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WHITE PAPER

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A Detailed Review of 2019 Labor & Employment Legislation in California

The first year of Governor Gavin Newsom's term produced many significant pieces of employment legislation in California, including most prominently one law limiting the use of independent contractors for most businesses and another aimed at outlawing employer-mandated arbitration agreements.

In this Jones Day *White Paper*, we recap the employment-related legislative developments of 2019, including the current state of litigation seeking to enjoin the anti-arbitration statute, and provide our insights on the impact of those developments for California businesses going forward.

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The first year of Governor Gavin Newsom's term produced 13 significant employment-related pieces of legislation. Most important by far are Assembly Bill 5 ("AB 5"), which codifies the *Dynamex* decision restricting the use of independent contractors for most businesses; and Assembly Bill 51, a highly-controversial statute aimed at outlawing employer-mandated arbitration agreements entered into after January 1, 2020. However, Assembly Bills 5 and 51 were not the only important measures signed by Governor Newsom: the Legislature extended the statute of limitations from one to three years for claims of discrimination, harassment, and failure to accommodate disabled employees; it outlawed "no rehire" provisions in most separation agreements; it extended from six to eight weeks the period for Paid Family Leave benefits for eligible employees; and it granted the Labor Commissioner new authority to seek "contract" wages (i.e., wages owed pursuant to private agreement, as opposed to overtime premiums or minimum wages established by statute), among others.

Governor Newsom did veto several controversial pieces of legislation.

Of the new measures, AB 5, which dramatically restricts the use of independent contractors by most businesses, will have the broadest impact on the California economy. Three large ride-sharing and delivery companies have already announced a well-funded ballot initiative seeking to exempt their drivers from coverage under AB 5.

The following are summaries of the most important new enactments. Employers should consult with knowledgeable employment counsel about these new statutes.

"NO REHIRE" PROVISIONS IN SETTLEMENT AGREEMENTS: AB 749

- Effective January 1, 2020, a provision in an agreement to settle an aggrieved employee's employment dispute is void if it prevents him or her from obtaining future employment with the employer or any affiliate of the employer. An aggrieved employee is any employee that has filed a claim against an employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process. However, if the employer makes a good faith determination that the employee engaged in sexual harassment or sexual assault, the employer may restrict the employee's future employment with the employer.
- The statute applies only to the settlement of a dispute in which the employee or former employee has filed a claim against the employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process. Therefore, on its face, the new statute does not apply to separation agreements where *no* claim has been initiated in any of those fora.
- Nothing in AB 749 prohibits an employer and an aggrieved employee from entering into an agreement to end a current employment relationship. Further, an employer is not required to continue to employ or rehire an employee if the employer had a legitimate, non-discriminatory, or non-retaliatory reason for the employee's termination.

Recommendations for Employers. In situations where no claim has been filed at all (as in many staff reduction situations), this statute on its face would not invalidate a "no rehire" provision. However, no rehire provisions are generally sought where there *has* been a claim initiated, and in those situations the no rehire provision can no longer be used. Employers should review their standard separation agreement and remove any language that prohibits an aggrieved employee from obtaining future employment with the employer, or any of the employer's affiliates. This language usually appears in separation agreements as a no rehire provision. Employers can consider developing a second separation agreement to be used only when an employee has not filed a claim against the employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process; or, if the employee has engaged in unlawful sexual harassment.

RESTRICTIONS ON ARBITRATION AGREEMENTS: AB 51 AND SB 707

Effective January 1, 2020, Assembly Bill 51 ("AB 51") purports to outlaw arbitration agreements required as a condition to obtain or keep employment. On its face, AB 51 contains a statement that it is not "intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act ("FAA")." Read literally, this limitation of the statute would mean that AB 51 applies only to agreements

that *are not* enforceable under the FAA. However, in practice, the great majority of arbitration agreements *are* governed by the FAA. Properly drafted agreements should be within the scope of the FAA's protection for such agreements. However, the California Attorney General and many plaintiff's advocates claim that the statute is designed to prohibit "coerced" arbitration agreements, meaning those that are required by the employer as a condition of employment.

