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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *May 2020*

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LEGISLATIVE

California

COVID-19

The California Legislature returned from recess on May 4, 2020. Prior to recess, a number of bills were proposed to assist Californians during this crisis. There will certainly be other proposed bills.

AB 3216 (Kalra): AB 3216 would expand the California Family Rights Act to any employee (no time of service or employer size requirement) impacted, for defined reasons, by COVID-19.

SB 2887 (Bonta): SB 2887 addresses a number of issues (education, unlawful detainer). In connection with employment in California, SB 2887 provides zero-interest rate loans directly to small businesses and nonprofit organizations affected by the emergency. This bill would also provide each employee with paid sick days for immediate use, regardless of how long the employee has been employed, in the amount of 14 days for a full-time exempt employee. Part-time or non-exempt employees would receive paid sick days in an amount equal to the number of hours that the employee was scheduled to work, or, if not scheduled to work, regularly works in a 14-day period, as specified. The bill would authorize an employee to use those paid sick days to care for a family member affected by the public health crisis, to care for a child because of a school closing related to the public health crisis, or because the employee has been affected by the public health crisis. This bill would require the Department of Industrial Relations to establish a program to provide paid sick days for family care and medical leave due to a public health crisis to independent contractors and day laborers. The bill would require the program to provide paid sick days in an amount equal to the number of hours that the independent contractor or day laborer was scheduled to work or, if not scheduled, regularly works in a 14-day period, as specified. The bill would require the Department of Industrial Relations to establish an application process for independent contractors and day laborers to apply for the paid sick days provided under these provisions.

SB 943 (Chang): SB 943 would expand California's Paid Family Leave program, until January 1, 2021, to authorize wage replacement benefits to workers who take time off work to care for a minor child whose school has been closed due to the COVID-19 virus outbreak.

In addition to the COVID-19 legislation, there are various other bills pending that, if signed into law, would certainly impact California's employees and employers. A number of bills address AB 5.

AB 1850 (Gonzalez): AB 1850 would replace the submission limit and instead exempt still photographers, photojournalists, freelance writers, editors, and newspaper cartoonists from the application of *Dynamex Operations W. Inc. v. Superior Court* (2018) 4 Cal.5th 903 based upon different specified criteria, including that these persons provide professional services pursuant to a contract that includes specified items, as provided.

AB 1925 (Obernolte): AB 1925 would exempt small businesses from *Dynamex* and rather subject said businesses to the test set forth in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341. A small business is defined as: independently owned and operated; not dominant in its field of operation; employs fewer than 100 employees; and has average gross receipts of fifteen million dollars or less over the previous three years.

AB 1928 (Kiley): AB 1928 would repeal AB5 regarding independent contractors and mandate *Borello* as to the test for all workers in California.

AB 2465 (Gonzalez): AB 2465 would recast and reorganize the exemptions for a person licensed as an esthetician, electrologist, manicurist, barber, or cosmetologist. This bill would also require the Board of Barbering and Cosmetology, by July 1, 2022, to adopt regulations for the development of a booth renter permit and a biennial fee, as specified, for a person licensed as an esthetician, licensed electrologist, licensed manicurist, licensed barber, or licensed cosmetologist, for purposes of compliance with Labor Code requirements for exemption from the presumption employee status for those individuals.

SB 806 (Grove): SB 806 would repeal AB 5 and establish a new test that, for purposes of specific provisions of the Labor Code governing the relationship of employer and employees, a person providing labor or services for remuneration is considered an employee rather than an independent contractor, unless the hiring entity demonstrates that 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, determined by a preponderance of factors, with no single factor of control being determinative, *and either that* (a) the person performs work that is outside the usual course of the hiring entity's business, or the work performed is outside the place of business of the hiring entity, or the worker is responsible for the costs of the place of the business where the work is performed, *or that* (b) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. The bill would apply the new test to all pending claims, whether in civil court or as an administrative action, filed on or after January 1, 2018, that relate to the classification of workers in this state.

