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EMPLOYMENT LAW UPDATE

Relationship-Driven Results October 2018

12th Annual Employment Law Symposium

November 15, 2018
8:00 a.m. – 4:00 p.m.
Farmer & The Seahorse
at The Alexandria

Topics Include:
• Discrimination & Retaliation
• Wage & Hour Update
• Arbitration Issues
• Immigration & Employment
• Marijuana in the Workplace
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LEGISLATIVE

California Legislation

California legislators sent Governor Jerry Brown 1,217 bills to consider in his final opportunity to sign bills. Governor Brown signed 1,016 bills into law. Of these new laws, many address **sexual harassment** in California. These new laws include:

AB 2338 (Levine): AB 2338 adds Article 4 (commencing with section 1700.50) to Chapter 4 of Part 6 of Division 2 of the Labor Code. AB 2338 requires talent agencies to provide adult artists, parents, or legal guardians of minors aged 14 -17, and age-eligible minors, within 90 days of retention, educational materials on sexual harassment prevention, retaliation, and reporting resources. For adult model artists only, the talent agency will be required to provide materials on nutrition and eating disorders. Talent agencies will also have to retain, for three years, records showing that those educational materials were provided.

AB 3082 (Gonzalez Fletcher): AB 3082 adds section 12318 to the Welfare & Institutions Code. This law requires the Department of Social Services to develop or identify – and provide a copy and description to the legislature by September 30, 2019 – (1) educational materials addressing sexual harassment of in-home supportive services ("IHSS") providers and recipients, and (2) a method to collect data on the prevalence of sexual harassment in the IHSS program.

SB 224 (Jackson): SB 224 amends section 51.9 of the Civil Code and amends sections 12930 and 12948 of the Government Code. SB 224 gives additional examples of professional relationships where liability for claims of sexual harassment may arise and authorizes the California Department of Fair Employment and Housing ("DFEH") to investigate those circumstances. These examples include investor, elected official, lobbyist, director, and producer among those listed persons who may be liable to a plaintiff for sexual harassment.

SB 820 (Leyva): SB 820 adds section 1001 to the Code of Civil Procedure. For settlement agreements entered into on or after January 1, 2019, this law will prohibit and make void any provision that prevents the disclosure of information related to civil or administrative complaints of sexual assault, sexual harassment, and workplace harassment or discrimination based on sex. The law does, however, permit provisions that (1) preclude the disclosure of the amount paid in settlement and (2) protect the claimant's identity and any fact that could reveal the identity, so long as the claimant has requested anonymity and the

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opposing party is not a government agency or public official. SB 820 suggests that a violation of its provisions would give rise to a cause of action for civil damages.

SB 970 (Atkins): This bill adds section 12950.3 to the Government Code and requires hotel and motel employers (excluding bed and breakfasts) to provide by January 1, 2020, and once every two years thereafter, at least 20 minutes of interactive human trafficking awareness training to employees likely to interact with human trafficking victims. The DFEH can seek an order requiring an employer comply with these requirements.

SB 1300 (Jackson): SB 1300 amends Government Code sections 12940 and 12965 and adds Government Code sections 12923, 12950.2, and 12964.5. This new law declares the purpose of harassment laws is to provide all Californians with equal opportunity to succeed in the workplace. To that end, the bill expressly affirms or rejects specified judicial decisions in:

- *Harris v. Forklift Systems*: Approving the standard in Justice Ruth Bader Ginsburg's concurrence that in a workplace harassment suit "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job."
- *Brooks v. City of San Mateo*: Prohibiting reliance on Judge Alex Kozinski's Ninth Circuit opinion to determine what conduct is sufficiently severe or pervasive to constitute actionable harassment under the Fair Employment and Housing Act ("FEHA").
- *Reid v. Google, Inc.*: Affirming the California Supreme Court's rejection of the "stray remarks doctrine," because the "existence of a hostile work environment depends on the totality of the circumstances and a discriminatory remark, even if made not directly in the context of an employment decision or uttered by a non-decisionmaker, may be relevant, circumstantial evidence of discrimination."
- *Kelley v. Conco Companies*: Disapproving different standards for hostile work environment harassment depending on the type of workplace.
- *Nazir v. United Airlines, Inc*: Affirming that "hostile working environment cases involve issues 'not determinable on paper.' "

