Top Ten List – Watch These Ten Key Employment Bills as the California Legislative Year Comes to a Close

Insights
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It's been a nice summer recess as the California Legislature has been on break, with Members returning to their home districts. But that respite is about to end as the Legislature reconvenes on August 6. There will be a flurry of activity as legislators have just a few short weeks to finish work on legislation for the year. All bills must be passed and sent to Governor Brown by August 31, who will have until September 30 to sign or veto bills.

As we have discussed previously (here and here), the #MeToo movement and sexual harassment have dominated the public policy debate in Sacramento (and elsewhere) in 2018. Just this year, there were over two dozen bills introduced in the Legislature addressing this hot-button topic. Therefore, this list of ten bills is dominated by sexual harassment-related legislative proposals. But there are several other hot-button items on this list as well – most of which will add significant responsibilities and obligations to businesses – so California employers should closely track these proposals as they near the finish line.

So without further ado, here's our "top ten list" of pending bills to watch:

Assembly Bill 3080 (Gonzalez Fletcher) – Ban on Mandatory Arbitration Agreements

The use of mandatory arbitration agreements in employment has long been a target of plaintiff attorneys and their allies in the Legislature. The California Legislature has repeatedly passed bills prohibiting mandatory arbitration agreements in the employment context, despite very strong arguments that such state action would be preempted by federal law (under the Federal Arbitration Act). Thus far, no California Governor has signed such a proposal into law (Governor Brown vetoed the last attempt in 2015).

This year, the #MeToo movement has generated renewed debate about the use of arbitration agreements, particularly in the context of sexual harassment claims. Proponents argue that the use of arbitration agreements keep such issues "behind closed doors" and allows perpetrators to continue to victimize co-workers.

In addition, the recent United States Supreme Court decision in *Epic Systems*, holding that class action waivers in employment arbitration agreements do not violate the National Labor Relations Act (NLRA), has given more fuel to California opponents of such contractual provisions

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All of this debate and discussion has therefore culminated in AB 3080, a bill that would prohibit (as a condition of employment) arbitration agreements that require employees to arbitrate claims under the Fair Employment and Housing Act (FEHA) or the Labor Code. It's important to note that, despite all the discussion about sexual harassment, AB 3080 is much broader than just sexual harassment. It would prohibit mandatory arbitration of any employment discrimination claims (not just sexual harassment), as well as any wage and hour claim under the Labor Code. Therefore, the implications of AB 3080 passing would be much more significant than merely sexual harassment claims.

As mentioned above, there remain significant legal questions about whether a state law such as AB 3080 would be preempted by federal law. When Governor Brown vetoed the last version of this bill in 2015, he specifically stated concerns over federal preemption. And if anything, the U.S. Supreme Court has become more conservative and likely more hostile to state legislation that attempts to interfere with the strong federal preference for arbitration.

The real question, however, is whether the heightened politics of the #MeToo movement will compel Governor Brown to change his tune and sign this bill into law. AB 3080 will be one of the most closely-watched bills of the year, so stay tuned!

Senate Bill 1284 (Jackson) – Pay Data Reporting

If you followed California legislation the last two years, one constant theme has been the ongoing battle between the Trump Administration and California. For every action taken by the Trump Administration, the California Legislature seems to have an equal and opposite reaction.

Add SB 1284 to that list of "reactive" legislative proposals. As many of you will recall, during the end of his term, President Obama proposed to amend the federal demographic reporting form, known as the EEO-1, to require covered employers include pay data information – part of a purported effort to combat the gender pay gap. However, in 2017 the Trump Administration put the brakes on the proposed revisions to the federal EEO-1.

Not one to rest on its laurels, the California Legislature has responded with SB 1284. Under this bill, beginning in September 2019, California employers with 100 or more employees would be required to submit certain pay data to the Department of Industrial Relations (DIR). This information could then be shared with other state agencies (such as the Department of Fair Employment and Housing), which could lead to enforcement activity against employers. The bill would require employers to provide specific pay information by "race, ethnicity, and sex," largely tracking the changes to the EEO-1 proposed by the prior administration. Failure to comply could result in civil penalties ranging from $500 to $5,000.

