#MeToo and More! What's the California Legislature Up to Now?

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A Busy Legislative Year!

- ***2,177 new bills were introduced in 2018!***
- On top of all the regular labor and employment bills, we have two particular areas of focus:
  - Sexual Harassment
  - Labor responds to *Janus v. AFSCME* (union dues case)
- Makes for a very busy 2018!

Legislative Process – General Calendar

January-February	-Bills introduced in house of origin.
March-April	-Bills heard in policy committees.
May	-Bills heard in fiscal committees. -Last week of May – floor votes.
June-August ***(we are here)***	-Same process in other house.
September	-All bills must pass both houses. -Bills sent to Governor.

Key Remaining Legislative Deadlines for 2018

- August 31, 2018 – Last day for any bill to be passed.
- September 30, 2018 – Last day for Governor to act on bills.
- January 1, 2019 – New laws generally take effect.

Case Law Update

- Don't worry…this is a ***legislative*** update, not a case law update.
- But there have been two very significant recent decisions that we need to at least mention.

Case Law Update – *Epic Systems*

- US Supreme Court case (May 21, 2018).
- Class action waivers in arbitration agreements ***do not*** violate the National Labor Relations Act (NLRA).
- Overturns prior Obama-era NLRB position (*D.R. Horton*).

Case Law Update – *Epic Systems*

A few notes for California employers:

- If you have an arbitration agreement with an "opt-out" provision, you may want to contact counsel and discuss revising those provisions.
- Class action waivers in arbitration agreements do not violate NLRA, but California Supreme Court has held that **PAGA claims** may not be compelled to arbitration. (*Iskanian*).
- US Supreme Court has refused to take up the PAGA issue, but may take up the case now that it has dispensed with the NLRA issue.

Case Law Update – *Dynamex*

ABC Test - Classifying Independent Contractors

- *Dynamex Operations West, Inc. v. Lee* (April 30, 2018).
- California Supreme Court adopted a new legal standard that will make it much more difficult for businesses to classify workers as independent contractors (ICs).

ABC Test - Classifying Independent Contractors

- Decision directly affects the trucking and transportation industry with delivery drivers, but also has the potential to affect nearly every other industry—including the emerging gig economy.
- New standard for determining whether a company "employs" or is the "employer" for purposes of the California Wage Orders

ABC Test - Classifying Independent Contractors

- Under the new "ABC" test, a worker is considered an employee under the Wage Orders unless the hiring entity establishes all three of these prongs:

ABC Test

A. The worker is **free from the control and direction** of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; AND

B. the worker performs work that is **outside the usual course** of the hiring entity's business; AND

C. the worker is **customarily engaged in an independently established trade, occupation, or business** of the same nature as the work performed for the hiring entity.

Part A of The ABC Test

A. The worker is **free from the control and direction** of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact.

How much control does the business have over the worker?

Little control = IC classification might be OK

A lot of control = IC classification is likely problematic

Part B of The ABC Test

B. the worker performs work that is outside the usual course of the hiring entity's business

- Employees typically perform services that are integrated into an employer's operations. (e.g., a plumber for a plumbing company).
- IC's perform ancillary services that are central to their business, not that of the employer. (e.g., a plumber providing services to an architectural consulting company).

Part B of The ABC Test

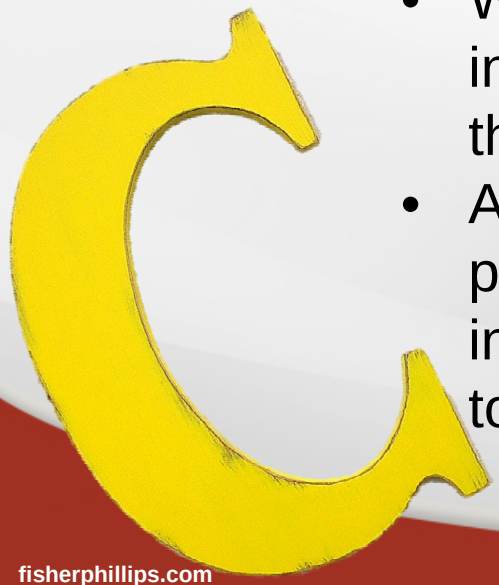
B. the worker performs work that is **outside the usual course** of the hiring entity's business

- Not an IC if the worker provides services within the usual course of the business and would ordinarily be viewed by others as working in the hiring entity's business and not in his/her own business.
- Not an IC if the worker is operating as part of your business on a regular basis and everyone you work with including your employees and clients consider him/her to be part of your business.