The new law also:

- Expands an employer's potential FEHA liability for acts of nonemployees to all forms of unlawful harassment (removing the "sexual" limitation).
- Prohibits employers from requiring an employee to sign (as a condition of employment, raise, or bonus): (1) a release of FEHA claims or rights or (2) a document prohibiting disclosure of information about unlawful acts in the workplace, including nondisparagement agreements. This provision does not apply to negotiated settlement agreements to resolve FEHA claims filed in court, before administrative agencies, alternative dispute resolution, or though the employer's internal complaint process.
- Prohibits a prevailing defendant from being awarded attorney's fees and costs unless the court finds the action was frivolous, unreasonable, or

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groundless when brought or that the plaintiff continued to litigate after it clearly became so.

- Authorizes (but does not require) employers to provide bystander intervention training to its employees.

SB 1300 would have – contingent upon SB 1038 also passing – subjected employees alleged to have engaged in harassment to personal liability for retaliation, discrimination, and other adverse employment actions taken against any person who has opposed practices forbidden by FEHA or participated in a FEHA action. As SB 1038 failed to pass the legislature, this proposed amendment in SB 1300 does not become operative.

SB 1343 (Mitchell): This bill amends sections 12950 and 12950.1 of the Government Code. SB 1343 requires an employer of five or more employees – including seasonal and temporary employees – to provide certain sexual harassment training by January 1, 2020. Within six months of obtaining a supervisory position (and once every two years thereafter), all supervisors must receive at least two hours of training, and all nonsupervisory employees must receive at least one hour. SB 1343 also requires the DFEH to make available a one-hour and a two-hour online training course employers may use, and to make the training videos, existing informational posters, fact sheets, and online training courses available in multiple languages.

SB 3109 (Stone): This bill adds section 1670.11 to the Civil Code. SB 3109 makes void and unenforceable any provision in a contract or settlement agreement that waives a party's right to testify in a legal proceeding (if required or requested by court order, subpoena or administrative or legislative request) regarding criminal conduct or sexual harassment on the part of the other contracting party, or the other party's agents or employees.

Governor Brown also **signed** into law a number of other bills that will impact California employers and employees. These bills include:

AB 1565 (Thurmond): This bill was passed as an urgency statute to make clarifying changes to last year's AB 1701, which created joint liability for construction contractors and subcontractors. AB 1565 immediately repeals the express provision that relieved direct contractors for liability for anything other than unpaid wages and fringe or other benefit payments or contributions including interest owed. For contracts entered into on or after January 1, 2019, the direct contractor must specify what documents and information the subcontractor must provide in order to withhold a disputed payment. AB 1565 amends section 218.7 of the Labor Code.

AB 1976 (Limón): AB 1976 amends section 1031 of the Labor Code. The new law requires employers to make reasonable efforts to provide a room or location (that is not a bathroom, deleting "toilet stall" and inserting "bathroom") for lactation for nursing mothers. The bill also authorizes a temporary lactation location if certain conditions are met and provides a narrow undue hardship exemption. The Governor vetoed the similar, more onerous, SB 937.

AB 2605 (Gipson): This bill, which adds section 226.75 to the Labor Code, exempts from rest-period requirements certain workers who hold "safety-sensitive positions." This is defined as a position whose duties reasonably include responding to emergencies in the facility and carrying communication devices. The exemption applies only to workers covered by a collective bargaining agreement and subject to Industrial Wage Commission Wage Order No. 1. Employers must pay exempted workers one hour of pay at the regular rate if the rest period is interrupted to respond to an emergency. Because AB 2605 is an urgency statute, these provisions took effect immediately when approved by Governor Brown on September 20, 2018 and will sunset on January 1, 2021.

