PETTITKOHN
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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *May 2019*

LEGISLATIVE

California

There are numerous bills pending in the 2019-2020 legislative session which, if signed into law, would impact California's employers and employees. These bills include:

AB 5 (Gonzalez): This bill would state the Legislature's intent to codify *Dynamex*. Specifically, it would add new Labor Code section 2750.3 stating that *Dynamex's* ABC test for determining whether someone is an independent contractor would apply to all provisions of the Labor Code and the Industrial Welfare Commission's Wage Orders, absent those provisions containing an alternative definition of "employee." AB 5 would specifically enumerate the following four occupations that would not be governed by *Dynamex*, but instead would remain governed by the *Borello* test: (1) persons or organizations licensed by the Department of Insurance; (2) a physician and surgeon licensed by the State of California; (3) a securities broker-dealer or investment advisor or their agents and representatives registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority or State of California; or (4) a direct sales representative as described in Unemployment Insurance Code section 650. AB 5 is currently before the Assembly Appropriations Committee.

AB 160 (Voepel): AB 160 would add new Government Code section 12958 and would authorize employers to extend a preference during hiring decisions to veterans. "Veterans" would be defined as any person who served full time in the Armed Forces in time of national emergency or state military emergency or during any expedition of the Armed Forces and was discharged or released under conditions other than dishonorable. Employers would be permitted to require a veteran to submit United States Department of Defense Form 214 to confirm eligibility for this preference. AB 160 further specifies that such a preference shall be deemed not to violate any state or local equal employment opportunity law, including California's Fair Employment and Housing Act ("FEHA"), if used uniformly and not established for purposes of unlawfully discriminating against any group protected by the FEHA. AB 160 has been referred to the Assembly Appropriations Committee.

AB 170 (Gonzalez): AB 170 would add Government Code section 12940.2 requiring client employers and labor contractors to share both legal responsibility and civil liability for harassment by any workers supplied by a labor contractor. AB 170 has passed the Assembly and has been referred to the Senate.

Save the Date

Thursday
November 14, 2019

13th Annual Employment Law Symposium

Farmer &
The Seahorse
at The Alexandria

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AB 196 (Gonzalez) and 406 (Limón): AB 196 would revise the formula for determining benefits available for the family temporary disability insurance program for periods of disability commencing after January 1, 2020. This change would redefine the weekly benefit amount to be equal to 100% of the wages paid to an individual during the quarter of the individual's disability base period in which these wages were highest, divided by 13, but not exceeding the maximum workers' compensation temporary disability indemnity weekly benefit. AB 406 would require the Employment Development Department to distribute the application for family temporary disability insurance benefits in all non-English languages spoken by a substantial number of non-English speaking applicants. Both bills are before the Assembly Appropriations Committee.

AB 403 (Kalra): AB 403 would amend Labor Code section 98.7 to extend from six months to three years the period for a person to file a complaint with the Labor Commissioner. AB 403 would also amend Labor Code section 1102.5 to allow a judge to award reasonable attorneys' fees to a prevailing plaintiff. AB 403 is currently being heard by the Assembly Appropriations Committee.

AB 443 (Flora): While Labor Code section 226 authorizes a prevailing plaintiff to recover attorneys' fees in an action involving wage statement violations, this bill would limit these fees in Private Attorneys General Act ("PAGA") actions for such violations. Specifically, if the gross judgment amount or gross settlement amount in the action is $50,000 or more, the attorneys' fees shall not exceed 25% of these amounts. AB 443 has been referred to the Assembly Committee on Labor & Employment.

AB 547 (Gonzalez): This bill, also known as the "Janitor Survivor Empowerment Act," would enact specific harassment training rules related to the janitorial service industry, including allowing peers to provide direct training on harassment prevention for janitors. AB 547 would also require employers, upon request, to provide a copy of all training materials used during the training and require employers to use a qualified organization from the list maintained by the Department of Industrial Relations. The bill would also amend Labor Code section 1421 to require employers to maintain records for three years identifying the names and addresses of all employees engaged in rendering janitorial services for the employer. AB 547 has been referred to the Assembly Appropriations Committee.

