New California Laws Impose Greater Burdens and Higher Risks of Liability for Employers

By Stephen L. Berry, Blake R. Bertagna & Graham M. Hoerauf

California’s annual legislative term has just ended, and the state once again has produced more new employment-related laws than anywhere else in the country. Among the measures enacted by the California Legislature and signed by Governor Jerry Brown are 20 new laws—including amendments to last year’s highly publicized Fair Pay Act—that for the most part impose additional burdens on employers and continue the trend of expanding employee rights and increasing the risks of employer liability.

Except where otherwise specified, all of the new laws reported in this Stay Current take effect on January 1, 2017. Employers with operations in California should begin to prepare for the changes now.

Discrimination, Harassment, and Retaliation

SB 1063 (Expansion of Fair Pay Act—Race/Ethnicity)

The California Fair Pay Act, enacted a year ago, prohibits employers from paying employees wage rates that are less than what they pay employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions. Citing a 2013 study showing that compared to every dollar a white male makes, Asian-American women make 90 cents, African-American women make 64 cents, and Latina women make 54 cents, SB 1063 takes the Fair Pay Act further, extending the protections of the statute to race and ethnicity, and not just gender.

Under the new law, employers are prohibited from paying any of their employees at wage rates less than those paid to employees of another race or ethnicity for "substantially similar work," which, as with sex-based wage differentials, is to be determined based on a "composite of skill, effort, and responsibility, and performed under similar working conditions. "The new law imposes a significant burden on employers for defending against race/ethnicity wage discrimination claims. To demonstrate that the wage differential is based upon a bona fide factor other than race or ethnicity, the employer must show that it (1) is not based on, or derived from, a race/ethnicity-based differential in compensation, (2) is related to the job at issue, and (3) is consistent with business necessity, which is defined as an "overriding legitimate business purpose." In addition, the employer must demonstrate that each factor relied upon is "applied reasonably," and that one or more of the relied-upon factors account for the entire pay differential.
SB 1063 also extends the enforcement mechanism and penalties under the Fair Pay Act to wage discrimination based on race or ethnicity. Accordingly, an employer who is found to have engaged in wage discrimination based on race or ethnicity may be liable to the employee for the amount of the wages the employee lost, plus interest, as well as an additional equal amount as liquidated damages, and attorneys’ fees.

**AB 1676 (Prior Salary Inadequate Justification for Wage Differential)**

Last year, Governor Brown vetoed AB 1017, which would have prohibited employers from seeking a job applicant’s prior salary history. However, the issue did not go away. In enacting AB 1676 this year, the California Legislature explained its rationale as follows: “[S]eeking salary history from job applicants and relying on prior salary to set employees’ pay rates contribute[s] to the gender wage gap by perpetuating wage inequalities across the occupational spectrum” and “[w]hen employers make salary decisions during the hiring process based on prospective employees’ prior salaries or require women to disclose their prior salaries during salary negotiations, women often end up at a sharp disadvantage and historical patterns of gender bias and discrimination repeat themselves, causing women to continue earning less than their male counterparts.”

AB 1676 does not prohibit inquiries into prior salary history, but it provides that prior salary, by itself, cannot justify any disparity in compensation between workers of the opposite sex, race, or ethnicity.

**AB 2337 (New Notice to Employees of Employment Protections)**

Current law prohibits an employer with 25 or more employees from discharging or in any manner discriminating or retaliating against an employee who is a victim of domestic violence, sexual assault, or stalking on two bases: (1) because of the employee taking time off from work to address a domestic violence, sexual assault, or stalking situation, or (2) because of the employee’s known status as a victim of domestic violence, sexual assault, or stalking. AB 2337 amends the California Labor Code to require employers to inform all new employees of these rights in writing upon hire, and to current employees upon request. Employers are required to comply with this new notice requirement only after the Labor Commissioner makes available on the commissioner’s website a form that an employer may use to satisfy this new requirement, which the Labor Commissioner must do on or before July 1, 2017.

