



SOUND ADVICE
FOR EMPLOYERS

2020 EMPLOYMENT LAW UPDATE

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INTRODUCTION



WHAT WILL WE COVER?

- New Laws
- New Regulatory Agency Policy (and Interpretations)
- Recent Court Cases
- What does the future hold?

NEW LAWS

Laws adopted by federal, state & local governments

Minimum Wage



Minimum Wage

- Minimum wage to \$13.00 on January 1, 2020 for employers with 26 or more employees
- Minimum wage to \$12.00 on January 1, 2020 for employers with 25 or fewer employees
- Raises a dollar per year through 2022



Minimum Wage

- Other effects:
 - Salary must be at least twice the amount (starting at \$54,080/49,920) for white collar exemptions
 - Meal and rest period minimum penalties
 - “Unproductive time” and rest periods for piece-rate employees
 - Reporting-time pay, split-shift pay



Minimum Wage

- Computer Software Professionals = *exempt if paid:*
 - \$46.55 per hour, *or*
 - annual salary of not less than \$96,968.33 for full time employment, and paid not less than \$8,080.71 per month
 - No part-time “salary” employees



Minimum Wage

- Physicians = *exempt if paid:*
 - \$84.79 per hour
- But could also be paid \$54,080/49,920 salary on a 'salary basis'!
- No similar hourly exemption for attorneys (unlike federal law) or *any other* professions (except software professionals, above)

Local Minimum Wages



Minimum Wage

- Local ordinances – throughout the Bay Area
 - Consider workers who spend some time in different jurisdictions (delivery, telecommute, etc.)
- Remember: Labor Commissioner can now recover amounts owed under *local* wage statutes!



Minimum Wage (No. Cal)

- Alameda
- Belmont
- Berkeley
- Cupertino
- Daly City
- El Cerrito
- Emeryville
- Fremont
- Los Altos
- Menlo Park
- Milpitas
- Mountain View
- Novato
- Oakland
- Palo Alto
- Petaluma
- Redwood City
- Richmond
- San Francisco
- San Jose
- San Leandro
- San Mateo
- Santa Clara
- Sonoma
- South San Francisco
- Sunnyvale

Agricultural Overtime



Agricultural Overtime

- 2020: Employers with 26 or more employees:
 - 9 hour daily overtime
 - 50 hours weekly overtime
 - Phased each year to 8/40 in 2022
- On the horizon: employers with 25 or fewer employees
 - Starts in 2022, rises to 2025



Agricultural Overtime

(Wage Order 14)

- 2022: Employers with 26 or more employees:
 - Double time after 12 hours of work
- 2025: Employers with 25 or fewer employees
 - Double time after 12 hours of work

Independent Contractors



ABC – The New World

- AB 5 has adopted “ABC” standards recognized by the state Supreme Court in its *Dynamex* case and applied them to most aspects of the employment relationship
- Labor Code section 2750.3 now applies the “ABC” standard to Labor Code and Workers Compensation contexts
- Where it does not apply, traditional common-law standards (the *Borello* test) will still apply



ABC – The New World

- ABC: Entity must establish contractor factors:
 - (A) The worker is free from control and direction in connection with the work
 - (B) The work is outside the usual course of the entity's business
 - (C) The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed



ABC – The New World

- Yes these are confusing and may be interpreted in many different ways!!!
- There may be recognized independent occupations that *could* be part of the entity's usual business ...
- Labor Commissioner staff noted even after *Dynamex* that they would be open to considering arguments on each point



ABC – The New World

- Some *occupations* are excluded:
 - certain insurance industry,
 - certain health-care professionals,
 - certain white-collar professionals (lawyers, architects, engineers, private investigators, accountants),
 - security brokers/dealers and investment advisers who are SEC/FINRA registered/licensed financial,
 - certain “direct sales” (as seen on TV!)
 - commercial fishermen,
 - newspaper distributors/carriers



ABC – The New World

- Some “*Professional Services Contracts*” are excluded:
 - Separate business location
 - With business license or and professional license/permits
 - That sets or negotiates its own rates
 - That sets own hours (apart from reasonable completion dates and business hours)
 - Customarily performs same type of work with another entity or for the general public
 - Exercises independent judgment and discretion



ABC – The New World

- “Professional Services Contracts” require:
 - Engaged in Marketing (original and creative)
 - Human Resources administration
 - Travel Agents
 - Graphic design, grant writers, fine artists
 - Enrolled agents, payment processing agents
 - Writers, reporters, photojournalists with limited jobs (35)
 - Certain beauty industry workers (manicurists only to 2022)