Part C of The ABC Test

C. the worker is **customarily engaged in an independently established trade, occupation, or business** of the same nature as the work performed for the hiring entity.

- Worker must have taken steps to create independent business, making the decision on their own without collusion.
- Although a business does not necessarily have to prove that workers in question took steps such as incorporation, licensure, advertising, and the like to prove this prong, it is definitely recommended.



Is the *Dynamex* Decision Retroactive?

- Issue currently being litigated
- Fairness and due process concerns
- But it wouldn't be the first time in CA!
- Good arguments for non-retroactivity because it is a NEW test.

Get Ready for the "Weinstein Effect"

- CA employers should expect an increase in the number of sexual harassment complaints and claims.
- And an increase in the amount of money it takes to settle claims.
- Over **two dozen** bills have been introduced in the Legislature in 2018!

Sexual Harassment Bills

AB 1870 (Reyes)

- Extends the statute of limitations for filing claims with DFEH (for all claims, not just sexual harassment) from one year to **three years**.
- Witness memory? Stale evidence?
- Not like wage and hour claims.
- Passed the Assembly 57-4 (7 Republicans voted for it).
- *Sexual harassment bills are getting bipartisan support!!*

Sexual Harassment Bills

AB 1867 (Reyes)

- Employers with 50 or more employees must maintain records of "employee complaints" of sexual harassment for **10 years**.
- Current law for personnel records is three years after termination. LC 1198.5(c)(1).
- Passed the Assembly 53-10 (4 Republicans voted for it).
- *Sexual harassment bills are getting bipartisan support!*

SB 820 (Jackson) – Settlement Agreements

- Prohibits confidentiality or non-disclosure clauses in any settlement agreements involving:
  - Sexual harassment
  - Sexual assault
  - Workplace discrimination based on sex.
- May be included at the request of the plaintiff.
- Does not prohibit a provision that precludes the disclosure of the amount paid in settlement of a claim.
- Applies to agreements entered into on or after January 1, 2019.
- Exposes employers to public presumption of guilt even though the decision to settle was not based on merit of claim. More likely to litigate than settle?
- Passed the Senate 29-7 (4 Republicans voted for it).
- *Sexual harassment bills are getting bipartisan support!*

AB 3080 – Ban on Arbitration

- Touted as a **sexual harassment** bill (Gretchen Carlson), but actually much broader.
- Prohibits mandatory arbitration as a condition of employment for any violation of FEHA (employment discrimination) or the Labor Code.
  - No mandatory arbitration of wage and hour claims, etc.
  - Arbitration clauses are common to avoid class action lawsuits.
- Similar to AB 465 from 2015 (but even broader) which was vetoed by Governor Brown on the grounds that it was likely **preempted** by the Federal Arbitration Act.
- Recent ***Epic Systems*** decision probably gives proponents more ammunition to get this bill to the Governor. But the argument that this bill is preempted by the FAA is even stronger.
- *What will the Governor do????*

AB 3109 (Stone) – "No Rehire" Clauses

- Effectively bars **"no rehire"** clauses in settlement agreements if:
  - Business "so dominates the labor market" such that a restriction would impose a substantial impairment on right to seek employment.
- Without these clauses, employers are subject to "failure to hire" lawsuits after they've settled claims.
- Passed the Assembly 70-0!

Sexual Harassment Bills

SB 1038 (Jackson)

- Joint and several liability for ***intentional*** retaliation under FEHA.
- Overturns CA Supreme Court decision in *Jones v. Lodge at Torrey Pines* (2008).
- Still creates a potential litigation nightmare for HR professionals and other staff.
- Employer will ultimately be the one to pay (LC 2802).
- Passed the Senate 21-13.

