California Employers Should Monitor These 10 Critical Bills as the Legislative Year Comes to a Close

Insights
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As the 2019 legislative year is about to come to a close, there are a number of critical labor and employment proposals still making their way to Governor Newsom's desk. With just four short weeks remaining for the Legislature to pass bills, there will be a flurry of activity as everyone watches to see which bills cross the finish line on or before the September 13 deadline.

As California employers are used to by now, the Legislature continues to push the envelope when it comes to labor and employment proposals and many of these bills, if signed into law, will greatly impact the employer community. This is also Governor Newsom's first year in office, so there is an element of high drama as nobody really knows what action he might take on these legislative proposals.

But we will all find out shortly, as the Governor has until October 13 to sign or veto measures. In the meantime, California employers should closely monitor the following bills:

Assembly Bill 5 (Gonzalez) – *Dynamex* and the ABC Test

By far the most significant issue facing the California Legislature this year, AB 5 is a labor-sponsored measure to codify the "ABC test" for determining whether an individual is an employer or an independent contractor that was adopted last year by the California Supreme Court in the *Dynamex* case.

Several industries and professions – including doctors, dentists, lawyers, insurance agents, direct sellers, real estate agents, and others – have been exempted from the *Dynamex* test. But many others have been left out and continue to advocate that they should be excluded from the ABC test. Also still unresolved is the question of retroactivity; will the *Dynamex* decision be applied retroactively, or only prospectively on a go-forward basis?

And then there's that little issue of the gig economy. Several big gig economy players continue to push for a compromise with labor that will maintain independent contractor status but provide portable benefits and a mechanism for workers to dialogue with gig platforms on work issues.

It is anticipated that there will be significant further activity on AB 5 before the dust settles, so this will be one to watch closely!

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Assembly Bill 25 (Chau) – California Consumer Privacy Act and Employers

Enacted in 2018, the California Consumer Privacy Act (CCPA) will provide sweeping privacy protections for California residents when it goes into effect on January 1, 2020. Troubling for California employers, the CCPA makes no distinction between employees and consumers, potentially covering information that employers collect, maintain, or share about employees or applicants.

AB 25 was introduced by the same legislator who authored the CCPA and sought to clarify the scope of the CCPA and exempt most employment data. However, relatively late in the process, organized labor and their supporters opposed the bill and stated that they were very concerned about "workplace privacy." This opposition threatened to derail AB 25, which would have been a terrible outcome for all California employers.

Fortunately, a compromise deal was reached to allow labor to remove their opposition to AB 25. This deal exempts employment information from the CCPA, but only for one year, unless extended. This reflects a commitment by the business community to work with organized labor on legislation related to labor's concerns regarding workplace privacy over the next year, in exchange for extending or eliminating the sunset date on the employment data exemption to the CCPA.

However, this compromise will still require employers covered under the CCPA to disclose to employees and job applicants the categories of personal information collected and the purposes for which the information will be used. Covered employers must comply with this disclosure requirement no later than January 1, 2020.

Assembly Bill 51 (Gonzalez) – Ban on Mandatory Arbitration in Employment

In what has become almost an annual tradition, labor and plaintiff attorneys have again advanced legislation in 2019 that would prohibit mandatory arbitration agreements for nearly all types of employment law claims in California.

While AB 51 is pitched as a "sexual harassment" bill and has been inextricably linked by supporters to the #MeToo movement, the bill is actually much broader and would cover much more than just sexual harassment.

The bill would add a new Section 432.6 to the Labor Code, prohibiting employers from requiring an applicant or employee from entering into any contractual agreement as a condition of employment to "waive any right, forum, or procedure" for alleged violations of the entire Fair Employment and Housing Act (FEHA) and the entire Labor Code. In sum, AB 51 would prohibit mandatory arbitration agreements for *any* discrimination claims covered under FEHA – not just sexual harassment – and for *any* claims under the Labor Code, including wage and hour and other protections).

Governor Brown vetoed almost-identical legislation last year (AB 3080), noting that it would be preempted by the Federal Arbitration Act (FAA) and "plainly violates federal law." In addition, a

federal court in New York recently held that legislation passed in that state last year prohibiting mandatory arbitration of sexual harassment claims was preempted by the FAA.

Despite this, it is anticipated that AB 51 may obtain a more favorable outcome under Governor Newsom, setting up years of litigation over whether such a state law is preempted by the FAA.

Senate Bill 778 (Senate Labor Committee) – Sexual Harassment Prevention Training

Legislation passed last year at the height of the #MeToo movement amended California law to provide that sexual harassment prevention training must be provided by employers with five or more employees, and extended the law to require employers to provide one hour of training to non-supervisory employees (in addition to two hours for supervisors). These changes were enacted by SB 1343 (Mitchell) and were set to go into effect on January 1, 2020.

However, at the prompting of the business community, the Legislature passed SB 778 a year later to make some needed clarifications to the law. Primarily, SB 778 would delay the changes made by SB 1343 until January 1, 2021, so employers would have additional time to comply with the training requirements.

In addition, SB 778 clarifies that covered employers are required to provide training to nonsupervisory employees within six months of hire, and to new supervisory employees within six months of the assumption of a supervisory position. Finally, the bill permits employers who have provided training to an employee in 2019 to provide "refresher" training to that employee two years thereafter (rather than the January 2021 deadline). This will avoid forcing employers who have already provided compliant training from having to do so twice in a single two-year period.

SB 778 has already passed the Legislature and is on Governor Newsom's desk. The bill contains an "urgency clause," meaning it will go into effect immediately if signed into law. If enacted, it will provide much needed clarity to the business community, so let's keep our fingers crossed on this one.