ABC – The New World

- Business & Professions Code Occupations:
 - Real estate licensee
 - Repossession agency (if free from control)



ABC – The New World

- “Business to Business” relationships:
 - Bona-fide business – sole proprietor or entity
 - Free from direction and control (contract and “fact”)
 - Providing services to the contracting entity, *not* its customers
 - With a contract in writing
 - With local business license or tax registration



ABC – The New World

- “Business to Business” relationships also require:
 - Separate business location
 - Customarily work in the independently established business
 - Actually contract with other businesses without limitation
 - Advertise to the public
 - Provide own tools, set own rates and hours,
 - not be doing work that would require a **contractor’s license** (which is dealt with separately under Labor Code section 2750.3)



ABC – The New World

- Construction industry subcontractor:
 - Subcontract is in writing
 - Work is in scope of valid contractor's license
 - Possess required business license and tax registration
 - Business location separate from business or contractor
 - Authority to hire and fire others
 - Assumes financial responsibility for errors (e.g., insurance)
 - Customarily engaged in independent business of same nature



ABC – The New World

- Other special situations:
 - Referral agencies vs. service providers
 - Motor clubs
 - Construction trucking services
 - Owner/operator trucking



ABC – The New World

- Certain aspects of the law have been challenged – and the law has already been partially stayed for owner-operators in the trucking industry
- In my opinion: the law does not change most relationships! The longstanding *Borello* standard already eliminated most “contractor” status and has been misapplied for decades.

Harassment Prevention Training



Harassment Prevention Training

- State-mandated harassment prevention training for *nonsupervisory* employees (one hour) and *supervisors* (two hours) originally required by January 1, 2020
 - Affects employers with 5 or more employees – even though FEHA prohibits harassment by *all* employers
- Deadline extended to January 1, 2021



Harassment Prevention Training

- Does not affect current supervisor training requirements for employers with 50 employees
- Separate bill also delayed training for *seasonal* and *temporary* workers (within 30 days or 100 hours of employment) to 2021
- Watch for Labor Commissioner recommendations for *construction industry* training: www.dir.ca.gov/dlse/

Harassment and Discrimination Enforcement



EEO Claims

- Traditionally employees required to “exhaust administrative remedies” by filing alleged FEHA violations with the DFEH within one year
- In 2020: extended to three years
- Individuals may file with the agency within three years, then will have an additional year after the complaint is processed



EEO Claims

- Impact: the three plus one year will allow individuals an automatic four years
- Impact: the pendency of an EEO complaint with the DFEH may *toll* other claims (such as common-law wrongful termination)
- Most other claims have strict one, two or three-year limitations



EEO Claims

- Other issues: Extension only applies to employment violations, not housing or business discrimination claims
- Additional extensions apply where
 - Employee must establish the identity of the actual employer
 - Employee was a minor at the time of the alleged conduct

Racial Discrimination and Harassment



Traits Associated with Race

- Legislature addressed “hairstyles” and noted that African American applicants and employees are most likely to be affected
- Noted that federal courts have recognized that “afro” hairstyles are protected under Title VII
- But the legislature also noted that there are many other types of distinctive styles such as braids, locks, and other “protective” hairstyles



Traits Associated with Race

- Most attention has focused on “hairstyle” – but the new law applies to *all* traits:
- “traits historically associated with race, including, but not limited to, hair texture and protective hairstyles”
- “Race” includes “ancestry, color, ethnic group identification, and ethnic background”



Traits Associated with Race

- Impact: consider *all* traits that might be associated with race or ethnicity (such as religious expression)!
- Impact: ensure that employee handbooks are amended to contain the new rule in harassment policies (which must list all protected categories)

Resolving Claims



Settlement and Severance

- Last year – legislature limited “nondisparagement” and nondisclosure rules in employee settlements
- This year: settlement and severance agreement may not prevent employees from applying for reemployment
- Employers may refuse to rehire for legitimate reasons (but this will create a retaliation pitfall!)

