And Now The Bad News: Avalanche of California Bills Continues to Advance

Insights
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As we discussed in our last blog post, California employers received some rare good news in recent days. Bills to expand California's paid sick leave requirement and to require employers to accommodate medical marijuana use both failed to advance and are dead for the year.

We hope you savored that good news while it lasted. Because unfortunately, there are hundreds of bills still alive and kicking. All of the bills described below have passed out of their original house and appear likely to make it to the Governor's desk.

Take a deep breath, because here we go.

Sexual Harassment Continues to Take Center Stage
Sexual harassment has dominated discussion across multiple fronts since the #MeToo movement exploded last fall – and the California Legislature is no exception. Nearly two dozen bills were introduced dealing with the subject, most imposing new requirements and obligations on employers. The political dynamics behind the #MeToo movement is such that many of these bills are passing by wide margins – including significant support from Republican legislators. For this reason, it appears that most of these bills are destined to make it to the Governor's desk.

Here's a rundown of the most significant sexual harassment-related legislation:

- **AB 3080 (Gonzalez Fletcher) – Arbitration** – This bill prohibits employers from requiring employees, as a condition of employment, to arbitrate claims arising under the Fair Employment and Housing Act (FEHA) or the Labor Code. Therefore, while the bill is pitched as a "sexual harassment" bill, it actually covers a much wider spectrum of employment claims. This is not the Legislature's first attempt to bar mandatory arbitration agreements, and there are very strong arguments that such a law would be preempted under the Federal Arbitration Act (which is among the reasons Governor Brown vetoed the last version of this bill). Nevertheless, the national attention around sexual harassment and the issue of arbitration agreements makes it likely this bill will at least pass the Legislature and make it to the Governor's desk. While employers received some good news with the recent U.S. Supreme Court ruling that class action waivers in arbitration agreements do not violate the National Labor Relations Act, that decision has actually given proponents of AB 3080 more ammunition to argue that this bill is necessary

(despite the obvious preemption elephant in the room). The big question here is what will the Governor do?

- **AB 1870 (Reyes) – Extends Statute of Limitations** – Under current law, employees have one year to file an administrative claim for harassment with the Department of Fair Employment and Housing (DFEH). This bill would extend that period to three years. This bill is not limited to sexual harassment, however, and would extend the statute of limitations to three years for *all* forms of employment and housing discrimination.
- **AB 1867 (Reyes) – Record Retention** – This bill would require employers with 50 or more employees to maintain records of sexual harassment complaints for 10 years.
- **SB 1038 (Leyva) – Personal Liability for Retaliation** - This bill would make an individual employee jointly and severally liable for unlawful retaliation under FEHA for any action committed with the intent to retaliate. Although currently an individual may be personally liable under FEHA for harassment, the California Supreme Court ruled 10 years ago in the *Jones v. The Lodge at Torrey Pines Partnership* case that personal liability does not extend to retaliation claims.
- **SB 1300 (Jackson) Omnibus Sexual Harassment Bill** – I call this bill the "mother of all sexual harassment bills" because it is loaded up like a plaintiff attorney's wish list. First, this bill provides that a plaintiff is not required to prove that they endured sexual harassment – only that the employer failed to take necessary steps to prevent it. This blows the door off traditional "standing" requirements and will lead to a flood of litigation against employers by employees that have suffered no harm. Second, this bill states that a single incident can constitute unlawful "severe and pervasive" sexual harassment. Third, this bill prohibits a general release in exchange for a raise or bonus or continued employment, and prohibits "nondisparagement" agreements to prohibit an employee from disclosing information about unlawful acts in the workplace, including sexual harassment. Whew! This is definitely one to keep your eye on!
- **AB 3081 (Gonzalez Fletcher) – Retaliation and More** – This is another bill that contains multiple proposals related to sexual harassment. Most notably, this bill establishes a rebuttable presumption that any adverse action taken against an employee within 90 days of a sexual harassment complaint is retaliatory. AB 3081 also extends existing law that imposes joint liability on labor contractors and client employers to include sexual harassment, sexual assault, or sex discrimination. This bill also extends leave and anti-discrimination protections to employees who are "family members" of sexual harassment victims. AB 3081 also unnecessarily duplicates many existing requirements of FEHA in the Labor Code, which will lead to confusion and increased litigation against employers under the Labor Code Private Attorney General Act (PAGA).