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SB 867 (Bates): SB 867 would delete the above inoperative date of January 1, 2021, applicable to newspaper distributors or newspaper carriers, thereby making the exemption from AB 5 apply indefinitely.

SB 868 (Bates): SB 868 would revise that freelance journalist exemption to include photographers, photojournalists, and videographers, without regard to the number of content submissions per year, from the application of *Dynamex*.

SB 875 (Grove): SB 875 would exempt court interpreters and translators from AB 5.

SB 881 (Jones): SB 881 would exempt defined musicians from AB 5.

SB 963 (Morell): SB 963 would provide that referees and umpires for youth sports are independent contractors.

SB 965 (Nielsen): SB 965 would exempt health facilities, as defined, which contract with companies that employ health care providers who provide services to patients at those facilities, from AB 5.

Other

There is other current, pending legislation not related to either COVID-19 or AB 5. These bills include:

AB 1844 (Chu): Since 2014, the Healthy Workplace Healthy Family Act has required paid sick leave for the diagnosis, care, or treatment of various conditions for the employee and their family. This bill would expand that act to include behavioral health conditions.

AB 1947 (Kalra): AB 1947 would provide 12 months to file a retaliation complaint with the Labor Commissioner. Currently, employees have six months to do so.

AB 1963 (Chu): AB 1963 would designate as mandated reporters of child abuse or neglect any human resources personnel who work in companies that hire minors, as well as anyone supervising or having contact with minors at such companies.

AB 2143 (Stone): AB 2143 would add criminal conduct as another reason to use the no rehire clause to settlement agreements.

AB 2999 (Low): AB 2999 would provide 10 days of unpaid bereavement leave for employees who have worked at least 60 days prior to the leave. The employee could only use this leave for specified family members and would need to provide written proof of the death.

SB 1129 (Dodd): SB 1129 would provide companies more time to fix their wage statements prior to an employee filing suit. Currently, an employer has 65 days and must fix the wage statements for the past three years. This bill proposes a company has to fix incorrect wage statements only for the past year and the

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timeline would not start until the postmark date of the certified letter notifying the company of the problem.

JUDICIAL

Federal

Employee's ADA Claim Defeated by a False Representation on Her Job Application

In *Anthony v. Trax International*, a technical writer brought a disability discrimination claim under the Americans with Disabilities Act ("ADA") against her employer, a contractor for the Department of the Army. During the litigation, the contractor learned that plaintiff Sunny Anthony ("Anthony") lacked the bachelor's degree required of all technical writers, contrary to her representation on her employment application. This prerequisite was not subjective, unrelated to the job, or open to exception: under the contractor's government contract, it could bill for technical writer work only if the employee in question had a bachelor's degree. The trial court granted summary judgment in favor of the contractor, reasoning that, in light of the after-acquired evidence that Anthony lacked the required bachelor's degree when her employment was terminated, she was not a "qualified individual" within the protection of the ADA.

Anthony appealed the judgment, arguing that after-acquired evidence cannot be used to demonstrate she was not a "qualified individual." The Ninth Circuit Court of Appeals disagreed. Although after-acquired evidence cannot establish a superseding, non-discriminatory justification for an employer's challenged actions, it remains available for other purposes, including to show that an individual is not qualified under the ADA. The Ninth Circuit held that an individual who fails to satisfy the job prerequisites cannot be considered "qualified" within the meaning of the ADA unless she shows that the prerequisite is itself discriminatory in effect. Because Anthony did not have the requisite bachelor's degree at the time she was terminated, she was not qualified within the meaning of the ADA, and her employer had no obligation to engage in the interactive process.

Anthony is a favorable decision for employers highlighting the importance of thoroughly investigating a plaintiff throughout the litigation process, as new evidence previously not considered during the termination process can nevertheless defeat a plaintiff's claim.