Employers have expressed concern that such pay data, presented with little or no context, will create the impression that unlawful discrimination has occurred. However, both state and federal law specifically provide that pay disparities are lawful when based on non-discriminatory factors

(such as differences in education and experience). The concern is that SB 1284 will raise the impression of unlawful discrimination (and potential litigation) where none actually exists.

Assembly Bill 1870 (Reyes) – Extended Statute of Limitations for FEHA Claims

Under current law, employees have one year to file an administrative claim for employment discrimination (including sexual harassment) with the Department of Fair Employment and Housing (DFEH) as a precursor to filing a civil lawsuit. This bill would extend that period to three years. Proponents argue that, like victims of sexual assault, victims of sexual harassment sometimes are reluctant to come forward and need additional time to process and be ready to publicly to make a complaint. However, AB 1870 is not limited to sexual harassment and would extend the statute of limitations to three years for *all* forms of employment and housing discrimination. Employers have expressed concern that extending the statute of limitations makes responding to and litigating claims more difficult, as evidence gets "stale" and witness' memories fade with the passage of time.

Senate Bill 937 (Weiner) – Lactation Accommodation

A hot topic in recent years has been an employer's obligation to accommodate employees who are lactating or expressing breast milk. Several local jurisdictions (including San Francisco) have adopted their own workplace policies in this area.

Under current state law, employers are required to make reasonable efforts to provide employees with the use of a room or other location (other than a toilet stall) for purposes of expressing breast milk at work.

Largely based on the San Francisco ordinance, SB 937 by Senator Scott Weiner would require employers to provide a lactation room (other than a bathroom) that shall be "in close proximity to the employee's work area, shielded from view, and free from intrusion." SB 937 also specifies that the lactation room must (1) be safe, clean, and free of toxic or hazardous materials, (2) contain a surface to place a breast pump and personal items, (3) contain a place to sit, (4) have access to electricity, and (5) have access to a sink with running water and a refrigerator in close proximity to the employee's workplace. SB 937 also provides that denial of reasonable break time or adequate space to express milk shall be deemed a failure to provide a rest period under current law, which entitles an employee to one hour of pay at their regular rate of pay.

SB 937 also requires employers to develop and implement a lactation accommodation policy, which must be included in employee handbooks and policies and provided to new employees or when an employee makes and inquiry about or requests parental leave. SB 937 also imposes new building standards by requiring the California Building Standards Commission to adopt new rules that require the installation of lactation space for improvement projects for interior spaces of at least 15,000 with estimated costs of over $1 million.

SB 937 does contain two accommodations for employers. First, it provides that an employer can comply with the law's requirements by designating a lactation location that is temporary, if the space is identified by signage and free from intrusion while the employee is expressing milk. Second, the bill provides that employers with fewer than 50 employees may establish an exemption from the law's requirements if the employer can show the requirement would impose an undue hardship under specified conditions.

Senate Bill 820 (Leyva) – Ban on Confidentiality and NDAs in Certain Settlement Agreements

Like arbitration agreements, the use of confidentiality clauses and non-disclosure agreements (NDAs) in settlement agreements involving sexual harassment claims has come under fire from the #MeToo movement. Proponents of reform claim that the use of such clauses in settlement agreements serve to keep such claims "secret" and allow perpetrators to continue to victimize individuals in the workplace.

SB 820 would enact the Stand Together Against Non-Disclosures (STAND) Act. Specifically, SB 820 would prohibit any provision in a settlement agreement that prevents the disclosure of factual information related to a civil action for (1) an act of sexual assault, (2) an act of sexual harassment, (3) an act of workplace harassment or discrimination based on sex, or retaliation, or (4) an act of housing harassment or discrimination based on sex, or retaliation.

SB 820 provides that a clause that shields the identity of the claimant, and all facts that could lead to the discovery of his or her identity, may be included in a settlement agreement at the request of the claimant. In addition, the bill provides that it does not prohibit a clause in a settlement agreement that precludes the amount paid in settlement of a claim.

This proposal would apply to settlement agreements entered into on or after January 1, 2019.

Assembly Bill 2334 (Thurmond) – Cal/OSHA Electronic Recordkeeping Requirements

Add this one to the list of bills by which "California responds to the Trump Administration."