SB 826 (Jackson): SB 826 requires California-based publicly held corporations to have on their board of directors at least one female – defined as people who self-identify as women, regardless of their designated sex at birth. The deadline for compliance is December 31, 2019. A corporation may need to increase its authorized number of directors to comply with this requirement. The bill imposes minimum seat requirements that must be filled by women, proportional to the total number of seats, by December 31, 2021. The Secretary of State must publish a report by July 1, 2019 of the number of corporations whose principal executive offices are in California and have at least one female director, and an annual report beginning March 1, 2020, detailing the number of corporations that (1) complied with requirements in 2019, (2) moved their headquarters in or out of California, and (3) were subject to these provisions during 2019, but no longer publicly traded. For each company where a director's seat not held by a female during at least a portion of the calendar year – when by law it should have been – the corporation will be subject to a $100,000 fine for the first violation and a $300,000 fine for further violations. Corporations that fail to timely file board member information with the Secretary of State will also be subject to a $100,000 fine. This bill adds sections 301.3 and 2115.5 to the Corporations Code.

SB 954 (Wieckowski): SB 954 amends Evidence Code section 1122 and adds Evidence Code section 1129. This new law requires attorneys, except in class actions, to provide their mediating clients with a written disclosure containing the confidentiality restrictions provided in Section 1119 of the Evidence Code and obtain the client's written acknowledgment that the client has read and understands the confidentiality restrictions. This duty arises as soon as reasonably possible before the client agrees to participate in mediation or a mediation consultation.

SB 1252 (Pan): This bill provides employees the right "to receive" a copy of – not just inspect or copy – their pay statements. SB 1252 amends section 226 of the Labor Code and states that it is declaratory of existing law.

SB 1402 (Lara): SB 1402, which adds section 2810.4 to the Labor Code, requires the Division of Labor Standards Enforcement to post a list on its website of port drayage motor carriers with any unsatisfied judgment or assessment or any "order, decision, or award" finding illegal conduct as to various wage/hour issues, specifically including independent contractor misclassification and derivative claims. This bill also extends joint and several liability to the customers of these drayage motor carriers for their future wage violations of the same nature.

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SB 1412 (Bradford): This bill amends section 432.7 of the Labor Code and requires employers to consider only a "particular conviction" ("for specific criminal conduct or a category of criminal offenses prescribed by any federal law, federal regulation, or state law that contains requirements, exclusions, or both, expressly based on that specific criminal conduct or category of criminal offenses") relevant to the job when screening applicants using a criminal background check.

Governor Brown also **vetoed** several employment law related bills. It is important to be aware of this failed legislation, however, as there will be a new governor next year.

AB 1867 (Reyes): This bill would have required employers with 50 or more employees to maintain records of complaints alleging sexual harassment for at least five years after the last date of employment of the complainant or alleged harasser, whichever is later.

AB 1870 (Reyes, Friedman, and Waldron): AB 1870 would have extended a complainant's time to file an administrative charge with the DFEH from one year to three years after the alleged incident for all types of FEHA-prohibited conduct.

AB 2079 (Gonzalez Fletcher): This bill would have amended the Property Service Worker Protection Act, which went into effect July 1, 2018 (AB 1978), and imposes requirements to combat wage theft and sexual harassment for the janitorial industry. It would have required: (1) all employers applying for new or renewed registration to demonstrate completion of sexual harassment violence prevention requirements and provide an attestation to the Labor Commissioner, (2) the Department of Industrial Relations ("DIR") to convene an advisory committee to develop requirements for, and maintain a list of, qualified organizations and peer-trainers for employers to use in providing training, and (3) employers, upon request, to provide requesting employees a copy of all training materials. AB 2079 would have also prohibited the Labor Commissioner from approving a janitorial service employer's request for registration or for renewal if the employer had not fully satisfied a final judgment to a current or former employee for a violation of the FEHA.

AB 2496 (Gonzalez Fletcher): This bill would have established a rebuttable presumption that janitorial workers who perform services for property service employers are employees, not independent contractors.

AB 2732 (Gonzalez Fletcher): AB 2732 would have subjected to penalties employers that destroy or withhold passports or other immigration documents, and would have required all employers to provide a "Worker's Bill of Rights" (to be developed by the DIR) to all employees. AB 2732 also would have made various changes to the Property Service Worker Protection Act, contingent upon this bill's and AB 2079's passing.