Arbitration Agreements



Mandatory Arbitration

- New law prohibits mandatory employment arbitration – requires that employees be allowed to voluntarily elect arbitration agreements – covering FEHA and Labor Code claims
- “Opt out” provisions (where an employee must take action to opt out of an agreement) are deemed mandatory



Mandatory Arbitration

- Applies to agreements on or after January 1, 2020
- Does not apply to negotiated severance agreements or post-dispute settlements
- Contains a statement that the law does not affect agreements otherwise enforceable under federal law



Mandatory Arbitration

- Problem: the law creates a special set of rules for employment agreements, which is prohibited by the Federal Arbitration Act
- General language exempting FAA-governed agreements leaves employers open to potential *criminal* penalties for violation



Mandatory Arbitration

- The law has been *enjoined* by a federal court through the end of January while parties contest its validity under federal law
- Options: continue using prior agreements *or* use a form that contains language saying the agreement is voluntary and not required as a condition of employment

Lactation Accommodation



Lactation Accommodation

- Lactation accommodation requirements have been significantly expanded in 2020.
- Two immediate takeaways:
 - Lactation accommodation policy is *required* in each employee handbook and when employee requests parental leave
 - Undue hardship exception *removed* for businesses with 50 or more employees



Requirements

- Area must be in close proximity to the employee's work area, shielded from view, and free from intrusion while the employee is expressing milk
- May be employee's usual workspace if it complies with other requirements, but may not be a restroom



Requirements

- Must be “safe” and “clean”
- Must be free of “hazardous materials” defined in Labor Code section 6382 (a long list!)
- Must contain a surface to place breast pump and personal items
- Must contain a place to sit



Requirements

- Must provide access to electricity or alternative devices (extension cords, charging stations, etc.) needed to operate an electric *or* battery-powered breast pump
- Must provide *access* to a sink with running water
- Must provide *access* to refrigerator “suitable for storing milk” (or, if not possible, another device such as a cooler) in close proximity to the employee’s workspace.



Requirements

- If a “multipurpose” room is used, lactation accommodation must “take precedence over the other uses” while used for lactation purposes
- In a multitenant building or multiemployer worksite, employer may provide space used by employees of different employers
- Employers or general contractors “coordinating a multiemployer worksite” must provide a “safe and secure location” for a subcontractor employer to provide lactation accommodations on the worksite within two business days of a written request from a subcontractor



Requirements

- Agricultural employers may still provide a “private, enclosed, and shaded space” including, if necessary, the air-conditioned cab of a truck or tractor
- A temporary location can be designated if required by operational, financial, or space limitations



Exemption

- Employers under 50 employees
- Who can demonstrate that compliance would cause “significant difficulty or expense” for their “size, financial resources, nature, or structure”
- May provide a “room or other location, other than a toilet stall,” in close proximity to the employee’s work area, for the employee to express milk in private.



Penalty

- Accommodation should be taken as part of regular rest breaks, and is unpaid when taken more often than rest breaks are due – *but*
- Denial of reasonable break time or adequate space is deemed a failure to provide a rest break (e.g., one-hour penalty!)
- Claims may be filed with the Labor Commissioner



Required Policy

Employers must create a lactation accommodation policy that includes:

- A statement about employees' right to request lactation accommodation
- The process for requesting accommodation
- The employer's obligation to respond to the request, including a written response if it cannot provide the accommodation
- An employee's right to file a complaint with the Labor Commissioner



Required Policy

Policy must be:

- Included in handbook or employer-distributed policies
- Distributed to new employees upon hire
- Distributed to employees who inquire about or request parental leave

Organ Donation



Bone Marrow – Organ Donation

- Current law requires up to business days *with pay* for organ donation
 - Applies to employer with 15 or more employees
 - Provides up to 5 days for bone marrow donation
 - May require up to 2 weeks of sick leave or vacation for organ donation, up to 5 days for bone marrow donation
- Amendment requires an additional 30 *unpaid* business days in a one-year period
- May not be taken concurrently with CFRA/FMLA leave

Consumer Privacy



California Consumer Privacy Act

- The CCPA allows consumers to request identification of personal information collected by businesses (with more than \$25m in annual revenue *or* that collect/sell information about many consumers)
- Also allows consumers to request deletion of information
- Language potentially applies to employees and applicants – who might request deletion of material in their own personnel files!



California Consumer Privacy Act

- Personal information includes information that can be associated directly or indirectly with a particular consumer or household such as:
 - Name, address, unique personal identifier, online identifier, email address, account name, social security number, driver's license number, passport number, or other similar identifiers.
 - Characteristics of protected classifications under California or federal law.
 - Biometric information.
 - Internet or other electronic network activity information
 - Geolocation data.
 - Audio, electronic, visual, thermal, olfactory, or similar information.
 - Professional or employment-related information.
 - Education information,



California Consumer Privacy Act

California has exempted employee data for one year:

- Personal information collected “in the course of” an individual being a job applicant, employee, director or officer, or contractor
- “Emergency contact information”
- Information necessary to administer employee benefits



California Consumer Privacy Act

- Individuals may still ask what information a business possesses regarding them
- Covered employers must still disclose prior to or at the time of collection *what categories* of information they will collect and what it will be used for
- Covered employers should immediately review the requirements and practices applicable to them

