



Looking Ahead – California Legislature to Address *Dynamex* and a Host of New Employment Proposals

Insights

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February 22 was the last day to introduce new legislative proposals for the 2019 California legislative year. A whopping 2,576 bills were introduced before the deadline, making for an extremely busy legislative year ahead. Although new ideas can be added later through the “gut and amend” process, we now have a fairly clear sense of the labor and employment issues the California legislature will be confronting in 2019.

Based on the bills introduced by the deadline, legislative proposals can be classified into four main areas: (1) bills dealing with employee/independent contractor status and the aftermath of the California Supreme Court’s decision in the *Dynamex* case; (2) reintroductions of bills that were previously vetoed by Governor Brown (or were otherwise unsuccessful) but are being given a new shot with California’s new governor, Gavin Newsom; (3) a host of bills dealing with the popular topic of paid family leave and/or paid sick leave; and (4) everything else, including significant new areas of proposed regulation.

Dynamex-Related Legislative Proposals

As we discussed previously [here](#), it was clear from the very first day of the 2019 legislative session that *Dynamex* would be the most significant employment issue to be tackled this year. In case you’ve been living under a rock for the last several months or so, the most significant and pressing concern facing California employers is continued fallout from the California Supreme Court’s blockbuster *Dynamex* decision. There, the court adopted an entirely new test for determining whether an individual is an employee or an independent contractor. As we discussed [here](#), this new legal standard, known as the “ABC Test,” makes it more difficult for businesses to utilize independent contractors and threatens to upend entire industries in California—and has potential far-reaching implications for the gig economy in particular.

The legislative negotiations around *Dynamex* will be significant in 2019, and there are indications that Governor Newsom is directly engaged in attempting to push interested stakeholders to reach a compromise on this contentious issue. Because the stakes are so high, *Dynamex*-related issues will dominate the legislature’s labor and employment bandwidth this year, leaving little room for much else.

Bills introduced in 2019 dealing with *Dynamex* include the following:

AB 5 (Gonzalez) – This bill is sponsored by the California Labor Federation. Although the proposal is only a placeholder (or “spot”) bill for now, it intends to codify *Dynamex* and “clarify the decision’s application in state law.” This legislative proposal is the likely vehicle for any comprehensive compromise between labor and the business community on this issue.

AB 71 (Melendez) – This bill represents a Republican counter-response to *Dynamex* and essentially proposes to revert to the previous multi-factor *Borello* test for determining employee or independent contractor status. AB 71 likely faces an uphill battle in Sacramento, but will be another opportunity for interested stakeholders to engage on this issue.

AB 233 (Cooley) – This bill is an industry-specific proposal and attempts to clarify that insurance agents and brokers shall not be considered “employees” where certain specific conditions are met.

SB 238 (Grove) – This is another Republican measure on *Dynamex*, but is only a placeholder bill for now.

Renewed Effort to Target Mandatory Arbitration in Employment

One of the more hot-button issues in recent years has been the use of mandatory arbitration agreements in employment. Plaintiffs’ attorneys and their allies in labor have made several attempts at legislation to prohibit mandatory arbitration agreements from being required as a condition of employment. Governor Brown vetoed two previous attempts, most recently with his veto last year of AB 3080 (Gonzalez). In his veto message, Brown expressed concerns that such an effort would clearly be preempted by the Federal Arbitration Act.

Nevertheless, advocates are back with another proposal to prohibit such agreements and feel they have a better shot with Governor Newsom. Assemblywoman Gonzalez has introduced Assembly Bill 51, which is virtually identical to her previous vetoed measure, AB 3080.

Reintroduction of Bills Related to the #MeToo Movement

The 2018 legislative year was dominated to proposals related to sexual harassment in response to the *#MeToo* movement and the flurry of attention paid to sexual harassment across virtually all industries. While a number of significant proposals were signed into law in 2018, a number of bills were vetoed or were otherwise unsuccessful. Proponents of those measures have brought many of them back for another go-around under our new governor. These include:

AB 9 (Reyes) – This bill would extend the statute of limitations for filing administrative claims for employment discrimination (including, but not limited to, sexual harassment) from one years to three years. It is a reintroduction of AB 1870 (Reyes) from last year, which was vetoed by Governor Brown.

AB 170 (Gonzalez) – This bill would make employers jointly liable with “labor contractors” for harassment (not just sexual harassment). Similar language was contained in last year’s AB 3081 (Gonzalez), also vetoed by Governor Brown.