AB 3080 (Gonzalez Fletcher): AB 3080 would have prohibited businesses from requiring, as a condition of employment, employment benefit, or contract (1) that a job applicant or employee waive any right, forum, or procedure (e.g., arbitration) for a violation of FEHA or the Labor Code, and (2) that a job applicant, employee, or independent contractor not disclose instances of sexual harassment

suffered, witnessed, or discovered in the work place or in performance of the contract, opposing unlawful practices, or participating in harassment and discrimination related investigations or proceedings.

AB 3081 (Gonzalez Fletcher and Bonta): AB 3081 would have amended the FEHA and Labor Code to (1) add status as a sexual harassment victim to existing prohibitions on discrimination against employees who are victims of domestic violence, sexual assault, or stalking, (2) create a rebuttable presumption of unlawful retaliation if an employer – within 30 days of notice of the victim's status – discharges or threatens to discharge, demotes, suspends, or otherwise discriminates against a victim employee, (3) make a business jointly liable for harassment of workers supplied by the business's labor contractor (existing law similarly extends liability for the contractor's failure to pay wages and obtain valid workers' compensation coverage), (4) prohibit businesses from shifting to their labor contractors duties or liabilities under the Labor Code workers' compensation insurance provisions.

SB 937 (Wiener and Leyva): This bill would have required employers to (1) provide a lactation room with prescribed features and access to a sink and refrigerator (or another cooling device suitable for storing milk) in close proximity to the employee's workspace, (2) develop and distribute to employees a lactation accommodation policy, and (3) maintain accommodation request records for three years and allow the employee and Labor Commissioner access to the records. SB 937 would have also deemed the denial of time or space for lactation a failure to provide a rest period under Labor Code section 226.7, and required the DLSE to create a model lactation policy and a model lactation accommodation request form.

SB 1223 (Galgiani): This bill would have required the DIR to convene an advisory committee to recommend minimum standards for a harassment and discrimination prevention policy and training programs specific to the construction industry, and to report to the Legislature specific implementation recommendations.

SB 1427 (Hill): SB 1427 would have added veterans and military personnel as a protected class under the FEHA.

There were also a number of bills that **failed** to pass both houses of the legislature. These bills include:

AB 1761 (Muratsuchi, Quirk, and Carrillo): AB 1761 would have required hotel employers to provide employees with a "panic button" to call for help in case of an emergency, post a notice of these provisions in each guestroom, provided paid time off or a reasonable accommodation to an employee who is the victim of an assault, required an employer – upon the employee's request – to contact police, prohibited employers from taking action against any employee who exercises the protections, and imposed penalties for violations of the proposed provisions.

SB 1038 (Leyva): SB 1038 proposed to impose personal liability upon an employee for retaliating against a person who has filed a complaint against the employee, testified against the employee, assisted in any proceeding, or opposed

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any prohibited practice. As discussed above, since SB 1038 failed, so did the same proposed amendment in SB 1300.

SB 1284 (Jackson): SB 1284 would have required private employers with 100 or more employees and required to file an EEO-1 report to submit a pay data report to the DFEH containing specified information. This bill would have also authorized fines to be imposed on employers who fail to report, authorized the DFEH to seek an order requiring the employer to comply, and require the DFEH to maintain the records for 10 years, though no individually identifiable information could be made public.

Finally, there were a variety of bills that **did not pass** out of their house of origin.

AB 1938 (Burke): This bill would have limited employer inquiries about familial status during the hiring or promotional process and made it unlawful to make any non-job related inquiry about an individual's real or perceived responsibility to care for family members.

AB 2016 (Fong): AB 2016 would have required an employee's required written Private Attorneys General Act ("PAGA") notice to the employer include a more in-depth statement of facts, legal contentions, and authorities supporting each allegation, and include an estimate of the number of current and former employees against whom the alleged violations were committed and on whose behalf relief is sought. AB 2016 would have prescribed specified notice procedures if the employee or employee representative seeks relief on behalf of ten or more employees. The bill excluded health and safety violations from PAGA's right-to-cure provisions, increased the time the employer had to cure violations from 33 to 65 calendar days, and provided an employee may be awarded civil penalties based only on a violation actually suffered by the employee.

AB 2069 (Bonta): This bill would have provided that the medical use of cannabis by a qualified patient with an identification card is subject to a reasonable accommodation by an employer.