The statute has temporarily been enjoined by a temporary restraining order ("TRO") issued on December 30, 2019, by Judge Kimberly Mueller of the United States District Court for the Eastern District of California, Sacramento. On January 10, 2020, Judge Mueller extended the TRO that bans enforcement of AB 51 only "to the extent it applies to arbitration agreements" covered by the FAA. She also ordered supplemental briefing of the issues to be completed by January 24, 2020. At that time, the matter will be submitted to her for final ruling.

California employers with existing arbitration programs should review their arbitration agreements and consult with knowledgeable employment counsel to determine how to proceed in light of the new law and Judge Mueller's ruling.

Our review of this statute and relevant case law suggests that if, as the California Attorney General asserts, the statute is intended to address the formation of arbitration agreements, it is in conflict with the FAA. However, some types of arbitration agreements *are not* within the scope of the FAA (examples of such agreements are described below).

AB 51 is Intended to Ban Many Pre-Dispute Arbitration Agreements

AB 51 purports to make it unlawful for "a person" to require, "as a condition of employment, continued employment, or the receipt of any employment-related benefit," the waiver of "any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act" ("FEHA"), including, "the right to file and pursue a civil action or a complaint with, or otherwise notify, any State agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation [of FEHA]." The statute, which takes effect January 1, 2020, also purports to forbid a person from requiring a "waiver" of any "right, forum, or procedure" for violation of the California Labor Code. A violation of the statute is punishable as a misdemeanor.

The clear purpose of this statute is to limit or stop the practice of employer-mandated, pre-dispute arbitration agreements. The statute itself states that its purpose is to "ensure that any contracts relating to [waivers of forums and procedures] be entered into as a matter of voluntary consent, not coercion." The new statute also creates a retaliation claim by an applicant or employee who refuses to consent to a "waiver" otherwise banned by AB 51.

"Carve Outs" in AB 51

The statute "applies to contracts for employment entered into, modified, or extended on or after January 1, 2020." The statute contains three significant limitations:

- "Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. § 1, *et seq*.)";
- "This section does not apply to post-dispute settlement agreements or negotiated severance agreements"; and
- "This section does not apply to a person registered with a self-regulatory organization as defined in Securities Exchange Act of 1934 or regulations adopted under that Act pertaining to any requirement of a self-regulatory organization that a person arbitrate disputes that arise between the person and their employer or any other person as specified by the rules of the self-regulatory organization."

Which Arbitration Agreements are Covered by AB 51? The FAA Preemption Issue

The TRO issued by Judge Mueller of the Eastern District of California will remain in effect until at least January 24, 2020.

AB 51 is the latest of many attempts in California to limit or invalidate arbitration agreements required by employers as a condition of employment. On at least five occasions, the United States Supreme Court has ruled that California anti-arbitration statutes or court decisions violate the FAA and the Supremacy Clause of the Constitution of the United States. The high Court has repeatedly struck down California laws and judicial decisions that conflict with the pro-arbitration policy of the FAA.

Ironically, a very similar measure—Assembly Bill 3080—was vetoed in 2018 by former Governor Jerry Brown, who found that the 2018 measure "plainly violates federal law." Undeterred, anti-arbitration advocates convinced the Legislature to adopt, and Governor Newsom to sign, AB 51.

If, as the statute says, it is not "intended to invalidate a written arbitration agreement that is otherwise enforceable under the [FAA]," what category of arbitration agreements would it apply to? The "exception" in the statute would seem to swallow the rule it purports to establish. Except for certain agreements in the transportation industry, the arbitration agreements of almost all large employers are within the coverage of the FAA.

We believe that, if applied to arbitration agreements and programs within the scope of the FAA, AB 51 likely is preempted and invalid. The Supreme Court has repeatedly upheld employer-mandated arbitration agreements against a variety of claims or objections based on California law. In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the Court overturned the California Supreme Court's ban on class action waivers in employer-mandated arbitration agreements. The ban, in the words of the Supreme Court, "stands as an obstacle to the accomplishment" of the FAA's pro-arbitration policy. It seems likely that AB 51 "stands as an obstacle" to that policy as well.

Can a State Regulate the Making of Arbitration Agreements Rather Than Their Enforcement?

