution of a non-disparagement agreement or other document that prohibits disclosure of unlawful workplace conduct. This provision does not apply to negotiated settlements of claims filed in court, before an administrative agency or alternative dispute resolution forum, or submitted through an employer's internal complaint process.

Discrimination

SB 826 – California Will Require Women on Corporate Boards of Directors

Under SB 826, a publicly held corporation with principal executive offices in California must have a representative number of women on its Board of Directors. Specifically, by the end of 2019, covered corporations must have at least one woman on their boards. By the close of 2021, the law will require at least two women on boards with five directors and at least three women on boards with at six or more directors. Companies that don't comply will face a $100,000 fine for the first violation.

FEHA: National Origin Regulations Expanded

The new amendments to the California Fair Employment Housing Act (FEHA) expand the definition of "national origin" to include:

- Physical, cultural or linguistic characteristics associated with a national origin group;
- Marriage to or association with persons of a national origin group;
- Tribal affiliation;
- Membership in or association with an organization identified with or seeking to promote the interests of a national origin group;
- Attendance or participation in schools, churches, temples, mosques, or other religious institutions generally used by persons of a national origin group; and
- Name that is associated with a national origin group.

New Legislation - Cont.

Family Rights

SB 1123 – Paid Family Leave Uses

California has a Paid Family Leave ("PFL") program that provides partial wage replacement to employees who take leaves of absence for specified purposes. This new law, SB 1123, expands the program to provide PFL benefits beginning January 1, 2021 to employees who take time off for reasons associated with being called to active duty or to a spouse, domestic partner, parent, or child being called to active duty.

AB 1976 – Lactation Accommodations Clarified

This new law requires employers to make reasonable efforts to provide a room or other location in close proximity to the employee's work area—***other than a bathroom***—for lactation purposes. If this isn't feasible, a temporary location is okay if it's private, free from intrusion, and used only for lactation purposes. See Labor Code §1031.

Wages, Hiring, Salary & Payroll

Minimum Wage: CA's Minimum Wage Hike Continues

Remember that the state minimum wage will also increase on January 1, 2019 to **$11 per hour for employers with 25 or fewer employees, and to $12 per hour for employers with 26 or more employees**. This is not a new law—SB 3 was signed in 2016, and this is the next mandatory increase.

(And remember to determine if any local minimum wage ordinances have increases that apply to your business: City of Los Angeles: July 1, 2019: $13.25 for employers with 25 or fewer, and $14.25 for employers with 26 or more employees.)

These minimum wage increases will also impact California's exempt workers. California law requires exempt employees to meet both a "salary basis test" and a "duties test." The "salary basis test" requirement is directly tied to the minimum wage – an exempt employee must earn at least twice the state's minimum wage.

That means, at **$11.00 per hour, the salary threshold for exempt employees will be $45,760 annually,** and at **$12.00 per hour, exempt employees cannot be paid less than $49,920 annually**.

SB 1252 – Payroll records

Labor Code 226 allows an employee to "inspect or copy" payroll records and imposes a penalty of $750 on those employers who fail to allow inspection and copying within 21 days of the request. SB 1252 is a clarifying bill that provides employees with the right to "receive" a copy of the records, in addition to the already existing right to inspect and copy.

SB 1412 – Applicants for Employment: Criminal History

This bill permits employers to conduct background checks for employees under certain narrow exceptions. Current law generally prohibits consideration of an applicant's judicially sealed or expunged convictions. SB 1412 will 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.

AB 2282 – Salary History: Understanding the Meaning Behind the Ban

AB 2282 clarifies unresolved questions about the scope of the salary inquiry ban provided through AB 168. First, it defines the previously undefined terms, "applicant," "pay scale," and "reasonable request," in Labor Code Section 432.3. Second, AB 2282 clarifies that while employers may not ask for an applicant's salary history information, they may ask for an applicant's salary expectations. Third, it amends Section 1197.5 to authorize an employer to make a compensation decision based on an employee's current salary as long as any wage differential resulting from that compensation decision is justified by one or more specified factors, including a seniority system, a 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.

Miscellaneous

SB 954 – Mediation: Tell Clients About Mediation in Writing

SB 954 amends Evidence Code Section 1122 to require that attorneys provide their clients with a "printed" written disclosure about mediation confidentiality as soon as reasonably possible before a client agrees to participate in the mediation process. The attorney must also obtain a printed acknowledgment signed by the client stating that the client has read and understands the mediation confidentiality restrictions of Evidence Code 1119.

