2019 Mid-Year Employment Law Update

Newsletter from The Maloney Firm, APC

The California legislature continues to enact increasingly employee-favorable legislation (with a few exceptions.) This means significantly more burden and potential liability for employers.

Issues related to employee and independent contractor classifications and the *Dynamex* decision are at center stage of the discussion and likely to have the most impact for California businesses.

Also, the legislature is reintroducing numerous employment bills addressing paid family leave, harassment and discrimination as well as proposing legislation on new topics.

PROPOSED EMPLOYMENT LEGISLATION

Dynamex Aftermath

Last year, the California Supreme Court in Dynamex Corporations West, Inc v Superior Court (2018) 4 Cal. 5th 903, 916-917, *adopted an entirely new test for determining whether an individual is an employee or an independent contractor. This new "ABC" test makes it more difficult for businesses to classify workers as independent contractors.*

AB 5 – This bill intends to codify the California Supreme Court's 2018 decision in *Dynamex*. In addition, the bill would exempt specified professions and instead provide that the employment relationship test for those professions shall be governed by the test adopted in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 if certain requirements are met. These exempt professions would include licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, direct sales salespersons, real estate licensees, workers providing hairstyling or barbering services, and those performing work under a contract to provide professional services (e.g. lawyers.) Notably, gig-economy workers such as Uber drivers aren't included in the proposed exemptions.

AB 71 – This bill represents a counter-response to *Dynamex* and essentially proposes to revert to the previous multi-factor *Borello* test for determining employee or independent contractor status.

Reintroduction of *#MeToo* Bills By Governor Newsom

In 2018 a series of bills in response to the #MeToo movement were signed into law providing additional protections to victims of sexual harassment. However, there were a number of bills that did not make it through and are now being reintroduced for another attempt under Governor Newsom.

AB 9 – This bill would extend the statute of limitations for filing administrative claims for employment discrimination (including, but not limited to, sexual harassment) from one year to three years.

Proposed Legislation - Continued on Page 2

CALIFORNIA CASE LAW UPDATE

Wage & Hour

ABC – 123

***Vazquez v. Jan-Pro Franchising Int'l Inc.* (2019) 923 F. 3d 575**

The Ninth Circuit held that *Dynamex* should be applied retroactively. The *Dynamex* decision adopted the more stringent ABC test for determining independent contractor status. Under *Dynamex*, to establish that a worker is an independent contractor, the business must prove that the worker: (a) is free from control and direction in the performance of his or her work, both under the contract for the performance of the work and in fact; (b) performs work that is outside the usual course of the hiring entity's business; and (c) is customarily engaged in an independently

California Case Law - Continued on Page 3

(Proposed Legislation - Cont.)

AB 170 –This bill proposes to impose joint employer liability on companies that hire a labor contractor for employee harassment claims made against the labor contractor pursuant to the Fair Employment and Housing Act (FEHA).

AB 171 – This bill would prohibit employers from taking adverse action against an employee because of his or her status as a victim of sexual harassment. It would also establish a rebuttable presumption that any adverse action taken against an employee within 90 days of a complaint is unlawful.

AB 547 – This bill deals with mandated sexual harassment prevention training for janitorial contractors. It would require them to use training providers from an approved list, including peer trainers and other union-affiliated entities.

AB 628 – This bill extends certain leave and other protections to victims of sexual harassment or family members of victims of sexual harassment.

SB 778 – Harassment Training Requirement – The Senate introduced SB 778 to clear up some of the confusion regarding the new training requirements in two important ways. First, SB 778 extends an employer's deadline to provide sexual harassment training and education by a full year, resetting the compliance deadline to January 1, 2021. Second, the bill makes clear that an employer who has provided the required training and education to an employee in 2019 is not required to provide refresher training and education again until two years thereafter. As a result, employers already offering compliant training in 2019 can delay providing refresher training until 2 years after the date of the training, rather than provide another round of training before the January 2021 deadline.