One argument made by proponents of AB 51 is that it regulates only the *making* of the arbitration agreement, not its enforcement. AB 51's premise is that any arbitration agreement imposed as a condition of employment is coerced and therefore not "voluntary." However, an agreement is not the product of "coercion" merely because it is required as a condition of employment. Most employees are unable to negotiate over many aspects of their offer of employment, such as their salary, benefits, position location, or supervisor's identity; yet those employees are not "coerced" into accepting the offer. The requirement of an arbitration agreement is no different. In fact, case law interpreting the FAA makes clear that the requirement of an arbitration agreement cannot be treated differently than other terms of a job offer. *See Concepcion*, 563 U.S. at 341 (a state "may not rely on the uniqueness of an agreement to arbitrate" as the basis to refuse to enforce the agreement); *Perry v. Thomas*, 482 U.S. 483, 492 (1987) (a state cannot "construe [an arbitration] agreement in a manner different from that in which it otherwise construes non-arbitration agreements"). An employee is free to decline a job offer because it requires him or her to sign an arbitration agreement, just as the employee is free to decline the offer if the salary or job location is unacceptable.

Further, the Supreme Court has long held that "arbitration is a matter of contract." The formation of an arbitration contract is as much a part of the pro-arbitration policy of the FAA as the enforcement of the contract once it is made. In rejecting Assembly Bill 3080 in 2018, former Governor Brown stated, "the [United States] Supreme Court has made it explicit this approach is impermissible." For years, mandatory employer-imposed arbitration agreements have been held not to violate the FAA merely because they are required as a condition of employment. As the Supreme Court noted in *Concepcion*, "the rule [the high Court held preempted] is limited to adhesion contracts, [citation omitted] but the times in which consumer contracts were anything other than adhesive are long past." The Court observed in a footnote that states "remain free to take steps addressing the concerns that attend to contracts of adhesion. . . . Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." AB 51 does exactly that. It frustrates the purpose of the FAA by purporting to invalidate arbitration agreements at the time of contract formation.

In March 2018, the California Court of Appeal held preempted a 2014 statute that contained a provision very similar to a provision in AB 51. Assembly Bill 2617, which was applicable to claims under California's Ralph and Bane civil rights statutes, provided that any waiver of a "forum" for a violation of those statutes "shall be deemed involuntary, unconscionable, against public policy and unenforceable." But the Court of Appeal in *Saheli v. White Memorial Medical Center*, 21 Cal.App.5th 308 (2018), held that the provision was preempted by the FAA. The unsuccessful arguments made to defend AB 2617, which were rejected in *Saheli*, are the same as those being made by proponents of AB 51 today. "The FAA simply mandates that we treat agreements to arbitrate, including agreements to arbitrate Ralph Act and Bane Act claims, as we would other contracts. The special requirements in sections 51.7 and 52.1 do not comport with this mandate, and are therefore preempted by the FAA."

Does AB 51 Apply to Contracts Entered Into Prior to January 1, 2020?

The new statute states that it "applies to contracts for employment entered into, modified, or extended on or after January 1, 2020." This language strongly suggests that arbitration agreements entered into *prior* to January 1, 2020 are not within the scope of the statute. However, some plaintiff's advocates argue that enforcing, after January 1, 2020, a preexisting arbitration agreement constitutes "extending" the agreement, therefore making it subject to the statute. We believe this interpretation is incorrect.

Note that the Legislature did not use the words "enforced" or "continuing." AB 51's use of the words "entered into" and "modified" suggests overt actions to create or modify a contract, not simply the continuation of a contract previously in effect.

And, even if AB 51 is interpreted to apply to pre-existing arbitration agreements that are sought to be enforced after January 1, 2020, the "savings" provision for agreements "otherwise enforceable under the Federal Arbitration Act" should shield arbitration agreements that are well-drafted to ensure FAA compliance, especially those that have been previously upheld against court challenges.

Limits to the Exception for Agreements Valid Under the FAA

Having reviewed the arguments advanced by the proponents of AB 51, we believe Governor Brown was correct in 2018. Like Assembly Bill 3080 then, AB 51 is an ill-conceived statute that is likely preempted by the FAA with regard to the great majority of arbitration agreements currently in use. Before concluding that its arbitration program will survive, however, an employer must consider multiple additional factors.