California Case Law - Continued from page 1

AND THE WINNER IS…

Huerta v. Kava (2018) 29 Cal.App.5th 74

Prevailing plaintiffs can receive costs and attorney's fees under California's FEHA, but prevailing defendants cannot, absent a finding that the case was frivolous. In line with the reasoning of the Fourth District Court of Appeal earlier this year in *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (2018) 19 Cal.App.5th 525, the Second District confirmed that a defendant employer cannot obtain any costs (including ordinary costs, expert witness fees, or attorney's fees) in nonfrivolous FEHA actions regardless of whether the defendant beat a statutory settlement offer under Code of Civil Procedure section 998. *Arave* and *Huerta* will affect cases filed before January 1, 2019, after which time the FEHA has been amended to include Government Code section 12965(b) with language to the same effect.

TO BE OR NOT TO BE

Garcia v. Border Transportation Group (2018) 28 Cal.App.5th 558

The California Supreme Court's April 2018 decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 established a new, stricter "ABC" test for determining whether workers in California should be classified as employees or as independent contractors. In *Garcia*, the California Court of Appeal clarified that *Dynamex* applies only to workers covered by the California Industrial Welfare Commission's wage orders. The status of other workers will continue to be determined under the prior multi-factor test involving the extent of control exercised over the worker.

NOT AS EASY AS A-B-C

Curry v. Equilon Enterprises, LLC (2018) 23 Cal.App.5th 289

The Fourth District Court of Appeal held that the far-reaching "ABC" test set out by the Supreme Court in *Dynamex* does not apply in the context of joint employment claims. *Curry* involved a gas station manager who alleged she was jointly employed by Equilon Enterprise LLC, doing business as Shell Oil Products US and ARS, the company that leased gas stations from Shell. The *Curry* court concluded that policy considerations driving *Dynamex* to apply the ABC test did not apply because in a joint employer context, the alleged employee is already considered an employee of the primary employer.

Thus, the Fourth District reasoned, "the policy purpose or presuming the worker to be an employee and requiring the secondary employer to disprove the worker's status as an employee is unnecessary because taxes are being paid and the worker has employment protections." Although the full extent of *Dynamex's* applicability remains ambiguous, *Curry* provides that companies may still be able to contract out individuals that are part of their core business, as long as they do so through another entity rather than contracting directly with individuals.

THERE'S NO "I" IN PAGA

Khan v. Dunn-Edwards Corp. (2018) 19 Cal.App.5th 804

Under California's Private Attorneys General Act ("PAGA") an "aggrieved employee" may file a representative action on behalf of himself or herself and other current and former employees to recover civil penalties for violations of the California Labor Code. In *Khan*, the Court of Appeal affirmed summary judgment in favor of the employer where notice to the Labor and Workforce Development Agency ("LWDA") failed to mention or reference other aggrieved employees. Where the notice referenced only the plaintiff employee's particular claims and "no group is identified" in the notice, the employee cannot pursue representative PAGA claims.

NO PENALTY LEFT BEHIND

Huff v. Securitas Security Services USA, Inc. (2018) 23 Cal.App.5th 745

The California Court of Appeal held that PAGA allows a plaintiff to pursue penalties for all of the Labor Code violations committed by an employer that affected any employee, provided that the plaintiff must have been affected by at least one Labor Code violation.

Looking Ahead

GIVE ME A BREAK

*Stewart v. San Luis Ambulance, Inc., (*2018) Cal. LEXIS 2299

Pursuant to the Ninth Circuit's request, the California Supreme Court will provide guidance on wage and hour questions, including whether a California employer of ambulance attendants working 24-hour shifts must relieve the attendants of all duties during rest breaks and meal periods, including the duty to be available to respond to an emergency call if one arises (with or without a written agreement), and whether the applicability of "premium wage" payments for improper meal periods give rise to claims under sections 203 and 226 of the California Labor Code for waiting time penalties and improper pay statements.

HEAD OF THE CLASS

Lamps Plus Inc. v. Frank Varela, No. 17-988 (Argument October 29, 2018)

The United States Supreme Court will decide whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements. The Supreme Court's decision has implications for the employment sector and will likely influence whether employers expressly exclude class actions from future arbitration agreements.

SETTLED OR STANDING?

Kim v. Reins International California, Inc., (2017) 18 Cal.App.5th 1052 (Review Granted March 28, 2018)

The California Supreme Court will decide whether a PAGA representative loses standing as an "aggrieved employee" to pursue representative claims for wage-related civil penalties under PAGA after dismissing his individual wage claims against his employer.

The Maloney Firm, APC, is a Los Angeles law firm that represents clients in trials, arbitrations, and appeals in both state and federal courts. Our attorneys routinely represent clients in employment litigation, business litigation, and professional malpractice.

Our employment team includes Lisa Von Eschen, Patrick Maloney, Vanessa Willis, and Samantha Botros and they are happy to answer questions you may have.

Please give us a call if your company would like more guidance on employment matters discussed on these pages.

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