Additional Developments



Additional Laws

- **Paid Family Leave:** increased from six to eight weeks
- **Flexible Spending Accounts:** requires disclosure of FSA withdrawal deadlines via at least two approved methods
- **Domestic Partnership:** Permits any two adults over 18 years old to enter into a domestic partnership



Additional Laws

- **Gun Violence Restraining Orders:** expands employer right to request an order prohibiting gun access by an individual
- **Patients' Rights Whistleblowing:** protects county mental health worker reports to a county patients' rights advocate



Additional Laws

- **DLSE – PAGA Claims:** AB 673 allows individuals to bring a claim with the Labor Commissioner or under PAGA for certain failures to pay wages
- **DLSE – Expanded Authority:** Labor Commissioner may issue citations for amounts due under an employment contract *even if* above statutory requirements



Additional Laws

- **Wildfire Regulations:** emerging air quality standards

AGENCIES

DOSH – Cal-OSHA



Valley Fever

- Training for construction employees required in areas where fungus exposure is reasonably anticipated
- Required in Fresno, Kern, Kings, Madera, Merced, Monterey, San Joaquin, San Luis Obispo, Santa Barbara, Tulare, and Ventura Counties
- DOSH will also require safety monitoring and reporting in other areas where Valley Fever *may* be an issue
- see www.dir.ca.gov/dosh/valley-fever-home.html



“Serious” Exposures

- “Serious” Exposures - DOSH: Definition changed
 - Serious injury or illness must be reported to Cal-OSHA for *any* hospital admission (even less than 24 hours)
 - Must include amputation, the loss of an eye, or any serious degree of permanent disfigurement
 - Does not include stays for diagnostic procedures or observation
 - exposure to any substance posing a “realistic possibility” or death or serious injury must be reported



Reporting

- **DOSH Reporting:** online portal must be used once available
- Employers may use telephone for now but must use the online portal once available

U.S. Department of Labor

Regular Rate of Pay



DOL Final Rule

- DOL clarifies exclusions from regular rate of pay when calculating overtime
- California typically follows federal law on regular rate issues
- Federal rules clarified to address benefits that had not been considered or did not exist in the past



DOL Final Rule

- Modern benefits:
 - certain parking benefits,
 - wellness programs,
 - onsite specialist treatment,
 - gym access and fitness classes,
 - employee discounts on retail goods and services,
 - certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program),
 - and adoption assistance;



DOL Final Rule

- unused paid leave, including paid sick leave or paid time off;
- payments of certain penalties required under state and local scheduling laws (e.g., rest and meal period penalties!);
- reimbursed expenses including
 - cellphone plans,
 - credentialing exam fees,
 - organization membership dues,
 - travel, even if not incurred “solely” for the employer’s benefit



DOL Final Rule

- certain sign-on bonuses and certain longevity bonuses;
- cost of office coffee and snacks to employees as gifts;
- discretionary bonuses,
- contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense.



DOL Final Rule

- www.dol.gov/agencies/whd/overtime/2019-regular-rate/faqs

Federal Exemption Rates



Exemption Rates

- Like California, there are minimum pay requirements for federal exempt employees
- The rates have been very low in the past
- Amounts increased under DOL final rule



Exemption Rates

- “standard salary level” increased from \$455 to \$684 per week
 - equivalent to \$35,568 per year
- Minimum for “highly compensated employees (HCEs)” raised from \$100,000 to \$107,432 per year;
- Nondiscretionary bonuses and incentive payments (including commissions) may satisfy up to 10 percent of the standard salary level



Exemption Rates

- Discussion:

www.dol.gov/whd/overtime2019/overtime_FS.htm

NLRB – Unions



National Labor Relations Board

- Huge changes have been happening at the NLRB
- Current Board is eliminating some of the most radical changes imposed under recent activist administrations
- Most significant impact: restoration of prior standards that were upset by rapid changes in the Obama administration



National Labor Relations Board

- Examples:
 - NLRB restores the ‘presumptive’ validity of requests for confidentiality during workplace investigations
 - Requires new secret-ballot election after employer discovers union has lost majority support



National Labor Relations Board

- NLRB revisits recent holdings allowing employees almost unlimited right to use profane speech in the workplace
- NLRB general counsel urges limitation on unfettered displays directed at ‘secondary’ employers
- NLRB *overturns* requirement that employers allow access to employer email for union and organizing purposes