First, not *all* arbitration agreements are subject to the FAA. Here are three examples of agreements that may not be subject to the FAA and, therefore, would be beyond the "savings" provision in AB 51:

- Arbitration agreements for certain transportation workers are not covered by the FAA due to an exception in the FAA itself. Employers in the transportation industry should review their arbitration agreements and the nature of the employees who are subject to them to determine whether the FAA will apply to those agreements and those employees.
- Very small employers, who are not involved in interstate commerce, are not covered by the FAA; or, more accurately, arbitration agreements that do not evidence "a transaction involving [interstate] commerce" are not subject to the FAA. If an employer's arbitration agreement is challenged in court, the employer should provide evidence to the court that both the employer and the employee(s) in question are engaged in duties that involve interstate commerce.
- Some employment arbitration agreements contain very specific choice-of-law provisions indicating that the California Arbitration Act, rather than the FAA, will govern the arbitration. However, a generic choice of law provision, which does not mention the law applicable to the arbitration agreement itself, will not defeat the application of the FAA if the arbitration agreement evidences a transaction in interstate commerce.

Many financial industry employers will be able to take advantage of an exception in AB 51 for employees registered with a self-regulatory agency or where arbitration agreements in the financial services industry have been adopted pursuant to regulations or a requirement of a self-regulatory organization (i.e., FINRA or one of the stock exchanges).

Does AB 51 Criminalize Mandatory Arbitration Agreements?

AB 51 contains what can only be viewed as an *in terrorem* feature: it punishes violations of the statute as a misdemeanor. Theoretically, a person who participates in implementing an employer's arbitration agreement could face prosecution.

Conclusions Regarding AB 51

After analyzing AB 51, we offer the following guidance:

- Any employer with an existing arbitration agreement and arbitration program should weigh the risks presented by AB 51 to determine whether to suspend the program, modify the agreement with guidance from knowledgeable counsel, or continue the status quo.
- We believe AB 51 likely will be held preempted as to agreements that are within the protection of the FAA, regardless of when those agreements were adopted, entered into, modified, or extended. Employers who currently use arbitration agreements, or who are considering adopting such agreements, should make sure that their agreements are covered by the FAA (e.g., that the employees who will sign

the agreement are not transportation workers excluded from the FAA). Employers that need to revise or update their arbitration agreements should do so with guidance from knowledgeable counsel. If an employer is currently using an arbitration agreement that is valid under the FAA (and compliant with all current requirements as to procedure and/or content), the employer should consult with knowledgeable employment counsel about the alternatives, and should follow developments in the case before Judge Mueller.

- Employers who are considering adopting a mandatory arbitration program should have the structure and content of the program reviewed by competent employment counsel. Some states, including California in particular, have procedural and substantive requirements for employment arbitration programs that should be observed, and the agreement itself must pass muster under the FAA.

SB 707: Make Sure to Pay the Fees of the ADR Provider

AB 51 is not the only recently-passed measure that affects employers with arbitration agreements. Senate Bill 707, signed by the Governor on October 13, 2019, amends the California Arbitration Act to add a provision that states, if the "drafting party" to an arbitration agreement (i.e., typically the employer) fails to pay fees or costs of an arbitration tribunal within 30 days of the due date, "the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel arbitration under Section 1281.2 [of the Code of Civil Procedure]." This statute applies not only to arbitration agreements imposed by employers but also to "consumer" arbitration agreements.

The new statute does not require that the arbitration agreement state that the drafting party (i.e., the employer) pay the fees of the arbitrator and the arbitration tribunal. Under existing California law, an employer who imposes an arbitration agreement on employees must pay those fees whether or not the agreement itself addresses the issue of payment.

The requirement to pay the fees and costs of an arbitration tribunal applies both to the initial fees/costs assessed at the time the arbitration is commenced, as well as ongoing costs and fees during the pendency of the arbitration. If the employer fails to pay the fees and costs within the required 30 days, the employee/plaintiff may withdraw the case from arbitration and proceed in court. Further, the court must impose monetary sanctions on the employer to reimburse the employee any costs, including attorneys' fees and expenses, incurred as a result of the employer's failure to timely pay the fees. Alternatively, the employee may proceed in arbitration and require the employer to pay "reasonable attorneys' fees and costs related to the arbitration." Although this provision is unclear, it could mean a shift of *all* attorneys' fees and costs to the employer if the employer is in breach of the obligation to timely pay the tribunal's fees and costs. This statute also authorizes a court to impose more severe sanctions against the drafting party, including prohibiting the drafting party from conducting discovery if the case is transferred to court, striking part of the pleadings of the drafting party, or holding the drafting party in contempt. These more severe sanctions must be imposed "unless the court finds that the one subject to the sanction acted with substantial justification or the other circumstances make the imposition of the sanction unjust."