**AB 1843 (Further Limitations on Obtaining and Using Criminal Background Information)**

California Labor Code section 432.7 currently prohibits employers from asking an applicant for employment to disclose, or from factoring as any condition of employment, information concerning: an arrest or detention that did not result in a conviction; a referral or participation in any pretrial or post-trial diversion program; or a conviction that has been dismissed or ordered sealed. However, the amendment of this law that became effective January 1, 2014, which added the prohibition against considering sealed convictions, did not explicitly address juvenile court records. AB 1843 eliminates this ambiguity and extends similar protections to people with juvenile records. As a result, employers may not ask a job applicant to disclose information concerning or related to an arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while the person was subject to the process and jurisdiction of juvenile court law, or seek or utilize any such information as a factor in determining any condition of employment. The bill further provides that “conviction” excludes an adjudication by a juvenile court or any other court order or action taken with respect to a person who is under the jurisdiction of the juvenile court law.
Employers should review their employment application form to insure that applicants are advised not to provide such information.

**AB 488 (Disability Discrimination)**

Under the Fair Labor Standards Act, individuals whose earnings or productive capacity is impaired by physical or mental disability for the work to be performed may be paid less than the federal minimum wage under a certificated program by the U.S. Department of Labor. Similarly, under the California Labor Code, mentally or physically disabled employees, and the nonprofit sheltered workshops and rehabilitation facilities employing them, can be issued a license authorizing a special subminimum wage.

The California Fair Employment and Housing Act (“FEHA”) prohibits employment discrimination and harassment on the basis of numerous protected characteristics, including physical and mental disability, as well as provides a right to reasonable accommodation. Under the FEHA, however, the term “employee” currently is defined to exclude an individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility. AB 488 eliminates this exemption under the FEHA, providing that an individual employed under a special license pursuant to the California Labor Code in a nonprofit sheltered workshop, day program, or rehabilitation facility may bring an action under the FEHA for any form of harassment or discrimination prohibited by the FEHA. The new law also provides employers with an affirmative defense to such an action by proving, by a preponderance of the evidence, that the challenged activity was permitted by statute or regulation and was necessary to serve employees with disabilities under a special license pursuant to the Labor Code.

**AB 2844 (No Discrimination Certification for Public Contracts)**

The “BDS Movement” is a Palestinian-led movement calling for the boycott of, divestment of institutions investing in, and international sanctions against, Israel in support of the Palestinian cause. In the past year, nearly a dozen states have passed “anti-BDS” measures, which range from bills that prohibit pension fund investment in entities that boycott Israel to measures that bar state contracts or funding with institutions that support the BDS Movement. AB 2844 is California’s first “anti-BDS” law.

The FEHA and the California Unruh Civil Rights Act prohibit discrimination in employment, housing, public accommodation, and services provided by business establishments on the basis of protected characteristics, such as sex, race, color, religion, ancestry, and national origin. Additionally, California Government Code section 11135 specifically prohibits discrimination on the basis of many of these same protected characteristics in the conduct, operation, or administration of any program or activity that is by the state or by any state agency, funded directly by the state, or that receives any financial assistance from the state.

AB 2844 relies on these anti-discrimination laws by requiring a person who submits a bid or proposal to, or otherwise proposes to enter into or renew a contract with, a state agency with respect to any contract in the amount of $100,000 or more to certify, under penalty of perjury that (1) the person is in compliance with the Unruh Civil Rights Act; (2) the person is in compliance with the FEHA; and (3) any policy that the person has adopted against any sovereign nation or peoples recognized by the government of the United States, including, but not limited to, the nation and people of Israel, will not be used to discriminate in violation of the FEHA or the Unruh Act.
**SB 1001 (Discrimination against Immigrant Applicants and Employees)**

Federal law requires an employer to verify, through examination of specified documents, the identity of a newly hired employee and the employee’s legal authorization to work in the United States by completing a Form I-9 for the employee.