AB 171 (Gonzalez) – This bill would prohibit employers from taking adverse action against an employee because of their status as a victim of sexual harassment, and would establish a rebuttable presumption that adverse action taken against an employee within 90 days is unlawful. Similar language was contained in last year’s vetoed AB 3081.

AB 547 (Gonzalez) – This bill deals with mandated sexual harassment prevention training for janitorial contractors, and would require them to use training providers from an approved list, including peer trainers and other union-affiliated entities. This bill is similar to AB 2732 (Gonzalez) from last year, which was vetoed by Governor Brown.

AB 628 (Bonta) – This bill extends certain leave and other protections to victims of sexual harassment or family members of victims of sexual harassment. Similar language was contained in last year’s AB 2366 (Bonta), which did not make it through the legislative process.

Paid Sick Days/Paid Family Leave

There has been significant discussion at both the state and federal level regarding issues related to paid family leave. Federally, politicians from both sides of the aisle have expressed support for some type of paid family leave program, but have not reached consensus on how such a program would be financed. Similarly, here in California, Governor Newsom has voiced support for providing six months of paid family leave, but, again, the discussion thus far is short on details. But this discussion has led to a flurry of placeholder bills, including the following:

AB 196 (Gonzalez) – This bill declares the intent of the legislature to expand California paid family leave program to provide a 100 percent wage replacement for workers earning \$100,000 or less annually.

AB 406 (Limón) – This proposal states legislative intent to ensure that paid family leave forms are language-accessible to all families in the state.

AB 555 (Gonzalez) – This bill is a placeholder related to California paid sick days requirement. Last year, the same author carried legislation (AB 2841) to expand the paid sick days requirement from three days (or 24 hours) to five days (or 40 hours). That bill did not make it through the legislative process, but it is anticipated that similar language will be inserted into AB 555.

SB 135 (Jackson) – This bill is similarly a placeholder vehicle that declares the intent of the legislature to strengthen California’s family leave laws, including by ensuring that all workers have job protection when they take paid family leave and increasing the wage replacement amount.

Other Repeat Legislation

State legislators have also introduced a number of other bills that were previously attempted but were either vetoed or did not make it through the legislative process. These bills include:

SB 142 (Wiener) – Lactation – This bill, based in large part on a local ordinance enacted in San Francisco, significantly expands employer responsibilities related to providing lactation rooms to employees who need to express breast milk. It is largely identical to SB 142 (Wiener) from last year, which was vetoed by Governor Brown.

SB 171 (Jackson) – Pay Data Reporting – This measure requires employers with 100 or more employees to submit an annual pay data report that includes specified information related to race, ethnicity, and sex. These changes largely reflect proposed changes to the federal EEO-1 reporting form proposed by the Obama administration but canceled under President Trump. This bill is similar to SB 1284 (Jackson) from last year, which was held in the Assembly Appropriations Committee.

AB 403 (Kalra) – Retaliation – This bill extends the statute of limitation for retaliation claims from six months to three years, and authorizes a plaintiff to recover attorneys' fees for administrative claims related to retaliation. This bill is identical to AB 2946 (Kalra) from last year, which failed passage on the Assembly floor. Employers expressed concern the one-sided attorneys' fees provision in administrative claims would incentivize further litigation.

AB 418 (Kalra) – Union Evidentiary Privilege – This bill would establish an evidentiary privilege for communications between a worker and a union agent or shop steward. This bill is identical to AB 3121 (Kalra) from last year, which did not make it through the legislative process.

AB 589 (Gonzalez) – Document “Servitude” – This bill would make it unlawful for an employer to possess or destroy immigration documents for the purpose of committing trafficking, peonage, slavery, involuntary servitude, or a coercive labor practice. Similar language was contained in AB 2732 (Gonzalez) from last year, which was vetoed by Governor Brown.

AB 673 (Carillo) – Wage Payment Penalties – This bill authorizes employees to file representative civil claims for civil penalties under Labor Code Section 210 for failure to pay wages or late payment of wages. Similar language was contained in AB 2613 (Reyes) from last year, but that bill did not pass the Assembly floor.

AB 749 (Stone) – “No Rehire” Agreements – This bill prohibits settlement agreements that contain a provision that prevents a party from working for that employer, related entity, or contractor of the employer. Similar language was contained in last year's AB 2109 (Stone), but that language was amended out of the bill.