AB 555 (Gonzalez): This bill would amend California's paid sick leave law requirements and would permit an employee to use up to five days (40 hours) of paid sick leave in each calendar year, year of employment, or 12-month period. AB 555 would also increase from six days (48 hours) to 10 days (80 hours) the accrual cap and carryover limitations an employer may have for paid sick leave purposes. Employers would still be entitled to use alternative accrual methods beyond the default one hour accrued for every 30 hours worked, provided the employer uses a regular accrual method so that the employee has 40 hours accrued by the 200th day of work, or by providing five days (40 hours) of paid sick leave available for use by the completion of the 200th day. This bill would also make revisions to paid sick leave limits for in-home support service providers beginning January 1, 2026. AB 555 would expand the purposes for which the employee may use paid sick leave to include absences due to the employee's donation of bone

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marrow or an organ, or due to a public health emergency closure of the employee's place of business or the employee's school or childcare. This bill would also modify the circumstances under which an employer may require documentation about an employee's usage of paid sick leave or PTO. Presently, Labor Code section 247.5 requires employers to retain records for three years of paid sick leave accrued and used, but also provides that an employer is not required to inquire into or record the purpose for which paid sick leave or PTO is used. If enacted, an employer would be specifically prohibited from compelling an employee to provide documentation verifying use of their first 5 days or 40 hours of paid sick leave or PTO. AB 555 has been referred to the Assembly Appropriations Committee.

AB 749 (Stone): This bill would prohibit any settlement agreement related to an employment dispute from preventing or restricting the "aggrieved person" from working for the employer against which the claim was filed, or any parent company, subsidiary, division, affiliate, or contractor of the employer. Any such provision in an agreement entered into or after January 1, 2020 shall be deemed void as a matter of law and against public policy. AB 749 passed the Assembly and has been referred to the Senate.

AB 758 (Carrillo): California's pay equity provisions (Labor Code section 1197.5 et seq.) prohibit employers from paying employees less than employees of the opposite sex for substantially similar work. This bill would specify that "sex" includes a person's "gender," which includes a person's gender identity and gender expression. "Gender expression" would mean a person's gender related appearance and behavior whether or not stereotypically associated with the person's sex at birth. While this section presently requires any civil action be initiated within one year of a cause of action occurring, this bill would impose a similar one-year requirement to initiate an administrative action. The bill states it is intended to be declarative of existing law. AB 758 has been referred to the Assembly Appropriations Committee.

AB 789 (Flora): AB 789 would amend Labor Code 226 to provide employers an opportunity to cure any alleged wage statement violations before actions could be pursued directly by an employee or as a representative action under PAGA. If enacted, an employee or his/her representative would need to first provide written notice by certified mail of the alleged violation, including the facts and theories to support the alleged violation. The employer would then have 65 days from the postmark date of the notice and if the employer does so, then no civil or PAGA claim could commence. However, this cure period would only apply for technical violations of the itemized statements written requirements (e.g., legal name of employer, employee's name, identification number, etc.), and would not apply if the employer had also failed to make a complete and timely payment of all wages due to the employee. The bill has been referred to the Assembly Committee on Labor & Employment.

AB 1223 (Aguilar-Curry): This bill would require private and public employers to grant an employee an additional unpaid leave of absence of up to 30 days within a one-year period for organ donation purposes. AB 1223 is before the Assembly Appropriations Committee.

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AB 1224 (Gray): While the Unemployment Insurance Code presently authorizes up to six weeks of temporary disability benefits in any 12 month period, this bill would also authorize up to 12 weeks of such benefits by permitting a maximum of two qualifying events of up to six weeks each in any 12 month period. AB 1224 is currently before the Assembly Appropriations Committee.