Sexual Harassment Bills

Training-Related Bills

- **SB 1343 (Mitchell)** – Employers with **5 or more** employees must provide two hours of training to ***all*** employees every two years. DFEH would develop a video to satisfy training requirement. *Passed 38-0!*
- **SB 1300 (Jackson)** – Requires **all** employers to provide two hours of training to ***all*** employees every two years. Including "bystander intervention" training.
- **AB 3081 (Gonzalez Fletcher)** – Employers with **25 or more** employees must provide training to ***all nonsupervisory*** employees at time of hire and once very two years.

SB 1300 (Jackson) – Sexual Harassment

- **Standing –** Provides that a plaintiff ***is not required to prove*** that they endured sexual harassment…only that the employer failed to take reasonable steps necessary to prevent it.
- **Severe and Pervasive –** Provides that a ***single incident*** can constitute severe and pervasive sexual harassment.
- **Settlements –** Prohibits a general release in exchange for a raise or bonus or continued employment. Prohibits "nondisparagement" agreements.
- **Training -** Requires **all** employers to provide two hours of training to ***all*** employees every two years. Including "bystander intervention" training.

AB 1761 (Muratsuchi) – Hotel Workers

- Requires workers to be provided with “panic buttons” at no cost.
- Warning notice on back of hotel room doors.
- Paid time off to contact police, counselor or attorney.
- “Blacklist” provision has been eliminated from the bill.

AB 3081 (Gonzalez Fletcher)

- Prohibits employer from taking adverse action against an employee for taking time off if the employee is a ***family member*** of a victim of a domestic violence, sexual assault or stalking (LC 230).
- Adds sexual harassment to time off leave under LC 230.1 (employers with 25 or more employees) to victims for medical care and related services.
- Prohibits retaliation against employee due to her status as a victim of sexual harassment. Ninety (90) day rebuttable presumption of retaliation.

AB 3081 (Gonzalez Fletcher)

- Makes labor contractors and client employers jointly liable for sexual harassment, sexual assault or sexual discrimination under existing joint liability statute (LC 2810.3) that currently covers wages and workers' compensation.
- Required sexual harassment notice to employees at time of hire and annually.
- Confuses Labor Commissioner and DFEH investigation of claims (duplicates many DFEH provisions in the Labor Code).

Who Needs Some Good News?

- ***Three*** (count 'em) significant and burdensome bills were held in the Assembly and ***will not advance*** this year.
- May be only 3 out of 2,000 bills, but we'll take every victory we can get.
- *We're batting 0.0015!!!*

AB 2069 (Bonta) – Medical Marijuana

- California legalized medical marijuana in 1996.
- In 2008, California Supreme Court said employers are ***not required*** to accommodate an employee's use of medical marijuana *(Ross v. RagingWire).*
- 2016 – Proposition 64 legalized recreational use, but said employers are ***not required*** to accommodate.

AB 2069 (Bonta) – Medical Marijuana

- Requires employers to provide **reasonable accommodation** for the medical use of cannabis by an employee to treat a known physical or mental disability or know medical condition.
- Exception – if hiring the individual would cause the employer to "lose a monetary or licensing-related benefit" under federal law.
- Does not prohibit an employer from taking adverse action against an employee who is **"impaired"** on the premises or during the hours of employment.

AB 2069 (Bonta) – Medical Marijuana

- What does **"impaired"** mean?
- How do you measure "impairment?"
- Technology has not yet caught up with the science.
- CHP is struggling with this issue under Prop 64 and driving.

AB 2069 (Bonta) – Medical Marijuana

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But not necessarily the end of the story…

- As more and more states legalize both medical and recreational marijuana, advocates are likely to continue to push for this protection.
- Courts may revisit this issue as well.
- Don't forget about "lawful off-duty conduct" statutes – theory likely to be pushed in the courts as well.
- ***Stay tuned! This is an evolving area of the law.***

AB 2841 (Gonzalez Fletcher) – Paid Sick Days

- Three (3) sick days is apparently not enough.
- Bill would expand paid sick days to ***five (5)*** days or ***40*** hours.