New Labor and Employment Proposals for 2019

In addition to legislative proposals that are getting another shot under Governor Newsom, there are a number of new employment bills on the horizon for 2019. These include:

SB 188 (Mitchell) – Discrimination: Hair Styles – This bill would amend the definition of “race” under the Fair Employment and Housing Act to include “traits historically associated with race,

including but not limited to, hair texture and protective hairstyles” (such braid, locks and twists). This is a hot issue nationally. Recently, the New York City Commission on Human Rights issued legal enforcement guidance on race discrimination on the basis of hair styles most closely associated with particular races.

AB 457 (Quirk) – Lead: Permissible Exposure Levels – This bill would require Cal/OSHA to complete rulemaking to establish a revised permissible exposure limit (PEL) for lead by February 1, 2020.

AB 1124 (Maienschein) – Wildfire Smoke – This bill would require the Cal/OSHA Standards Board, by June 13, 2019, to adopt emergency regulations that require employers to make respirators available to outdoor workers on any day the worker could reasonably be expected to be exposed to harmful levels of smoke from wildfires.

AB 1224 (Gray) – California Family Rights Act (CFRA) – This bill would eliminate the requirement that an employee, in order to be eligible for unpaid family and medical leave under CFRA, must work at least 1,250 hours for the employer within the last 12 months.

AB 1526 (Carillo) – Restaurants: Incentives – This bill would state the intent of the legislature to enact legislation that would foster workplace equity in restaurants in this state by providing economic incentives to equitable employers in the restaurant industry that complete specified training programs and enter into a contract with the state to commit to improving workplace equity and mobility by implementing standard and transparent hiring, training, promotion, and evaluation practices for their employees.

Employment Discrimination and Cannabis (and Beyond)

As more states legalize cannabis (both recreationally and for medical use), states are also grappling with how, if at all, employers should be required to accommodate cannabis use by their workers—especially while such use is still unlawful under federal law. This is a complicated issue that is likely to be at the forefront of legal and legislative debate for the near future.

Last year, California saw proposed legislation (AB 2069) that would have provided that the medical use of cannabis is subject to reasonable accommodation by employers. However, that measure was held in the Assembly Appropriations Committee.

This year, a new and broader measure has been introduced. Assembly Bill 882 (McCarty) would prohibit a private employer from terminating an employee if the sole reason for termination is that the employee tested positive on a drug test for a drug that “is being used as a medication-assisted treatment under the care of a physician or pursuant to a licensed narcotics treatment program.”

AB 882 is not limited to medical cannabis and could potentially extend to other drugs (such as opioids) that are prescribed under the care of a physician. This clearly raises a host of potential issues for California employers, and this measure will be one to watch closely in 2019.

Consumer Privacy and Data Breaches

One of the most significant issues facing the California legislature in 2019 will be consumer privacy. Last year, the legislature enacted the California Consumer Privacy Act (CCPA), landmark legislation to provide consumers with significant rights regarding the collection and sale of personal information. The CCPA does not go into effect until 2020; as a result, there is a flurry of legislative activity designed to clarify the law before the effective date. Nearly two dozen measures have been introduced related to CCPA and similar consumer privacy issues.

From an employer perspective, a critical concern is the question of whether the CCPA and its rights and responsibilities applies to employees and employment information. The California Chamber of Commerce and other groups will be sponsoring legislation in 2019 to clarify that “consumer” under the CCPA does not include employees in their role as employees. This clarification will be critical for California employers.

The business community will also be playing defense on consumer privacy, as stakeholders on the other side seek to expand and extend the reach of the CCPA. For example, Senate Bill 561 (Jackson) would establish a private right of action for alleged violations of the CCPA, and would likely lead to a flood of new litigation against California businesses. In addition, Assembly Bill 1035 (Mayes) would require a business to disclose a data breach within 72 hours. This standard would be extremely difficult, if not impossible, for businesses to comply with.

Conclusion

This year looks to be another significant legislative year for California employers. Issues related to employee and independent contractor classification and the *Dynamex* decision will dominate much of the debate in 2019. Moreover, a whole host of proposals that did not see the light of day under Governor Brown will be brought back for another try under Governor Newsom.

In addition to the proposals discussed above, there were dozens of “spot bills” introduced that are placeholders for now, but could be amended into substantive proposals down the road. We’ll keep you updated on any new developments as the legislative year gets under way.

For more information about these or any other legislative proposals and how they may impact your business, please contact Benjamin Ebbink, your Fisher Phillips attorney, or one of the attorneys in any of our California offices:

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