AB 2223 (Flora): AB 2223 would have provided employers the option to provide itemized pay statements on a monthly basis and extended the time an employer has to respond to a request to inspect or copy pay statements from 21 to 28 calendar days. AB 2613 would have imposed penalties on employers who violate Labor Code provisions requiring payment of wages twice per month on designated paydays, and once per month for exempt employees.

AB 2366 (Bonta): This bill would have extended existing law that protects employees who take time off work due to being victims of domestic violence, sexual assault and stalking, to include victims of sexual harassment. This bill would have also extended job-protected leave to family members of such victims.

AB 2482 (Voepel and Baker): This bill would have allowed private non-exempt employees, not subject to collective bargaining agreements, to request a flexible work schedule to work ten hours per day within a 40-hour workweek without overtime compensation.

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AB 2680 (Jones-Sawyer): AB 2680 would have required the CA Department of Justice to adopt a standard form that employers would have to use when seeking the consent of an applicant for employment to conduct a conviction history background check on that applicant by the department. SB 1298 would have placed limits on the criminal history reporting that DOJ would provide to employers and required DOJ to provide the subject with a copy of the information and at least five days to challenge its accuracy before releasing it to the employer. AB 2647 would have prohibited evidence of a current or former employee's criminal history from being admitted, under specified circumstances, in a civil action based on the current or former employee's conduct against an employer, an employer's agents, or an employer's employees.

AB 2841 (Gonzalez Fletcher): AB 2841 would have increased an employer's alternate sick leave accrual method from 24 hours by the 120th calendar day of employment to 40 hours of accrued sick leave or paid time off by the 200th calendar day of employment – but not needing to exceed 80 hours. An employer would have been able to limit the amount sick leave carried over to the following year to 40 hours. This provision would have applied to IHSS providers on January 1, 2026.

AB 2946 (Kalra): AB 2946 would have extended the time to file a complaint with the Division of Labor Standards Enforcement ("DLSE") from six months to three years from the date of the violation and amended California's whistleblower provision to authorize a court to award reasonable attorney's fees to a prevailing plaintiff.

California

California Court of Appeal Concludes that Individuals Can Be Personally Liable for Civil Penalties for Wage-Hour Violations

In *Atempa v. Pedrazzani*, the California Court of Appeal held that persons responsible for overtime and/or minimum wage violations in fact can be held personally liable for civil penalties, regardless of whether they were the employer or the employer is a limited liability entity. The court concluded that private plaintiffs may pursue and collect these penalties for "aggrieved employees" on behalf of the state of California through the Private Attorneys General Act ("PAGA").

Defendant Paolo Pedrazzani was the owner, president, director, and secretary of Pama, Inc. Two former employees filed a variety of wage-hour claims against Pedrazzani and Pama in July 2013, including claims for civil penalties on the basis of unpaid minimum wages and unpaid overtime. Following a judgment in favor of the employees that Pedrazzani and Pama were jointly and severally liable for the civil penalties, Pedrazzani appealed and Pama filed for bankruptcy.

The Court of Appeal held that Pedrazzani was personally liable for the civil penalties because "the Legislature has decided that both the employer and any 'other person' who causes a violation of the overtime pay or minimum wage laws are subject to specified civil penalties." Because neither statute mentions corporate

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structure, corporate form, or suggests that the same has any bearing on liability, it concluded that "the business structure of the employer is irrelevant."

The court also held that personal liability can attach even if a person has no formal relationship with the corporate employer (e.g., employee, manager, officer). Rather, for overtime violations, it is sufficient that that the "other person" was "acting on behalf of the employer"; and for minimum wage violations, it is sufficient that the "other person" "pays or causes to be paid less than the prescribed minimum wage." Summarizing, the court held that the statutes at issue "provide for an award of civil penalties against the person who committed the underlying statutory violations."

After establishing the basis for Pedrazzani's personal liability, the court went on to explain that the former employees had standing to seek and collect the penalties under PAGA, and that such penalties are subject to the standard division between the aggrieved employees and the State (25% to the former; 75% to the latter).

Unfortunately, the court did not address the standard or evidentiary showing needed to establish that someone is an "other person" who can be held personally liable for the civil penalties.

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