AB 2841 (Gonzalez Fletcher) – Paid Sick Days

- Dead for this year.
- But author tweeted: *"I'm glad we raised the issue this year and look forward to fighting for more paid leave next year."*
- ***Stay tuned in 2019!!!***

AB 2613 (Reyes) Wage Payment Penalties

- Establishes new penalty for **"late"** payment of wages.
- $200 per employee per pay period. Plus liquidated damages.
- These penalties are in addition to, and independent and apart, from existing penalties.
- Does not include an "isolated or unintentional payroll error due to a clerical or inadvertent mistake."
- Does not apply to final wages.
- Penalties "cannot be waived." (No settlement?)
- An employer "or other person acting on behalf of an employer" (owner, officer, director or managing agent) is liable for these penalties (**individual liability**).

AB 2613 (Reyes) Wage Payment Penalties

Plus one "good" bill…
AB 2282 (Eggman) – Salary History

"Clean-up" measure to clarify and define key terms from AB 168 from last year:

- "Applicant" means individual seeking employment who is not currently employed with employer (not internal hires).
- "Pay scale" means a salary or hourly range.
- "Reasonable request" means a request made after applicant has completed an initial interview.
- Clarifies law does not prohibit employer from asking about salary expectations.
- Also provides prior salary history shall not justify ***any*** disparity in compensation.

OK, now back to the bad news….

SB 1402 (Lara) – Port Trucking Joint Liability

- DLSE would compile and post list of port trucking companies with unpaid judgments.
- Any "customer" who contracts with a port trucking company on the list would be jointly liable for future claims.
- Retailers, car dealers, agriculture…many others!

SB 1284 (Jackson) – Gender Pay Reporting

- Requires employers with 100 or more employees to submit a pay data report beginning September 2019.
- Includes pay information by job categories and race, ethnicity and sex.
- Response to Trump Administration stay of revised federal EEO-1 reporting requirement.

SB 1284 (Jackson) – Gender Pay Reporting

- Number of employees by **race, ethnicity, and sex** in the following job categories:
  - Executive or senior level officials and managers, first or mid level officials and managers, professionals, technicians, sales workers, administrative support workers, craft workers, operatives, laborers and helpers, service workers.
- Number of employees by **race, ethnicity and sex** who fall within “pay bands” used by USBLS.
- Civil penalty for non-compliance - $500 for an initial violation and $5,000 for a subsequent violation.

SB 826 (Jackson) Boards of Directors

- By 2019, a publicly held corporation with principal offices in California shall have a minimum of one female director on its board.
- "Female" includes those who self-identify as female, regardless of sex at birth.
- By 2021:
  - 3 female directors for boards of 6+
  - 2 female directors for boards of 5+
  - 1 female director for boards of 4 or less.

Lactation Accommodation

AB 1976 (Limón)

- Current law requires employers to provide location "other than a ***toilet stall***" for expressing milk.
- This bill would require it to be a room "other than a ***bathroom***."

Lactation Accommodation

SB 937 (Weiner)

- Based on San Francisco ordinance.
- Lactation room must: (1) be clean and free of toxic materials, (2) contain a surface to place a breast pump, (3) contain a place to sit, and (4) have access to electricity.
- A sink with running water and a refrigerator must be in close proximity.
- New standards for construction – 15,000 square feet or $1 million.
- Employer must include lactation policy in handbook or set of policies and provide to new workers and to those who make inquiries.
- Hardship exemption for less than 50 employees – undue hardship (significant expense or operational difficulty).

Data Breach Lawsuits

SB 1121 (Dodd)

- Allows for data breach lawsuits without proof of injury.
- Anyone (including employees) whose personal information has been breached can file a civil lawsuit.
- Minimum $200 per consumer (again with no showing of injury!)

Resources

Fisher Phillips "California Employers Blog"

- https://www.fisherphillips.com/california-employers-blog

California Legislative Information (bill language, bill status, committee analyses, etc.):

- http://leginfo.legislature.ca.gov/
- Remember to view "Today's Law As Amended"

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- @benebbink (Twitter)
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Questions?

Thank You

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