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Coming in 2020: Seven New Laws Ratcheting Up the Regulation of Employment in California

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The California Legislature has been particularly busy this year passing new laws regulating employment. The new statutes address wide-ranging topics, including independent contractors, arbitration, restraints in trade, and the CCPA.

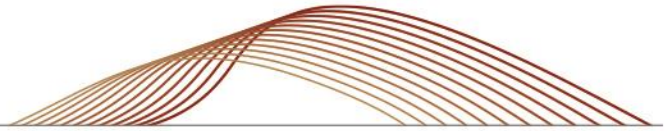
1. AB 5: Misclassification of Independent Contractors

With the enactment of AB 5, many independent contractors will become employees. AB 5 codifies the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903 (2018), which upended decades of jurisprudence on the criteria for when a worker should be deemed an independent contractor. *Dynamex* adopted the pro-employment "ABC" test, under which a worker is presumed to be an employee for purposes of the California Wage Orders. To rebut that presumption, the hiring entity must prove all three of the following:

- the person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- the person performs work that is outside the usual course of the hiring entity's business; and
- the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

AB 5 expands *Dynamex* by applying the ABC test beyond the Wage Orders to cover the California Labor Code, which includes such matters as expense reimbursements, wage statements, and workers' compensation, and the California Unemployment Insurance Code. AB 5 (with the accompanying AB 170) also narrows *Dynamex* by creating a number of exemptions from the ABC test for particular occupations.

AB 5 adds section 2750.3 to the Labor Code and amends section 3351 of the Labor Code and sections 606.5 and 621 of the Unemployment Insurance Code. For more details about AB 5, see our client alert, here.



2. AB 51: Attacking Arbitration, Again

AB 51 is the latest in the California Legislature's campaign against mandatory pre-dispute arbitration agreements. The law prohibits an employer from requiring any applicant or employee, as a condition of employment, to agree to the arbitration of any claim under the California Fair Employment and Housing Act ("FEHA") or the California Labor Code.

AB 51 precludes "a person" from requiring any applicant or employee, as a condition of employment, continued employment, or the receipt of any employment-related benefit, "to waive any right, forum, or procedure" for a violation of FEHA or the Labor Code. (The law says that requiring an employee to opt out of an agreement to avoid being bound, or to take any affirmative action to preserve his or her rights, is "deemed a condition of employment.")

It also precludes "an employer" from threatening, retaliating or discriminating against, or terminating any applicant or employee for refusing to consent to the waiver of "any right, forum, or procedure" for a violation of the FEHA or the Labor Code.

AB 51 sets forth specific instances where it does not apply, including to post-dispute settlement agreements, negotiated severance agreements, and a person registered with a self-regulatory organization under the Securities Exchange Act. Most significantly, AB 51 states that it is not intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* It remains to be seen how broad this exemption proves to be—the plaintiffs' bar will argue that it applies only to agreements made before January 1, 2020, while the defense bar will argue it applies to all agreements, regardless of when they were made, and therefore only those very few agreements not subject to the FAA are covered by the new law.

AB 51 adds its prohibitions to California Labor Code section 432.6. For a more detailed discussion, see our client alert, here.

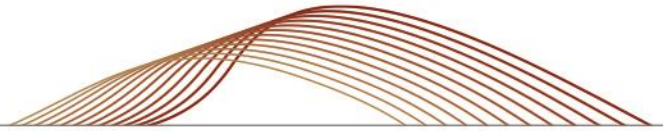
3. AB 25: Amendment to the California Consumer Privacy Act

The Legislature passed several bills this session to amend the California Consumer Privacy Act ("CCPA"), which generally goes into effect on January 1, 2020. The most important from an employment perspective is AB 25, which makes information collected from job applicants and employees exempt from certain CCPA obligations until January 1, 2021. After the one-year moratorium expires, job applicants and employees may seek disclosure of the personal information about them that the employer has collected. They also may seek access to the information, request its deletion, and learn which third parties received it, among other things.

The moratorium provides a much-needed opportunity for employers to make sure they are compliant with the CCPA. Companies should raise awareness and create new procedures to ensure that information is collected and readily accessible to respond promptly to individual access requests.

Also, it is important to note that the one-year moratorium on employment-related data does not apply to the CCPA's notice provision (Cal. Civ. Code § 1798.100(b)) or the private right of action provision (Cal. Civ. Code § 1798.150). Those provisions remain effective as of January 1, 2020.

This means that employers should update privacy notices to conform to CCPA requirements. For example, the notices must describe the categories of information being collected, as well as how that information is collected, used, shared, and disposed.