Senate Bill 707 raises significant issues of FAA preemption as well. However, we recommend that employers with arbitration programs promptly pay the fees and costs of the arbitration tribunal. The apparent motivation for Senate Bill 707 is to discourage employers from delaying (or failing to make) payments due to an arbitration tribunal as a means of delaying or avoiding the proceedings. We strongly urge employers not to adopt that tactic.

THREE YEAR STATUTE OF LIMITATIONS FOR CERTAIN DFEH COMPLAINTS: AB 9

- Under previous law, an individual had one year from the date of an unlawful employment practice to file a complaint with the California Department of Fair Employment and Housing ("DFEH") for the following unlawful employment practices, among others: discrimination, harassment, failure to accommodate a disability, and retaliation for filing a DFEH charge.
- Effective January 1, 2020, Assembly Bill 9 gives employees three years to file a complaint from the date of any of the aforementioned unlawful employment practices. The complaint's operative date is the date the intake form was filed with the DFEH. Despite the extended time period, the bill does not allow for the revival of lapsed claims.

- The time period to file a complaint will remain one year for cases that allege a violation of any of the following Civil Code Sections: 51, 51.5, 51.7, 54, 54.1, or 54.2. Sections 51 and 51.5, also known as the Unruh Civil Rights Act, prevent businesses from discriminating, boycotting, blacklisting, or refusing to buy from any person on account of any of the following characteristics: sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status. Section 51.7, also known as the Ralph Civil Rights Act, prohibits violence or threats of violence based on the aforementioned characteristics, a person's political affiliation, or a person's position in a labor dispute. Sections 54, 54.1, and 54.2, grant individuals with disabilities or medical conditions full and equal access to, and the right to have a guide dog in, streets, medical facilities, public conveyances, modes of transportation, places of lodging, places of public accommodation, etc.

Recommendations for Employers. Employers should review their policies to make sure they are compliant with all required trainings relating to workplace harassment. Employers should ensure they have internal procedures in place, and that their employees are made aware of the procedures, to prevent, report, and investigate possible unlawful workplace actions. Employers should retain all documents and emails relating to investigations and internal reviews and complaints. Employers may see an increase in litigation because claims will no longer lapse after one year and employees will now have three years to pursue a case.

LACTATION ACCOMMODATION: SB 142

- Under previous law, employers were required to give employees a reasonable amount of break time to express milk for the employee's infant child. Employers were required to make reasonable efforts to provide employees with the use of a room, not including a bathroom, in close proximity to the employee's work area, to express milk in private. Employers were exempt from the break time requirement if the employer's business would be seriously disrupted by providing that break time. Employers were subject to a $100 civil penalty per violation.
- Effective January 1, 2020, Senate Bill 142 removes the "reasonable efforts" standard and instead requires employers to provide a lactation room or location, not including a bathroom, that is in close proximity to the employee's work area, shielded from view, and free from intrusion while the employee is expressing milk. Employers must also provide a sink with running water and a refrigerator, or other cooling device suitable for storing milk, in close proximity to the employee's work area. Further, the lactation room or location must comply with all of the following requirements:
  (1) Be safe, clean, and free of hazardous materials.
  (2) Contain a surface to place a breast pump and personal items.
  (3) Contain a place to sit.
  (4) Have access to electricity or alternative devices needed to operate an electric or battery-powered breast pump.
- Employers that make a temporary lactation location available to employees comply with Senate Bill 142 if:
  (1) The temporary location is not a bathroom.
  (2) It is in close proximity to the employee's work area, shielded from view, and free from intrusion while the employee is expressing milk.
  (3) It meets the four requirements listed above.
  (4) The employer provides a sink with running water and a cooling device for storing milk in close proximity to the employee's work area.
- The statute does not define "close proximity."
- Employers with fewer than 50 employees may be exempt from any requirement if the employer can show that a requirement would impose an undue hardship by causing the employer significant difficulty or expense. If an employer can show such undue hardship, the employer may take reasonable efforts to provide employees with a room or location to express milk, other than a toilet stall, that is in close proximity to the employee's work area.
- Employers must not discharge or retaliate against employees that exercise, or attempt to exercise, any right protected by this bill. An employee who claims to have been discharged or discriminated against in violation of the lactation accommodation requirements may file a complaint with the Labor Commissioner. The statute is silent on whether there is any private right of action in court.
- Employers must also develop and implement a lactation accommodation policy that outlines the aforementioned rights and requirements. The policy must mention the right to file a complaint with the California Labor Commissioner, must be included in an employee handbook, and must

be distributed to new employees upon hiring and when an employee makes an inquiry about, or a request for, parental leave.