Sexual Harassment Training-Related Bills

Sexual harassment prevention training remains a big focus of legislative activity in 2018. Under current law, employers with 50 or more employees are required to provide at least two hours of

sexual harassment prevention training to supervisory employees every two years. The following bills seek to expand on this requirement:

- **SB 1343 (Mitchell)** – This bill would require an employer who employs five or more employees to provide at least two hours of sexual harassment training to *all* employees by 2020, and once every two years thereafter. DFEH would be required to make available a two-hour video training course that employers may utilize.
- **SB 1300 (Jackson)** – In addition to the changes mentioned above, this bill would also require employers of *all* sizes to provide two hours of sexual harassment prevention training to *all* employees (not just supervisors) within six months of hire and once every two years.
- **AB 3081 (Gonzalez Fletcher)** – This bill requires employers with 25 or more employees to provide prevention training to *all nonsupervisory at the time of hire and once every two years.*
- **AB 2338 (Levine)** - This bill is aimed specifically at the modeling and entertainment industry, and would require talent agencies to provide training and materials on sexual harassment prevention to employees and artists.

Confidentiality and Settlement Agreements

A major criticism of the #MeToo movement has been the allegation that the use of nondisclosure agreements or confidentiality provisions in settlement agreements keeps perpetrators of sexual harassment "hidden" and allow them to continue to victimize people. Therefore, there is a major legislative push in 2018 to restrict or prohibit the use of such agreements. Proposals along these lines include:

- **SB 820 (Leyva)** – This bill prohibits any provision in a settlement agreement that prevents disclosure of factual information related to a civil action involving an act of sexual assault, sexual harassment or sex discrimination. SB 820 provides that such clauses may be included at the request of the plaintiff, and does not prohibit clauses that preclude the disclosure of the amount paid in settlement of a claim.
- **AB 3109 (Stone)** – This bill effectively bans "no rehire" clauses (which are a very common feature in settlement agreements) if a business either (1) has 5 or more locations in the state, or (2) so dominates that labor market such that a restriction would impose a substantial impairment on an individual's right to seek employment.
- **SB 954 (Wieckowski)** – This proposal would require an attorney representing a party in mediation to inform his or her client of the confidentiality restrictions related to mediation, and to obtain informed written consent that the client understands these restrictions. This provision would not apply to class actions.

Hotel Worker "Panic Buttons"

The hospitality industry has been the target of numerous proposed local ordinances in recent years designed to target sexual harassment of hotel workers.

A statewide proposal, **AB 1761 (Muratsuchi)** attempts to impose a number of such requirements at the statewide level. First, the bill requires hotel employers to provide employees working alone in a guestroom with a panic button at no charge. Second, the bill requires hotel employers to post a specified notice on the back of each guestroom door related to sexual assault and harassment. Third, the bill requires hotel employers to provide employees who have been victims with paid time off for specified activities and to reasonably accommodate such employees. Unfortunately, the bill also provides that it does not preempt local ordinances, meaning a hotel employer would have to comply both with AB 1761 and any applicable local law.

As introduced, this bill also required hotels to maintain a list of guests that have been alleged to have committed acts of violence or harassment against employees, and to bar them from service for a period of three years. After industry representatives pointed out the clear constitutional and due process violations such a provision would entail, that language was stricken from the bill.

Another measure applicable to the hotel industry, **SB 970 (Atkins)**, would require hotel employers to provide at least 20 minutes of human trafficking awareness training to employees by 2020 and once every two years thereafter.

And Now The Rest of The Story

As you can tell from the aforementioned discussion, the California Legislature has been quite busy with proposals dealing with sexual harassment and related issues. But there are other bills as well – many of which would dramatically affect California employers. Some of the more significant non-sexual harassment bills include the following:

- **SB 1284 (Jackson) Pay Data Reporting** – This bill requires employers with 100 or more employees to submit specified pay data reporting beginning in September of 2019. This bill is largely a response to the Trump Administration's stay of proposed revisions to the federal EEO-1 form that were put forward by the Obama Administration. The report must identify the number of employees by race, ethnicity and sex in specified job categories, and must identify the number of employees by race, ethnicity and sex who fall within certain "pay band" ranges established by the federal government. Data would be submitted to state enforcement agencies, who could take action against employers alleging pay equity violations. Civil penalties for non-compliance are $500 for an initial violation and $5,000 for a subsequent violation. A concern with this bill is that it will presume that unlawful conduct has occurred despite the fact that current law provides legitimate, non-discriminatory reasons why pay inequities may exist (such as differences in education level and experience).
- **SB 1402 (Lara) – Port Trucking Joint Liability** – This bill would require the DLSE to compile a list of port drayage companies with unsatisfied judgments for unpaid wages and other employment claims. Any "customer" who contracts with a port drayage company on this list would be *jointly liable* for any future claims by workers. This proposal could have a major impact on retailers, car dealers, agricultural employers and other industries that rely on the ports and port trucking to transport goods or materials.