Back in 2016, the Obama Administration federal Department of Labor adopted a new electronic recordkeeping and reporting procedure known as the Improve Tracking of Workplace Injuries and Illnesses rule. However, the Trump Administration recently suspended the July 1 recordkeeping deadline and announced a proposed rule to revise and relax the increased reporting requirements.

In an effort to "resist" this federal action, AB 2334 requires Cal/OSHA to "monitor" rulemaking at the federal level and, if it determines that federal OSHA has eliminated the requirement that specified employers electronically report injury and illness data, it shall adopt regulations requiring California employers to electronically report data as was required under the proposed federal rule as it read on January 1, 2017.

AB 2334 also contains a provision that seeks to resurrect a statute of limitations rule related to recordkeeping requirements known as the "Volks Rule." The rule received its nickname from a D.C. Circuit Court case that held that federal OSHA could not cite employers for failing to record workplace injuries or illnesses if the violation took place more than six months before the citation was issued. However, in the waning days of the Obama Administration, federal OSHA adopted what amounted to a five-year statute of limitations for such violations, stating that the duty to record an injury or illness continues for the full five-year record retention period under federal law. In 2017, however, President Trump signed a resolution pursuant to the Congressional Review Act that revoked the so-called "Volks Rule."

Following the D.C. Circuit Court case mentioned above, the Cal/OSHA Appeals Board announced in a decision that it would similarly interpret the "occurrence" statute of limitations as barring any citation for failure to report an injury which occurred more than 6 months after the violation. *Key Energy Services* (DAR-15-0255-0256).

AB 2334 proposes to revert to the Obama Administration "Volks Rule" by specifying that a violative "occurrence" continues until it is corrected, Cal/OSHA discovers the violation, or the duty to comply with the requirement is no longer applicable. In other words, a failure to record an injury or illness would be deemed a "continuing violation" until discovered or corrected.

Senate Bill 1343 (Mitchell) – Expanded Sexual Harassment Prevention Training

In light of the #MeToo movement's highlighting of the pervasive nature of sexual harassment across many industries, an increased focus has been placed on employee training requirements.

Under existing California law, employers with 50 or more employees are required to provide two hours of sexual harassment prevention training to supervisors (known as "AB 1825 training.")

SB 1343 would instead provide that (beginning in 2020) employers with *5 or more* employees shall be required to provide two hours of sexual harassment training to supervisors, and *one hour of training for nonsupervisory employees*. Therefore, California law would mandate sexual harassment prevention training for nonsupervisory rank-and-file employees.

SB 1343 also requires DFEH to develop or obtain online training courses and make them available on the Department's website. Employers would be permitted to develop their own training or direct employees to view the online training course developed by DFEH.

Two other pending bills (AB 3081 and SB 1300) similarly would establish sexual harassment prevention training requirements for nonsupervisory employees (in addition to other, more controversial requirements). However, it appears that SB 1343 is gaining traction, has bipartisan support, and is the training requirement legislation most likely to be enacted into law.

Assembly Bill 2732 (Gonzalez Fletcher) Immigration Documentation and "Worker's Bill of Rights"

California has been quite active in legislative proposals to protect immigrant workers in recent years, and these efforts have ramped up under the Trump era.

AB 2732 would prohibit employers from knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported immigration or government identification document with the intention of committing trafficking, peonage, slavery, involuntary servitude, or a coercive labor practice. Violations of the law would constitute a misdemeanor and be subject to civil penalties of up to $10,000.

AB 2732 also requires employers to conspicuously post a notice specifying the rights of employees to maintain custody and control of their own immigration documents and that the withholding of immigration documents by an employer is a crime.

Finally, AB 2732 requires all employers, prior to verifying employment authorization as required under federal law, to provide employees with a specified "Worker's Bill of Rights," to be developed by the Department of Industrial Relations (DIR). The document must be in a language understood by the employee, be signed and dated by the employee, be retained for three years, and a copy of the signed document must be provided to the employee.