Recommendations for Employers. Employers should review and update their procedures and facilities to comply with the new, expanded requirements. Employers must be aware of the requirement to develop a policy consistent with the new statutory requirements and to include the policy in their employee handbooks. While there is currently no case law on what is, or is not, in "close proximity," the San Francisco Office of Labor Standards Enforcement states that the lactation space, refrigerator, and sink, "should not be placed so far away" that it "would be likely to deter a reasonable similarly situated person from exercising their rights." Employers with fewer than 50 employees may take reasonable efforts to provide employees with a suitable lactation room, if the employer can show undue hardship and as long as the room is not a toilet stall.

EMPLOYEES MAY OBTAIN STATUTORY PENALTIES AS WELL AS WAGES IN A "BERMAN" ADMINISTRATIVE HEARING BEFORE THE LABOR COMMISSIONER; BUT CANNOT ALSO PURSUE THE SAME PENALTIES UNDER THE PRIVATE ATTORNEYS GENERAL ACT: AB 673

- Effective January 1, 2020, Assembly Bill 673 amends Section 210 of the Labor Code to allow employees to bring a Berman administrative hearing, as described in Section 98 of the Labor Code, to recover statutory penalties for unpaid wages. Previously, the Labor Code did not authorize the award of statutory penalties in a Berman administrative hearing before the Labor Commissioner, except for penalties under Labor Code Section 558 (penalties for failure to pay overtime). The statute expands the Labor Commissioner's authority to impose penalties for failures to make timely payments of wages during employment and for violations of the California Fair Pay Act. For the same violation, an employee can recover statutory penalties under Section 210 of the Labor Code or civil penalties under Section 2699 (the Private Attorneys General Act), but not both. This bill is designed to prevent employees from obtaining double recovery for the same violation.

Recommendations for Employers. Employers should review their processes and procedures for how employees are paid. Generally, with limited exceptions, non-exempt employees must be paid at least twice during each calendar month on days designated in advance as regular paydays by the employer. Employers should consider implementing a reporting process that allows employees to timely inform the employer of any failure to pay wages for a specific pay period. Employers should also have a clearly defined and consistent process for calculating and paying overtime, and the process should be widely distributed.

LABOR COMMISSIONER MAY NOW SEEK "CONTRACT WAGES" IN ADDITION TO MINIMUM WAGE AND OVERTIME: SB 688

- Effective January 1, 2020, Senate Bill 688 grants the Labor Commissioner the authority to investigate and issue citations where an employer has failed to pay the wages "set by contract in excess of the applicable minimum wage." Under prior law, the Labor Commissioner had authority only to issue citations for minimum wage and overtime violations. "Contract wages" are wages owed in excess of the minimum wage set by an agreement between the employer and the employee. If the Labor Commissioner issues a citation for unpaid "contract wages," the employer may contest the citation by giving notice to the Labor Commissioner within 15 business days of service of the citation, in which case the Labor Commissioner will hold a hearing. The hearing may result in an award of the unpaid contract wages plus various penalties and liquidated damages depending on the nature of the violation. In order to appeal the Labor Commissioner's citation to Superior Court via a Writ of Mandate, the employer must post a bond with the Labor Commissioner for all minimum wage, contract wage, overtime, and liquidated damage amounts determined in the final citation.

Recommendations for Employers. Employers should provide in their employee handbooks or policies a mechanism for employees to promptly report any alleged wage shortages or failures to receive the appropriate amount of wages.

HAIRSTYLES: SB 188

- Effective January 1, 2020, Senate Bill 188 amends the definition of "race" as a protected characteristic in Section 212.1 of the Education Code and Section 12926 of the Government Code to include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles." Both Sections clarify that protective hairstyles includes, but is not limited to, "such hairstyles as braids, locks, and twists."
- The statute does not define which traits, other than "hair texture and protective hairstyles" are "historically associated with race." The statute specifically identifies "workplace dress codes and grooming policies that prohibit natural hair" as "policies [that] are more likely to deter black applicants and burden or punish black employees than any other group."