California

$13 Million Jury Verdict Overturned Following Inappropriate Judicial Comments to Jurors and Improper Admission of "Me Too" Evidence

In *Pinter-Brown v. the Regents of the University of California*, a California Court of Appeal issued a stern rebuke to a Los Angeles trial judge for showing bias in favor of the plaintiff employee and improperly admitting evidence that was irrelevant and highly prejudicial to the defendant employer. Plaintiff Dr. Lauren Pinter-Brown ("Dr. Pinter-Brown") was a clinical professor of medicine at UCLA

who shared a fraught relationship with some of her coworkers. Dr. Pinter-Brown complained several times about the behavior of one colleague in particular, apparently to no avail. After her clinical research was subject to an audit, Dr. Pinter-Brown quit and sued the UC Regents for gender harassment, retaliation, defamation, gender discrimination, age discrimination, and age harassment. The court dismissed several of Dr. Pinter-Brown's claims, and trial proceeded only on the gender discrimination, age discrimination, and age harassment claims. The jury returned a verdict in favor of Dr. Pinter-Brown as to gender discrimination but found for UCLA on the age claims. The jury awarded Dr. Pinter-Brown more than $13 million in damages.

UCLA appealed the verdict as to the gender discrimination claim, arguing the trial court biased the jury against the defense in its comments during jury selection and also improperly admitted "me too" evidence of other individuals' complaints against the entire UC system. The appellate court agreed that UCLA had been subject to a "miscarriage of justice" and reversed the jury verdict.

Once the prospective jurors had been ushered into the courtroom, the trial judge commenced a speech about the role of jurors in the justice system, beginning with a reference to Dr. Martin Luther King: "The arc of the moral universe is long. Dr. Martin Luther King said these words in 1965. The arc of the moral universe is long, but it bends toward justice." The court then proceeded to play a video showing civil rights leaders standing up for justice and thereafter discussed segregation, women's suffrage, Japanese internment, and the accomplishments of civil rights leaders throughout U.S. history. The judge concluded his speech by telling the jury it was their job to "help bend that arc toward justice." The appellate court determined that framing Dr. Pinter-Brown's claims as part of the centuries-long fight against discrimination and inequality gave the appearance that the court was partial to Dr. Pinter-Brown's claims and thereby rendered the trial fundamentally unfair to UCLA.

In addition to the pre-trial comments that "stacked the deck against UCLA," the trial court admitted problematic "me too" evidence over UCLA's valid objections. Specifically, the court admitted the "Moreno report," an independent report commissioned by the UC Regents regarding allegations of *race* discrimination at UCLA, which concluded that UCLA's policies and procedures for addressing incidents of racial and ethnic bias and discrimination were inadequate. Also admitted was a list of hundreds of administrative complaints filed against the UC Regents with the Department of Fair Employment and Housing ("DFEH"). However, the list contained complaints relating to institutions across the entire UC system over a period of five years, with no indication of who filed the complaint or whether the complaint had any merit. Moreover, the list contained complaints alleging improper conduct on bases other than gender. Typically, "me too" evidence—evidence from other employees about how they were allegedly subject to discrimination or harassment—may be admitted to prove the employer's motive or intent. However, "me too" evidence is never admissible to prove the employer's propensity to harass. Moreover, "me too" evidence must bear relation to the facts and circumstances of the plaintiff's case. Thus, a plaintiff alleging gender discrimination cannot admit "me too" evidence regarding race discrimination. According to the Court of Appeal, the foregoing "me too" evidence was admitted precisely to show UCLA's supposed propensity for harassing employees and only

contained four complaints of gender discrimination against UCLA (the rest concerned other forms of alleged misconduct across the UC system). The appellate court therefore determined the admission of the "me too" evidence was highly prejudicial to UCLA and should never have been admitted.

Pinter-Brown was tried in Los Angeles County by a plaintiffs' attorney known for aggressively pursuing (and winning) multi-million-dollar verdicts. Even though defense counsel filed all appropriate motions to exclude the problematic evidence, raised objections during trial, and sought a mistrial based on the judge's jury selection comments, none of those efforts stopped the judge or jury from proceeding with trial and awarding sizable damages. *Pinter-Brown* therefore serves as a case-in-point for employers about the risk and cost of trying cases to a jury, particularly in a venue known to favor plaintiff employees—though UCLA obtained the desired result after years of trial and appeal, that victory certainly didn't come cheap.

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