Paid Sick Days/Paid Family Leave

There has been significant discussion at both the state and federal level regarding issues related to paid family leave. Governor Newsom has voiced support for providing six months of paid family leave but has yet to provide any further details.

AB 196 – This bill declares the intent of the legislature to expand California's paid family leave program to provide a 100 percent wage replacement from the state disability insurance program for workers earning $100,000 or less annually.

AB 406 –This proposal would require the Employment Development Department to distribute the application for family temporary disability insurance benefits in English and all other languages spoken by a substantial number of applicants.

SB 83 – Beginning on July 1, 2020 the maximum duration of paid family leave (PFL) benefits individuals may receive from California's State Disability Insurance (SDI) program will extend from six to eight weeks: (a) to care for a seriously ill child, spouse, parent, grandparent, grandchild, sibling, or domestic partner; or (b) to bond with a minor child within one year of the birth or placement of the child via foster care or adoption. SB 83 also requires the Governor to propose, by November 2019, further benefit increases – in terms of duration and amount – and job protections for individuals receiving PFL benefits.

SB 135 –This proposal would prohibit an employer with 5 or more employees to refuse to grant an employee a request to take up to 12 weeks of unpaid leave for family care and medical leave if the employee had 180 days of service with the employer. The proposal expands the definition of family member, increases the wage replacement amount, and ensures employees have job protection when they take family leave.

Other Repeat Legislation

State legislators have also reintroduced a number of other bills that were previously proposed but defeated.

AB 403 – Retaliation –This bill extends the statute of limitations for pursuing a California Labor Code Section 98.7 agency claim for retaliation from six months to two years. The bill also seeks to add an attorneys' fee provision to California Labor Code Section 1102.5, which is another anti-retaliation section found in the Labor Code.

AB 749 – "No Rehire" Agreements – This bill prohibits settlement agreements that contain a provision that prevents a party from working again for that employer, related entity, or contractor of the employer.

SB 42 – Lactation Accommodation for Employees – This bill requires businesses to provide safe and clean lactation facilities for their workers, requires that lactation facilities be built in new construction, and ensures employees receive written information about their rights to a safe and comfortable lactation space at work.

SB 171 – Pay Data Reporting – This measure requires employers with 100 or more employees to submit to the Department of Fair Employment and Housing an annual pay data report that includes specified information related to race, ethnicity, and sex.

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New Labor and Employment Proposals

In addition to legislative proposals that are being reintroduced under Governor Newsom, there are a number of new employment bills on the horizon.

SB 188 – Discrimination: Hair Styles – This bill would amend the definition of "race" under FEHA to include "traits historically associated with race, including but not limited to, hair texture and protective hairstyles" (such braids, locks and twists). This is a hot issue nationally.

AB 1224 – California Family Rights Act (CFRA) – This bill would eliminate the requirement that an employee, in order to be eligible for unpaid family and medical leave under CFRA, must work at least 1,250 hours for the employer within the last 12 months. This means that covered California employers could be required to provide family and medical leave to eligible employers immediately upon hiring. This bill also expands paid family leave (PFL) benefits by allowing two 6 week PFL claims per year to an employee who has worked more than 900 hours in a year.

AB 51 – Arbitration Agreements – This bill would prohibit mandatory arbitration agreements as condition of employment.

(California Case Law - Continued from page 1)

established trade, occupation, or business of the same nature as the work that he or she is performing for the hiring entity. *Dynamex Corporations West, Inc v Superior Court* (2018) 4 Cal. 5th 903, 916-917.