Recommendations for Employers. Employers should review their grooming and appearance policies to ensure compliance with this new statute. Trainings should include information stating that hairstyles of African-American employees are a protected characteristic. Supervisors in particular should be informed of the new standards regarding hairstyles associated with African-American applicants or employees.

EXTENSION OF PAID FAMILY LEAVE BENEFITS: SB 83

- Under existing law, eligible employees can receive up to six weeks of Paid Family Leave benefits.
- Effective July 1, 2020, Senate Bill 83 extends the duration of Paid Family Leave benefits from six weeks to eight weeks. The Bill also states the Legislature's intent that the Governor's Office convene a task force to create a proposal to extend Paid Family Leave benefits to six months by 2021-22.

Recommendations for Employers. Employers should update their employee handbooks to reflect the increase in Paid Family Leave from six weeks to eight weeks. Employers should circulate to their employees, or add to their training curricula, notice of the extension of paid family leave benefits from six to eight weeks for eligible employees. Supervisors should be made aware that employees on Paid Family Leave may be out of the workplace for a longer period than under the previous law.

SEXUAL HARASSMENT TRAINING REQUIREMENTS: SB 778

- Senate Bill 778 makes several important changes to the mandatory anti-harassment training requirements for employers with five or more employees:
  (1) Supervisory employees who received the mandatory two-hour minimum training in 2019 will not have to be retrained until two years from the date of the 2019 training, and then every two years thereafter. This clarified confusion in the previous law.
  (2) The "threshold" for the size of the employers required to provide the mandatory training to supervisory and non-supervisory employees is reduced from 50 or more employees to five or more employees, including temporary and seasonal workers.
  (3) The deadline for providing one hour of training to non-supervisory employees was extended from January 1, 2020 to January 1, 2021.
  (4) The changes in Senate Bill 778 do not affect the timing required for training supervisory employees: all supervisors are still required to receive at least two hours of anti-harassment training once every two years, regardless of when they were last trained.
  (5) Employees who are hired into new non-supervisory positions, new hires in supervisory positions, and those promoted into supervisory positions must be trained within six months of starting the supervisory position. The new statute is unclear whether employees hired before its effective date (August 30, 2019) would have to be trained within the first six months; or if the six month period applies only to persons hired after August 30, 2019 in non-supervisory positions. The conservative approach is to train, within the first six months, all newly hired supervisors, all persons promoted into supervisory positions, and all persons being placed in newly created supervisory positions.
  (6) The bill retains the requirement that seasonal and temporary employees and any others who are hired to work for less than six months must be provided with training

within 30 calendar days of the hire date or within 100 hours of work, whichever first occurs. However, where an employee is hired through a temporary services employer or staffing agency, the training must be provided by the temporary services employer, not the client employer.

- The DFEH has been directed to develop sample one and two hour online training courses for both supervisory and non-supervisory personnel. The use of those DFEH-developed courses would be compliant with the statute if the training provided is consistent with the time frames established.

Recommendations for Employers. The DFEH is developing two training courses, a two-hour course for supervisors and a one-hour course for non-supervisory employees. Employers should consider using these training courses to ensure they meet the requirements by January 1, 2021. If employers do not want to use DFEH's training courses, employers can develop their own courses. Employers should ensure these trainings are in place before the law goes into effect in 2021. Employers should also ensure that newly hired supervisors, and those promoted into a supervisory position, are trained within six months of starting the new position.

ORGAN DONATION: AB 1223

- Under previous law, employers with 15 or more employees were required to grant to an employee, who had exhausted all available sick leave, a paid leave of absence that did not exceed 30 business days in a one-year period, for the purpose of organ donation.
- Effective January 1, 2020, Assembly Bill 1223 requires employers to grant an additional unpaid leave of absence, not to exceed 30 business days in a one-year period, to all employees who have exhausted their available sick leave for the purpose of organ donation.
- Under the new statute, the period of time during which an employee is required to be absent because of organ donation or bone marrow donation cannot constitute a break in service for purposes of salary adjustments, sick leave, vacation, paid time off, annual leave, or seniority. In other words, the employee is entitled to accrue vacation pay or similar paid leave during the absence. Further, the absence may be taken in one or more periods (not necessarily in a continuous period), but the total absence cannot exceed the 30 days of paid leave and 30 additional days of unpaid leave in a one-year period for organ donors. Shorter periods of leave apply to bone marrow donors.