- **AB 2282 (Eggman) – Salary History** – This bill actually will provide some needed clarity for California employers. Last year, AB 168 (Eggman) was enacted to prohibit employers from asking about and relying on salary history information regarding applicants for employment. AB 2282 seeks to clarify and define some key terms from last year's legislation. First, the bill specifies that "applicant" means an individual seeking employment who is not currently employed with the employer (meaning the prohibition does not apply to internal hires). Second, the bill clarifies that the law does not prohibit an employer from asking about salary expectations. Third, the bill addresses a provision of AB 168 that requires employers to provide a "pay scale" upon reasonable request. AB 2282 provides that "pay scale" means a salary or hourly range, and defines "reasonable request" to mean a request made *after* an applicant has completed an initial interview. This should help prevent against requests for such information coming from "fishing" plaintiff attorneys or competitors. Finally, AB 2282 provides that prior salary history shall not justify *any* disparity in compensation.
- **SB 826 (Jackson) – Corporate Boards of Directors** – This bill requires (beginning in 2019) a publicly held corporation with principal offices in California to have a minimum of one female director on its board. By 2021, these minimum requirements would increase depending on the size of the board of directors.
- **AB 1976 (Limón) – Lactation Accommodation (Part 1)** – Two pending bills would impact an employer's obligation to provide lactation accommodation. Current law requires employers to provide a location other than a "toilet stall" for employees to express breast milk. AB 1976 would require this location to be other than a "bathroom."
- **SB 937 (Weiner) – Lactation Accommodation (Part 2)** – SB 937 is a more comprehensive lactation accommodation bill, and is largely based on an ordinance recently adopted in San Francisco. This bill specifies that a 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. It also specifies that a sink with running water and a refrigerator must be "in close proximity." SB 937 does provide a hardship exemption for employers with less than 50 employees for undue hardship (significant expense or operational difficulty). Employers would also be required to include a lactation policy in their employee handbook or other set of policies. Finally, SB 937 imposes new specified lactation space building standards for construction projects of more than 15,000 square feet or $1 million in cost.
- **AB 2732 (Gonzalez Fletcher) – Immigration Documents** – This bill prohibits employers from knowingly destroying, concealing, removing, confiscating or possessing an employee's immigration or identification documents for the purposes of committing trafficking, peonage, slavery, involuntary servitude, or a coercive labor practice. This bill also requires employers to provide specified employees with a "Worker's Bill of Rights" to inform the employee of certain rights, including the right to hold on to the employee's own immigration and identification documents, and the right to be paid the minimum wage.
- **SB 1121 (Dodd) – Increases Liability and Litigation for Data Breaches** – Although this bill is not specific to employment, it could dramatically increase litigation against California employers

for data breach claims. Under the bill, anyone (including employees) whose data has been breached can bring a civil action against a business. SB 1121 allows such claims to go forward with no proof of injury and establishes minimum penalties of $200 per consumer. You can read more about SB 1121 on this recent post on our Employment Privacy Blog.

What's Next?

We're almost exactly midway through the legislative process. As noted above, all of the bills mentioned here have made it out of their house of origin and are now pending in the other legislative body. If they pass there, they'll advance to the Governor's desk later this summer. But a lot can change between now and then, and bills are often significantly amended as they get closer to the end of the process.

Most of the bills discussed above will likely make it to the Governor's desk. In fact, many of the sexual harassment-related bills are receiving significant bipartisan support, virtually guaranteeing they will make it to the Governor's desk.

All bills must pass the Legislature by August 31, and Governor Brown has until September 30 to sign or veto measures. Any legislation he does sign will generally go into effect on January 1, 2019, although some bills may have delayed implementation for some of their provisions.

Check back here often and we'll keep you posted on developments regarding these bills and other legislative activity!

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