*On July 22, 2019, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit withdrew its May 2019 ruling in *Vazquez v. Jan-Pro Franchising Int'l Inc.* (above) and asked the state Supreme Court instead to take up the question. Employers should be on the look-out for further clarification from the Supreme Court on the retroactivity of *Dynamex.*

CALL ME MAYBE

***Ward v. Tilly's, Inc.* (2019) 31 Cal. App. 5th 1167**

The California Court of Appeal ruled in a split decision that employees subject to on-call scheduling must be paid reporting time pay, even when the employee only has to make a short call to determine if they are needed, but does not physically report to work. The *Ward* majority held that Wage Order 7's reporting time pay provision applied because Tilly's workers "reported" for work when they called-in. The Court of Appeal significantly broadened the scope of California's reporting time pay requirement and expanded the types of circumstances in which it will be found to apply.

NOT MY PROBLEM

***Goonewardene v. ADP LLC* (2019) 6 Cal. 5th 817**

Payroll service providers cannot be held liable for errors they make in issuing paychecks to workers of companies they contract with, and they do not owe a duty of care to their customers' employees to ensure that wage laws are followed. That burden falls squarely on the shoulders of the employer that is providing information to the payroll provider.

NO SHIRT, NO SHOES, NO SERVICE

***Townley v. BJ's Restaurants, Inc.* (2019) STKCVUOE20140003168**

The California Court of Appeal held that an employer is not required to reimburse employees for the cost of slip-resistant footwear that is not part of a uniform. The court reasoned that because the shoes were something the employees could wear outside of work, the cost of the shoes did not qualify as "necessary expenditures . . . incurred by the employee[s] in direct consequence of the discharge of [their] duties," within the meaning of Labor Code 2802.

Arbitration Agreements

NO MEANS YES

***Diaz v. Sohnen Enterprises, et al.* (2019) 34 Cal. App. 5th 126**

When an employee continues his or her employment after notification that an agreement to arbitrate is a condition of continued employment, the employee has assented to the arbitration agreement (even when employee never signed agreement and verbally rejected it).

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BEYOND REPAIR

***Subcontracting Concepts (CT), LLC et al. v. Chafie Gabriel Pereira Moreira De Melo (Department of Industrial Relations)* (2019) 34 Cal. App. 5th 201**

When an arbitration agreement is procedurally and substantively unconscionable such that the arbitration clause is permeated with unconscionable taint, no provision can be stricken to remove it.

LIGHT OF THE LIVING DEAD

***Lamps Plus, et al. v. Varela,* (2019) 203 L. Ed. 2d 636.**

Class wide arbitration may not be compelled under the FAA where the arbitration agreement is ambiguous, notwithstanding state law principles construing ambiguities against the drafter.

Private Attorney General Act

SHARING IS NOT ONLY CARING, IT IS REQUIRED

***Moorer v. Noble L.A. Events, Inc.* (2019) 32 Cal. App. 5th 736**

The California Court of Appeal held that an action to recover civil penalties under the Labor Code Private Attorney General Act ("PAGA") is fundamentally a law enforcement action designed to protect the public and not benefit private parties. Therefore, a penalty under PAGA must be shared with the state and other affected employees. PAGA authorizes aggrieved employees to file lawsuits to recover civil penalties on behalf of themselves, other employees, and California Labor Code violations.

NOT UNLESS I SAY SO

***Correia v. NB Baker Electric, Inc.* (2019) 32 Cal. App. 5th 602**

The California Court of Appeal confirmed that employers cannot compel employees to arbitrate their PAGA claims, no matter the existence of an arbitration agreement, without some evidence that the State of California also consented to the employee's waiver of the right to bring the PAGA claim in court.

Miscellaneous

LOOSE LIPS SINK SHIPS

***Weil v. Citizens Telecom Servs. Co.* (9th Cir. 16-35813 4/29/19)**

A statement by a party's employee is admissible against that party if the statement concerns matters within the scope of the declarant's employment and if the declarant was still employed by the party at the time the statement was made.

PLAY BALL

***Melendez v. San Francisco Baseball Associates, LLC (*2019) S245607**

The California Supreme Court held that a security guard's lawsuit was not preempted by federal law simply because the collective bargaining agreement was relevant to the lawsuit and may be consulted to resolve the legal dispute.

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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