Recommendations for Employers. Employers should update their employee handbooks to reflect the additional unpaid leave clause for organ donors. Supervisors should also be advised of the new requirement for expanded, unpaid leave for any employee who has acted as an organ donor.

CIVIL LIABILITY AND ENFORCEMENT OF PERSONAL RIGHTS: AB 1820

- Under previous law, DFEH was authorized to investigate and prosecute civil actions stemming from violations of state law, specifically, the Fair Employment and Housing Act.
- Effective January 1, 2020, Assembly Bill 1820 gives the DFEH the power to investigate and prosecute cases for alleged violations of federal civil rights statutes. The DFEH will have the authority to bring civil actions under the federal American with Disabilities Act, the federal Fair Housing Act, and Title VII of the federal Civil Rights Act.

Recommendations for Employers. Employers should be prepared to defend cases brought by the DFEH in federal court. The DFEH will now have the ability to assert a federal cause of action, which means that the federal court will have subject matter jurisdiction over the case. Such cases, if filed in state court, could be removed to federal court by the employer. While employers should be prepared to defend against a wider variety of causes of action, we question whether this bill will lead to an increase in litigation because California civil rights laws are, in almost every instance, at least as broad as their federal counterparts.

BILLS VETOED BY GOVERNOR NEWSOM

Sexual Harassment in Employment: AB 171

- Governor Newsom vetoed Assembly Bill 171, which would have expanded the sexual harassment provisions in the Labor Code by redefining "employer" to mean "any person employing another under any appointment or contract of hire" and to include "the state, political subdivisions of the state, and municipalities." The bill would have also

established a rebuttable presumption of unlawful retaliation if an employer took specific action within 90 days of notice or knowledge of an employee's status as a victim of domestic violence, sexual assault, sexual harassment, or stalking.

Whistleblower Retaliation Complaints: AB 403

- Governor Newsom vetoed Assembly Bill 403, which would have extended the deadline to file a whistleblower retaliation complaint with the Labor Commissioner from six months to two years. The bill would have also authorized the court to award reasonable attorney's fees to a successful plaintiff. The governor's veto message indicated that he would probably sign a statute extending the limitations period from six months to one year.

Unfair Immigration Related Practices: AB 589

- Governor Newsom vetoed Assembly Bill 589, which would have made it unlawful for an employer to destroy any immigration or identification document with the intent to commit a coercive labor practice. The bill would have also required employers to provide a written "Worker's Bill of Rights" to their employees. The governor's veto message stated that he felt that the requirement to provide a "bill of rights" was "overly burdensome for law abiding employers and may not actually help workers who are the targets of trafficking."

Employment Discrimination: AB 1478

- Governor Newsom vetoed Assembly Bill 1478, which would have authorized employees who are victims of domestic violence, sexual assault, or stalking to bring a private lawsuit against an employer who violated anti-retaliation provisions of the Labor Code, without first filing with the Division of Labor Standards Enforcement. The governor's veto message stated that victims of domestic violence, sexual assault, or stalking "already have the ability under current law to file a retaliation claim through the Labor Commissioner's office, file a Private Attorney's General Act claim, and to seek reinstatement and reimbursement for lost wages and benefits."

Employment Discrimination Enforcement in Local Government: SB 218

- Governor Newsom vetoed Senate Bill 218, which would have authorized legislative bodies of local government within the county of Los Angeles to enact and enforce local anti-discrimination laws. This bill would have been the first to authorize a local governmental agency, such as a City Attorney or District Attorney, to enforce remedies available under the Fair Employment and Housing Act in addition to remedies available under any local anti-discrimination ordinance. Historically, only the DFEH can enforce the Fair Employment and Housing Act. The governor's veto message stated, "I don't support lifting a preemption that has been in place for decades in the manner proposed in this bill. As crafted, this measure could create confusion, inconsistent enforcement of the law, and increase costs without a corresponding increase in worker protections."

LAWYER CONTACTS

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