AB 1478 (Carrillo): This bill would also amend Labor Code section 230 and expand an employee's ability to bring a private civil action for violations of this provision without having to exhaust administrative remedies. Specifically, it would make clear that an employee may directly file a private action without first involving the Labor Commissioner for any violations regarding: (1) an employee's ability to take time off for jury duty; (2) an employee's status as a crime victim; (3) an employee's ability to take time off to seek legal aid because of a sexual assault, domestic violence or stalking; (4) an employee's status as a victim of sexual assault, domestic violence, or stalking; and (5) because an employee sought reasonable accommodation related to sexual assault, domestic violence, or stalking. In addition to awarding reasonable attorneys' fees to a prevailing employee, the court would also be able to award "any other relief" that the court deems would effectuate the purpose of these protections, including reinstatement, front and back pay, and emotional distress. AB 1478 passed the Assembly Judiciary Committee.

SB 135 (Jackson): SB 135 would materially expand the circumstances under which paid family leave benefits may be used generally, and also expand leave protections to enable employees the time off to draw upon these benefits. This bill would eliminate the 1,250 hours of service and the 12 months of service for California Family Rights Act ("CFRA") eligibility, and require only the employee have 180 days of service with the employer to qualify for up to 12 weeks of job protected leave. The bill would drop from 50 employees to five employees the threshold number of employees for an employer to be subject to CFRA. This bill would also expand the definition of "family care and medical leave" by changing the list of individuals for whom leave could be taken. SB 135 would make changes including the individuals for whom the employer may request medical certification to support the employee's request for leave to care for a serious health condition. The definition of "family care and medical leave" would be expanded to include "qualifying exigencies" related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child or parent in the United States Armed Forces. This bill would also delete a current CFRA provision that provides if both parents are employed by the same employer and are otherwise entitled to leave, the employer would not be required to grant leave that is greater than 12 weeks. SB 135 is currently before the Senate Appropriations Committee.

SB 188 (Mitchell): SB 188 would amend the definition of "race" under the FEHA to include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles." Protective hairstyles, in turn, would be defined as "including, but is not limited to, such hairstyles as braids, locks, and twists." SB 188 passed the Senate and has been forwarded to the Assembly.

SB 218 (Bradford): Government Code section 12993(c) presently states the Legislature's intent that the FEHA is intended to occupy the entire field of regulation regarding discrimination in employment and housing, but that it does not

affect the application of the Unruh Act regarding discrimination in certain business relationships. This bill would delete this subsection. SB 218 is before the Senate Appropriations Committee.

SB 707 (Wieckowski and Hertzberg): SB 707 would implement new penalties if an employer failed to pay within 30 days of their due date the fees to initiate or to maintain arbitration proceedings for employment or consumer claims. New Code of Civil Procedure sections 1281.97 and 1281.98 would deem such an employer in material breach of the arbitration agreement and in default of the arbitration, thus waiving their right to compel or proceed with arbitration. The employee would then have the option to withdraw the claim from arbitration and proceed in an appropriate court, or continue the arbitration but with the employer paying the employee's attorneys' fees involved with the arbitration. If the employee elects to proceed with court action, the statute of limitations would be deemed tolled during the pendency of the arbitration, and the court would be required to order sanctions against the employer, including monetary, evidentiary, and terminating sanctions. SB 707 is before the Senate Appropriations Committee.

SB 778 (Committee on Labor, Public Employment & Retirement): This bill would amend Government Code section 12950.1 and would extend the deadline of the state mandated harassment prevention training for employees with five or more employees and for non-supervisors to January 1, 2021. The current law mandates completion by January 1, 2020. The bill is currently in the Senate.

JUDICIAL

Federal

U.S. Supreme Court Rules That Class Arbitration Must be Explicitly Authorized

In *Lamps Plus Inc. et al v. Varela*, the U.S. Supreme Court determined that arbitration agreements must explicitly call for class arbitration for that process to be invoked. The justices overturned the Ninth Circuit's decision that Lamps Plus' arbitration agreement with employee Frank Varela ("the Employee") let him pursue class claims even though the agreement was vague on the issue of class arbitration. Rather, the U.S. Supreme Court ruled that arbitration agreements must explicitly call for class arbitration for that process to be invoked.