Assembly Bill 9 (Reyes) – Statute of Limitations for FEHA Claims

If AB 9 sounds familiar to California employers, it should. It is identical to legislation (AB 1870) that was vetoed by Governor Brown last year. But it's a new day and a new Governor, so this bill is back in 2019.

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 9 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.

Employers have asked (1) that this bill be limited to sexual harassment claims, and (2) the bill clarify that it only applies prospectively to claims on a going forward basis. However, the author thus far has refused to adopt those suggested amendments. Therefore, employers will just have to wait and see whether this bill has a different result under Governor Newsom than it did under his predecessor.

Senate Bill 142 (Wiener) – Lactation Accommodation

Another familiar topic (and one that was similarly vetoed last year) involves an employer's obligation to accommodate employees who need to express breast milk during work.

Largely based on the San Francisco ordinance, SB 142 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 142 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 142 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 142 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 142 also imposes new building standards by requiring the California Building Standards Commission to adopt new rules that require the installation of lactation spaces.

Governor Brown vetoed almost-identical legislation (SB 937) last year. However, the building standards provisions were deleted from that bill before it was sent down to the Governor. Therefore, SB 142 is actually broader than the proposal that was vetoed in 2018.

SB 171 (Jackson) – Pay Data Reporting and the Federal EEO-1

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

Add SB 171 to that list of "reactive" legislative proposals. As many of you will recall, President Obama proposed to radically amend the federal demographic reporting form, known as the EEO-1, near the end of his term. The Obama-era amendment would have required covered employers to include pay data information in their submissions to the government, part of a purported effort to combat the gender and racial pay gap. While the Trump administration put the brakes on the proposed revisions in 2017, a federal court revived the proposal in March of this year. And although the Trump administration continues to press litigation in an effort to once again strike down the broad disclosure requirements, the EEOC has advised covered employers that they need to provide the required payroll data for years 2017 and 2018 by the end of September.

Not known to rest on its laurels or wait for final resolution of the federal litigation, the California Legislature has responded with SB 171. Under this bill, California employers with 100 or more employees would be required to submit certain pay data to the Department of Fair Employment and Housing (DFEH) beginning in March 2021. This information could then be shared with other state agencies (such as DLSE), 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.

Employers have expressed concern that such pay data, presented with little or no context, will create the impression that unlawful discrimination has occurred. 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 171 will raise the impression of unlawful discrimination (and potential litigation) where none actually exists.

Senate Bill 218 (Bradford) – Local Employment Discrimination Laws and Enforcement

This proposal would make two changes to employment discrimination under state law. First, the bill would authorize local government jurisdictions to accept and enforce state claims for employment discrimination under FEHA (currently, such claims must be filed with a state agency, the Department of Fair Employment and Housing). Second, it would authorize local jurisdictions to enact their own antidiscrimination laws related to employment, including establishing remedies and penalties for violations.

Both of these proposals are very problematic from an employer perspective.

First, one could easily imagine the confusion and inconsistency that would result if you had individual cities and counties interpreting and enforcing state law FEHA claims. Different jurisdictions would likely interpret and apply the law differently, resulting is disparate outcomes for both workers and employers.

Second, employers already have to navigate a complex patchwork of both state and local employment laws – on issues including minimum wage, paid sick leave, "ban the box" laws, salary history, "predictable scheduling," and a number of other issues. If SB 218 passes, California

history," "predictable scheduling," and a number of other issues. If SB 218 passes, California employers would also have to deal with a proliferation of local employment discrimination laws (each with their own rights, procedures, and remedies), even though we already have a comprehensive statewide law on the books. Imagine the compliance nightmare!

At the direction of former Governor Brown, an advisory group explored local enforcement of FEHA claims as contemplated by this bill. The advisory group issued a report in December 2018 that raised a number of significant concerns about such an approach. SB 218 has not adequately addressed those concerns and, if enacted into law, will likely lead to great confusion for employers and employees alike.

Assembly Bill 1066 (Gonzalez) – Unemployment Benefits for Striking Employees

AB 1066 would authorize workers involved in a trade dispute (strike) to collect unemployment insurance benefits after a four-week waiting period. This would reverse a longstanding provision of California law that provides that individuals are not eligible for unemployment insurance benefits if they left their work because of a trade dispute.

As you can probably imagine, California employers have significant concerns with this proposal. First, it would represent a sharp departure from more than 70 years of precedent in California and would provide unemployment benefits to striking workers even though they are not looking for work, and already have a job to return to when the labor dispute is resolved. Second, AB 1066 politicizes unemployment benefits, whereas previously the law had been neutral in labor disputes. The bill will penalize employers for strikes, regardless of the facts of the underlying dispute. And finally, AB 1066 will create additional solvency issues for California's unemployment insurance system, which went billions of dollars into the red during the last recession.

Assembly Bill 170 (Gonzalez) – Joint Liability for Harassment

This bill would make a "client employer" jointly liable for harassment (including sexual harassment) of any worker supplied by a "labor contractor." California law already imposes similar liability for unpaid wages and failure to provide workers' compensation. AB 170 would extend that liability to harassment claims as well.

Employers have argued that the current common law "joint employment" test strikes the right balance by focusing on whether the client employer had sufficient knowledge and control of the harassing behavior. In some situations, a client employer could already be liable under current law, depending on the facts of a given case. However, AB 170 would purport to make the client employer automatically liable in *all* situations, even where they had completely no knowledge or ability to control the harassing behavior.

This would create another pathway for costly litigation against California employers for issues that are already protected under FEHA and common law. Moreover, Governor Brown vetoed very similar legislation (AB 3081) by the same author just last year.

Conclusion

Things can move quickly during the last few weeks of the legislative session, and many of these bills may be significantly amended before they cross the finish line. 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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