SB 1001 adds section 1019.1 to the California Labor Code, making it unlawful for an employer to: (1) request more or different identity and work authorization documents than what are required under federal law; (2) refuse to accept documents tendered that on their face reasonably appear to be genuine; (3) refuse to accept documents based upon the specific status or term of status that accompanies the individual’s authorization to work; and (4) attempt to reinvestigate or reverify an incumbent employee’s work authorization status by means that are not allowed by law. An employer who violates the new law is subject to an award of statutory damages of up to $10,000 per violation payable to the affected applicant or employee, or the Labor Commissioner.

**AB 1978 (Mandatory Sexual Harassment Prevention Training for Janitorial Service Workers)**

Supported by unions seeking to organize and represent commercial and retail janitorial workers, AB 1978 creates the "Property Services Workers Protection Act." The new law combines a registration process with sexual harassment and violence training and posting requirements in an effort to protect vulnerable workers in the janitorial industry from sexual harassment, sexual violence, and other forms of exploitation. Under the new law, on and after January 1, 2018, janitorial employers must: (1) provide all employees the DFEH’s pamphlet on the prohibition against sexual harassment in the workplace, and (2) register with the California Division of Labor Standards Enforcement (“DLSE”). No janitorial services company may conduct business in California thereafter without a valid registration. AB 1978 also requires the DLSE, no later than January 1, 2019, to develop a biennial sexual harassment and violence prevention training program for janitorial services employers to give to their employees, and imposes civil fines on the janitorial services business for failing to provide the training or to have a current and valid DLSE registration, as well as on an entity that contracts with an unregistered janitorial services company.

**AB 1732 (All-Gender Toilet Facilities)**

AB 1732 adds a new section 118600 to the California Health and Safety Code; it requires that all single-user toilet facilities in business establishments, places of public accommodation, or state or local government agencies be identified as all-gender facilities and designated for use by single occupants, families, and people who require assistance. It defines "single-user toilet facilities" as those with no more than one water closet and one urinal that have a locking mechanism controlled by the user. This new law takes effect on March 1, 2017.

**Wage and Hour**

**SB 3 (Minimum Wage Increases for All Employees and Paid Sick Leave for In-Home Supportive Service Workers)**

SB 3 increases the current $10 per hour minimum wage each year over the next seven years for employers with more than 25 employees, starting with $10.50 per hour on January 1, 2017, and ending with $15 per hour on January 1, 2022. The new law provides for annual increases thereafter based on a formula tied to the U.S. Consumer Price Index. Each of the fixed minimum wage increases is delayed one year for employers with 25 or fewer employees.
This new law also removes the exemption for In-Home Supportive Services workers (caregivers) that previously existed under the Healthy Workplace, Healthy Families Act of 2014. As a result, after January 1, 2017, employers of in-home caregivers must provide paid sick days on the same basis that currently exists for other employees, i.e., three days or 24 hours of paid sick time off per year.

**AB 2535 (Wage Statement Total Hours Worked Information Requirement Eliminated for All Exempt Workers)**

Employers are required to provide their workers with accurate, itemized wage statements (or pay stubs). California Labor Code section 226(a) requires nine categories of information to be shown on a wage statement, including the total hours worked in the pay period by the employee. However, section 226(a) excuses employers from showing total hours worked on pay stubs of salary-paid exempt employees.

AB 2535 amends section 226(a), and extends the total hours worked exception to all employees who are exempt from the payment of minimum wage and overtime under specified statutes or any applicable wage order of the Industrial Welfare Commission, such as outside sales employees, certain commission-paid employees, and computer professionals who are paid by the hour at the statutorily mandated hourly pay rate.

**AB 1066 (Overtime Pay, Meal Periods, and Days Off for Agricultural Workers)**

Recognizing the importance of the agriculture industry to California’s economy and the reality of long work days during the harvest season, California Labor Code section 554 currently provides an exemption from California’s daily and weekly overtime, meal period, and mandatory day off in seven rules for agricultural workers. This exemption has long been a target of the United Farm Workers union, and AB 1066 is the product of those efforts. The new law eliminates the agricultural worker exemption from section 554, thus requiring agricultural workers to be provided daily and weekly overtime, as well as meal periods in accordance with Labor Code section 512, and one day off in seven worked.