Lamps Plus had sought to make the Employee assert his claims in individual arbitration under the high court's ruling in *Stolt-Nielsen v. AnimalFeeds Int'l Corp*., which bars class arbitration when there is no "contractual basis for concluding" that the parties agreed to it. *Stolt-Nielsen* did not address whether courts can infer that a contractual basis exists in situations like the Employee's where an agreement does not explicitly block class arbitration and the language is ambiguous. In *Lamps Plus*, the court's majority held that *Stolt-Nielsen* does not permit lower courts to make such an inference.

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The Court held:

> Under the Federal Arbitration Act, an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration, . . . [l]ike silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice the principal advantage of arbitration.' This conclusion aligns with the court's refusal to infer consent when it comes to other fundamental arbitration questions.

U.S. Supreme Court to Review Cases Regarding Sexual Orientation/Gender Identity Protections Under Title VII

The U.S. Supreme Court recently agreed to hear three cases that hinge on whether gay and transgender employees are protected from discrimination under Title VII of the Civil Rights Act. The high court granted petitions for certiorari in three cases — *Altitude Express v. Zarda*; *Bostock v. Clayton County, Georgia*; and *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* — giving the justices a chance to settle questions regarding the scope of Title VII.

The three cases each pose similar questions. *Zarda* and *Bostock* ask the justices to decide whether the law's existing ban on sex discrimination protects employees from bias based on their sexual orientation. *Harris Funeral Homes* asks whether employees are protected from gender identity discrimination under the statute.

California's anti-discrimination statute, the California Fair Employment & Housing Act, already prevents discrimination based on gender identity, gender expression, and sexual orientation, among other protected classes.

California

Arbitration Agreements are Enforceable Even When Executed After Litigation is Initiated

Salgado v. Carrows Restaurant presented the issue of whether an arbitration agreement must predate the lawsuit to be enforceable. Although the trial court initially ruled against arbitration, the court of appeal supported the proposition that the agreement need not predate the lawsuit.

On November 22, 2016, Plaintiff Maureen Salgado ("the Employee") filed a discrimination lawsuit for employment discrimination and violation of civil rights against Food Management Partners dba Carrows Restaurant, and later amended the complaint on April 18, 2017 to name Carrows Restaurants, Inc. ("Carrows") and Catalina Restaurant Group, Inc. as defendants. Notably, the Employee entered into an arbitration agreement with Carrows on December 7, 2016, approximately four months before the company was named as a defendant in her lawsuit, but after the Employee's claims arose and litigation commenced. Accordingly, when Carrows brought a motion to compel arbitration, the Employee asserted the argument that the agreement applied only to claims arising after the agreement's execution.

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The Employee's argument was largely premised on the specific wording of the agreement, which stated that the parties entered into a binding and enforceable agreement to arbitrate all claims "which may arise out of or be related in any way to" the Employee's employment. Specifically, the Employee argued that the phrase "may arise out of" suggests that it applies to future disputes and not disputes over which a lawsuit has already been filed

The trial court agreed with the Employee's position, but the court of appeal overturned the ruling. Notably, the court of appeal's decision turned, in part, on the inclusion of a single word in the arbitration provision: "or." The court of appeal reasoned that the Employee's claims against Carrows were related to her employment with Carrows, and therefore fell under the arbitration provision, which covered all claims "which may arise out of or be related in any way to" the Employee's employment. Accordingly, it did not matter that the Employee had already filed suit by the time she entered into the arbitration provision, because the lawsuit was nevertheless related to her employment.

The court of appeal also relied on a second part of the same arbitration provision, which similarly indicated that the Employee agreed to arbitrate "any claim, dispute, and/or controversy" she may have against Carrows. The court of appeal again pointed out that this provision was broad in scope, and unrestricted and unlimited as to the age of the claim.

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