Finally, because the private right of action under the CCPA is effective on January 1, 2020, companies must take steps now to protect data, including employment-related data. In the event of a data breach, individuals may sue by proving that the data breach resulted from "the business's violation of the duty to implement and maintain information to protect the personal information."

4. AB 749: Restraints in Trade

AB 749 takes aim at common settlement "no rehire" provisions. It prohibits any clause that restricts a settling employee from obtaining future employment with the employer against which he or she filed a claim. Such provisions will be void as a matter of law and against public policy. The new law applies only to agreements entered on or after January 1, 2020, by aggrieved persons—defined as persons who have filed a claim against an employer in court, before an administrative agency (such as the Department of Fair Employment & Housing ("DFEH") or the Equal Opportunity Employment Commission ("EEOC")), or through the employer's internal complaint process.

AB 749 includes an important exception: it does not apply if the employer has made a good-faith determination that the settling employee engaged in sexual harassment or sexual assault. Importantly, the bill also does not require employers to rehire or continue to employ persons who are terminated or not hired for a legitimate nondiscriminatory and non-retaliatory reason.

AB 749 was spurred by increased coverage of sexual harassment claims and concerns that victims of alleged discrimination or harassment will be penalized by being permanently barred from seeking re-employment as a settlement condition. AB 749 is not intended to protect alleged perpetrators of wrongful acts that give rise to the dispute, as parties who have not filed a claim are not protected by the new law.

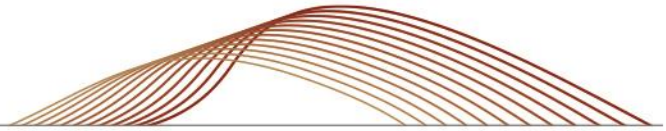
AB 749 adds section 1002.5 to the California Code of Civil Procedure.

5. AB 9: Extending the Statute of Limitations for Discrimination Claims to Three Years

Under existing law, the California Fair Employment and Housing Act requires that persons claiming to have been aggrieved by an unlawful practice must first file a verified complaint with the DFEH before they may file a claim in court. Current law requires the employees to file this DFEH complaint within one year from the date of the unlawful practice.

AB 9 allows employees to wait up to three years before filing a complaint with the DFEH. Lawmakers noted that lengthening the statute of limitations serves the goal of protecting people from workplace civil rights violations. However, AB 9 will significantly impair an employer's ability to gather accurate evidence about a complaint if the filing party waits several years after the allegedly unlawful practice occurred. It also reduces the effectiveness of the commonly asserted affirmative defense that the alleged unlawful acts fall outside of the complaint period. Former employees who have a claim may wait to file a complaint until they have found a new job. AB 9 does not specify whether it extends the filing deadline to existing claims based on acts that occurred more than one year, but less than three years, from its passage. California Supreme Court precedent under *Quarry v. Doe I*, 53 Cal. 4th 945 (2012), suggests that the extended limitations period would apply prospectively to cover these claims.

AB 9 amends sections 12960 and 12965 of the California Government Code.



6. SB 778: Extending the Deadline to Provide Mandatory Sexual Harassment Training

In 2018, the Legislature passed SB 1343, requiring that all employers with at least five employees provide at least two hours of training and education regarding sexual harassment to all supervisory employees and at least one hour of training and education to all nonsupervisory employees by January 1, 2020, unless they already received training after January 1, 2019. SB 778 extends the deadline to complete the training to January 1, 2021, and requires refresher training thereafter once every two years. Employers who have already provided the required training in 2019 are not required to provide refresher training for two years from that training. Following SB 778's passage, employers must still provide sexual harassment training and education to all new hires within six months of their hire and within six months of a current employee assuming a supervisory position.

SB 778 amends section 12950.1 of the Government Code.

7. SB 142: Lactation Accommodation

SB 142 requires employers to provide a safe and clean lactation room as well as access to a sink and refrigerator in close proximity to the employee's workspace. The bill deems denial of reasonable break time or adequate space to express milk a failure to provide a rest period in accordance with state law. It prohibits an employer from discharging, discriminating or retaliating against an employee for exercising rights under these provisions. The bill allows employers with fewer than 50 employees to seek an exemption from these requirements. Finally, employers must develop and distribute a policy about lactation accommodation that alerts employees to these rights.

SB 142 amends sections 1031, 1033, and 1034 of the Labor Code.

What Should Employers Do?

Unless otherwise specified, the new laws take effect on January 1, 2020. 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.

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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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