While some of the changes will take effect on January 1, 2017, the overtime pay requirement does not. AB 1066 also adds a new chapter to the Labor Code: Dubbed the “Phase-In Overtime for Agricultural Workers Act of 2016,” and codified at sections 857 to 864, the new law provides for overtime pay to be phased in over four years, beginning on January 1, 2019, for employers with more than 25 workers. That year agricultural workers with these employers will receive overtime pay after working more than nine and one-half hours in a workday or more than 55 hours in a workweek. The overtime pay thresholds are lowered each year until January 1, 2022, when they are the same as for all other California workers—overtime pay for all hours over eight in a workday or after 40 hours in a workweek. AB 1066 delays each step of the phase-in by three years for agricultural employers with 25 or fewer employees.

**AB 2899 (Bond Requirement for Challenge to Labor Commissioner Citation)**

California Labor Code section 1197.1 authorizes an employee to file a wage claim with the Labor Commissioner for unpaid wages. If the Labor Commissioner rules in favor of the employee, the employer may appeal to the superior court, but must first post a wage bond for the amount of unpaid wages owed, preserving the ability of the employee to collect the wages owed to him or her. This same bond requirement does not, however, exist for actions and decisions initiated by the Labor Commissioner involving Labor Code violations. AB 2899 changes this by requiring an employer to post a bond for the awarded amount of wages, including overtime wages, and liquidated damages, but
excluding penalties before appealing a decision by the Labor Commissioner based on the issuance of a citation following the Labor Commissioner’s own investigation. If the initial award is affirmed and the employer fails to pay the amount it owes to the employee within 10 days of the entry of the final judgment or settlement, the amount of the bond will be forfeited to the employee.

**AB 2063 (Employment of Minors)**

The California Education Code authorizes school districts that maintain high schools to establish work-based learning or work experience programs for the purpose of providing students with skills, experience, and understanding necessary for success in employment. Such programs may include work experience education, community classrooms, cooperative career technical education programs, and job shadowing. AB 2063 (1) lowers the minimum age for participation in work experience education programs from 16 to 14 years; and (2) raises the amount of hours a student can participate in job shadowing experiences from 25 hours to 40 hours per semester, subject to the principal of the school in which the student is enrolled certifies that it is necessary for the student’s participation in a career technical education program.

**Employment Contracts and Arbitration**

**SB 1241 (Limitation on Choice of Law Provisions in Employment Contracts)**

Current case law allows an employer and employee to specify that their employment and/or arbitration agreement will be governed by and decided under another state’s law, even when the employee lives and works in California. SB 1241 allows an employee who resides and works in California to have any provision in an agreement required by an employer as a condition of employment declared void if it would either: (1) require the employee to adjudicate outside of California a claim arising in California; or (2) deprive the employee of the substantive protection of California law with respect to a controversy arising in California. If such a provision is rendered void at the employee’s request, then the matter must be litigated or arbitrated in California and California law will govern the dispute. The new law prohibits an employee who was represented by legal counsel in negotiating the terms of an agreement from utilizing this provision.

A more detailed discussion of the changes effected by SB 1241 is in prior Stay Currents available [here](#) and [here](#).

**SB 1007 (Use of Shorthand Reporter During Arbitration)**

This new law adds section 1282.5 to the California Code of Civil Procedure, providing that a party to an arbitration governed by the California Arbitration Act (“CAA”) has the right to have a certified shorthand reporter transcribe any deposition, proceeding or hearing, and that the transcript is the official record. The party requesting the reporter may make the request in a demand, response, answer or counterclaim related to the arbitration, or may do so at a pre-hearing scheduling conference at which the deposition, proceeding, or hearing is being calendared. The party requesting the transcript bears the expense of the reporter, except as specified for consumer arbitration under the CAA. SB 1007 also authorizes a party whose request is refused by the arbitrator to petition the superior court for an order to compel the arbitrator to grant the request to have a reporter present, and for an order to stay any deposition, proceeding, or hearing pending the court’s determination of the petition.
Worker Safety

SB 1167 (Extension of Heat Illness and Injury Prevention Standards to Indoor Workers)

Current law requires employers, with some exceptions, to establish, implement and maintain an effective Injury and Illness Prevention Program ("IIPP"). In addition, employers in specified industries with outdoor workers must provide rest and recovery periods and take other steps to help prevent heat-related illnesses.