AB 1761 (Muratsuchi) Panic Buttons and More for Hotel Employees

Another front in the #MeToo discussion deals with hotel employees. A number of local jurisdictions (including Seattle, Chicago, and Sacramento) have passed ordinances recently specifically designed to safeguard hotel workers against sexual harassment and assault. Most of these local ordinances mandate the provision of "panic buttons" to employees, among other requirements.

AB 1761 proposes to enact a statewide version of such a requirement. The bill requires hotel employers to provide panic buttons (free of charge) to employees working alone in guestroom. Hotel employees are authorized to use the panic button and cease work if they reasonably believe there is an ongoing crime, harassment or other emergency occurring.

The bill also requires the hotel employer to provide paid time off to an employee that has been subjected to an act of violence, sexual assault or sexual harassment for contacting law enforcement and seeking other relief. In addition, the hotel employer is required (upon request) to provide reasonable accommodations to the employee which may include, but not be limited to, transfer, reassignment, modified schedule, or any other reasonable adjustment.

Hotel employers would also be required to post a notice on the back of each guestroom door that contains specified verbiage and states that panic buttons are provided to hotel employees.

AB 1761 also contains language stating that it provides minimum standards and shall not affect local ordinances that go farther and are more favorable to hotel employees. Industry representatives have expressed particular concern with this provision of the bill, stating that a hotel could invest hundreds of thousands of dollars in particular technology to comply with AB 1761, only to have a local jurisdiction adopt local requirements that require completely different technology.

Thankfully, one problematic provision of the bill was deleted during the legislative process. As introduced, the proposal contained a "blacklist" provision that stated that if a hotel employee declared that an assault or harassment had occurred, the hotel (without further verification or investigation) would have been required to refuse to serve the guest for three years. After industry representatives pointed out the clear constitutional and due process concerns with such language, the author wisely eliminated that provision from the bill.

Senate Bill 1300 (Jackson) – "Smorgasbord" Sexual Harassment Bill

I've taken to referring to this bill as a "smorgasbord" sexual harassment bill because it contains a little bit of this, and a little bit of that, related to sexual harassment law – all taken from a plaintiff attorney's dream menu.

Most troubling, SB 1300 would create a new cause of action for an employer's alleged failure to take "all reasonable steps" to prevent discrimination or harassment from occurring, even if the employee cannot show that they themselves suffered any harassment or discrimination. This would completely blow the doors off any traditional notion of "standing" in FEHA claims and would subject employers to claims by employees who could show no harm. Even more, the bill states that it would be sufficient for the plaintiff to show that "the conduct would meet the legal standard for harassment or discrimination if it increased in severity or became pervasive." Therefore, conduct would be actionable even if it did not meet the standard for sexual harassment, but would if it continued or increased in severity. Think about that one for a moment!

The bill has a number of other provisions as well. These include a provision that prohibits employers from requiring employees to sign a non-disparagement agreement or other document precluding them from disclosing information about unlawful acts (including sexual harassment). SB 1300 also prohibits employers from requiring execution of a release of a claim under FEHA in exchange for a raise, bonus, or continued employment. The bill also amends FEHA's attorneys fees provision to prevent a prevailing employer from recovering fees and costs unless an action was frivolous, unreasonable, or totally without foundation.

Finally, SB 1300 makes a number of legislative findings and declarations related to legal standards applicable to sexual harassment claims. These include statements that (1) harassment cases are rarely appropriate for summary judgment (meaning more cases would have to go through the time and expense of trial), (2) a "single incidence" of harassment may be sufficient to allege a hostile work environment claim, and (3) the existence of a claim depends on the totality of the

circumstances and a discriminatory remark may be relevant, circumstantial evidence of discrimination (rejecting a "stray remarks" doctrine that some federal courts have adopted).

There are a half-dozen other provisions contained in SB 1300 as well. But as the above discussion makes clear, the bill threatens to open the floodgates of litigation against California employers, which may very well be by design.

Conclusion

When the Legislature reconvenes on August 6, things can move quickly, so many of these bills may be significantly amended during the last few weeks of session. Also, beware of last-minute "gut and amend" proposals that represent completely new bills rushed through the process at the last minute with very little opportunity for analysis or debate.

Check back here to find out which bills make it to the Governor's desk – and which are signed or vetoed!

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