National Labor Relations Board

- But: NLRB invalidates an arbitration agreement that covers *all disputes* without excepting NLRB-governed charges and proceedings
- Agreements need to have some language suggesting that NLRB-related claims (such as federal administrative claims) would not be covered



National Labor Relations Board

- Employers should continue to monitor handbooks and other materials to ensure they do not violate federal union-related law
- But the standards are likely to be reasonable and to assume employees possess an adult ability to read and interpret employer policies

COURT CASES



On-Call Reporting

- Employee required to call in two hours prior to shift to see whether they would be needed that day
- Court finds that this counts as “reporting time” under the wage order
 - But it would not be payable if employee put to work
 - Does not mean employees owed pay whenever they check their schedule
- **Ward v. Tilly's, Inc. (CA2/3 B280151 2/4/19)**



Payroll Providers Not Liable

- Employees alleged that a payroll service was responsible for failure to pay employees properly
- Court held that payroll processors had no contact or traditional “tort” (e.g., negligence) duty directly to employees
 - Does not mean that providers could not be sued under labor laws if they were actively involved in decision making
- *Goonewardene v. ADP, LLC* (SC S238941 2/7/19)



Ministerial Exception

- California law (and the federal constitution) exempts “ministerial” workers from most employment laws
- Labor Commissioner argued that teachers at a Jewish school did not qualify as ministerial
- Court held that teachers were not designated ‘ministers’, did not need to adhere to faith, and did not require any particular religious education – so not covered *even though* they taught religion
 - Case probably subject to serious reconsideration under state and federal law.
- *Su v. Stephen S. Wise Temple* (CA2/3 B275426 3/8/19)



Arbitration – Transportation

- Employee was water delivery driver – argued that his arbitration agreement was not enforceable under federal law
- Court agreed that he was involved in interstate transportation and thus not covered by the Federal Arbitration Act – even though he did not cross state lines because the *product* had been moved interstate
- Transportation employers should consider whether they must apply California, rather than federal, arbitration law!
- *Nieto v. Fresno Beverage Co.* (CA5 Fo74704)



Wage Statements

- Employer used fictitious business name on wage statements rather than formal business name
- Employees argued this violated Labor Code section 226 requirement that employer list its name
- Court held that d/b/a is the 'name' of a company as well so using the fictitious business name is allowed
- *Savea v. YRC Inc.* (CA1/3 A152379)



Wage Statements - Compare

- Employer used the *initials* of a fictitious business name on wage statements rather than full d/b/a
- Used “CSSG” rather than “Countrywide Staffing Solutions Group”
- Court held that just using the *initials* was a violation of 226 because it was misleading and not the entity’s name
- Noori v. Countrywide Payroll & HR Solutions, Inc.
(CA3 Co84800)



Policies – Class Actions

- Employer maintained meal and rest policies that did not cover all requirements and were in some places facially unlawful
- Employees argued these facts necessarily allowed a class action
- Court disagreed: even where policies are incomplete or inaccurate, a court must still see how the policies were *applied* to employees
- But note: federal appellate court has also asked the state Supreme Court whether failure to maintain a lawful policy creates a *presumption* that it is out of compliance with meal and rest period requirements!
- *Cacho v. Eurostar, Inc.* (CA2/7 B284827)



No Wages for PAGA

- Attorneys had argued (and courts agreed) that the Labor Code Private Attorneys General Act allowed recovery of unpaid wages, in addition to penalties
- This is significant due to non-class-requirements and non-arbitrability of PAGA claims
- Supreme Court rules that PAGA *does not* allow the recovery, so no wages may be awarded under the statute
- **ZB, N.A. v. Superior Court** (SC S246711 9/12/19)



Arbitration

- Supreme Court holds that employers cannot be required to arbitrate claims on a “class” basis without their express agreement
- Typical arbitration agreement will act as a class waiver even without specific language
- But some claims remain non-arbitrable (e.g., class)
-



FCRA – CCRA Disclosures

- Disclosures must be in a separate document
- Employer combined state and federal credit requirements
- Court disallowed, noted both FCRA and CCRA must be in *separate* documents
- *Gilberg v. California Check Cashing Stores, LLC*

ON THE HORIZON



On the Horizon

- There are many more changes likely.
- Various laws are also likely to be addressed such as potential state laws affecting arbitration agreements, family and child care.
- NLRB likely to move pro-employer, state PERB likely to move pro-union/employee.



Be Prepared

- WATCH for interpretations by agencies over the coming months (DFEH, Labor Commissioner, etc.)
- READ postings and newsletters from chambers and industry organizations
- REVIEW policies and materials to ensure compliance with these new laws

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QUESTIONS?

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