SB 1167 is designed to address heat-related illnesses of indoor workers, such as warehouse and factory workers. The new law adds section 6720 to the California Labor Code and requires Cal-OSHA to develop standards that minimize heat-related illness and injury among workers working in indoor places of employment by January 1, 2019.

State Disability Insurance Benefits

AB 908 (Increased State Disability Insurance and Family Temporary Disability Insurance Benefits)

California’s State Disability insurance program ("SDI") provides partial wage replacement benefits to employees who are unable to work because of pregnancy or illnesses and injuries unrelated to their job. In 2002, the California Legislature created Family Temporary Disability Insurance benefits ("FTDI," and also referred to as "Paid Family Leave"), as part of the SDI program. FTDI provides partial wage replacement benefits to employees who are unable to work because of the need to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a newborn or newly adopted or foster care-placed child. Currently, the SDI and FTDI programs provide eligible workers with a wage replacement benefit of 55% of their base wages, after a seven-calendar-day waiting period. FTDI benefits are available for up to six weeks, and SDI benefits are available for up to 52 weeks.

Supporters of this law argued that SDI and FTDI benefits are under-utilized by low-wage workers due to the inability to take the pay cut resulting from the wage replacement rate of 55%. AB 908 increases the wage replacement rate for SDI and FTDI benefits from 55% to (1) 70% for those who earn less than 33% of the California average weekly wage; and (2) 60% for those who earn more than 33% of the California average weekly wage (or 23.3% of the state average weekly wage, if greater). In addition, the new law eliminates the seven-calendar-day waiting period for FTDI benefit claims. This new law takes effect on January 1, 2018.

Workers’ Compensation

SB 1160 (Modification of Utilization Review Process for Workers’ Compensation)

Utilization Review ("UR") is the review process for medical treatment recommendations by an injured worker’s physician to determine whether a prescribed treatment is medically necessary. SB 1160 amends section 4610 of the California Labor Code and implements significant changes to the UR process to address reported delays and denials of medical care under the current UR process. The new law eases the requirements of UR within the first 30 days of a worker’s injury, and requires that all UR entities meet the “best practices” of the industry, such as URAC accreditation, a voluntary peer-to-peer process between doctors in the event of a medical dispute, and a prohibition on the use of financial incentives to deny or modify medical care.
Accessibility Litigation

SB 269 (Prevention of Litigation for Certain Technical Accessibility Violations)

Like Title III of Americans with Disabilities Act, California’s Unruh Civil Rights Act guarantees individuals with disabilities and medical conditions full and free access to and use of buildings and facilities open to the public, hospitals and medical facilities, and housing. Citing widespread media coverage of “serial ADA litigation” led by “a handful of highly litigious plaintiffs” who have targeted small businesses, the Legislature deemed further legislative measures necessary to balance the rights of those who are disabled to protect their access to all public accommodations, while limiting the number of frivolous lawsuits threatened or filed against businesses that do not improve accessibility.

SB 269 provides two protections from costly accessibility litigation for small businesses: (1) it protects small businesses from liability for certain violations (e.g., accessibility signage and parking lot striping) if the business corrects the violation within 15 days of receiving notice of the potential violation, and (2) permits a business owner 120 days from the date of a Certified Access Specialist (“CASp”) inspection to fix violations before being subject to liability.

What Should Employers Do?

California-based employers and out-of-state employers with employees in California should immediately review their policies, procedures, and practices to ensure compliance with the new laws. If you have any questions concerning these developing issues, we encourage you to contact the Paul Hastings lawyer with whom you work or one of the lawyers listed below to discuss these developments.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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