

UPDATE: Recent Legislation on Employment Matters

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THE FOLLOWING BILLS PASSED IN 2018

Assembly Bill 1976

- Amends Section 1031 of the Labor Code
- Existing law provided that the lactation location could not be a toilet stall, it now is required that the lactation location not be anywhere in a bathroom
- Deals with employee's ability to express breast milk in private. Employers are to make reasonable efforts to provide an employee with the use of a room or other location, *other* than a bathroom, in close proximity to the employee's work area, for the employee to express milk in private.
 - The room must be (1) private and free from intrusion while an employee expresses milk, (2) used only for lactation purposes while an employee expresses milk (3) and otherwise meets the requirements of state law concerning lactation accommodation.
- If an employer can demonstrate to the Department of Industrial relations that the requirement to provide the employee with such a room, *other* than a bathroom would impose undue hardship on the employer, an employer shall make reasonable efforts to provide an employee with the use of a room or other location, other than a toilet stall, in close proximity to the employee's work area

Assembly Bill 2282

- Amends Sections 432.3 and 1197.5 of the Labor Code, relating to employment
- Made three changes to the California Pay Act
 - (1) the bill defines "pay scale" to mean salary or hourly wage range, "reasonable request" means a request made after an applicant has completed an initial interview with the employer and "applicant" excludes current employees of the employer
 - (2) the bill clarifies that while employers cannot ask for an applicant's salary history information, employers may ask an applicant about his or her salary expectations
 - (3) and the bill provides guidance on how California employers may treat compensation decisions of current employees. An employer can still make compensation decisions based on an existing employee's current salary if any wage differential resulting from that compensation decision is justified by the specific factors enumerated in Labor Code Section 1197.5
- Ultimately, the changes to the "Salary History Ban" provided by 2282, while helpful, do not substantially alter or lessen employers' obligations – the bill does not change the wide-ranging goal of the prior law which is to provide equal pay to employees who perform substantially similar work

Assembly Bill 2770

- Amended Section 47 of the Civil Code, relating to privileged communications
- (1) Protects alleged victims of sexual harassment in making complaints against a co-worker to their employer without the fear of being found liable for defaming the alleged harasser.

- (2) It **also protects** employers when making statements to interested parties (such as the Department of Fair Employment and Housing and/or Equal Employment Opportunity Commission)
- In both instances, however, the statements and/or complaints are only protected from liability for defamation *if* they are made without malice and based upon credible evidence
- The amendment also protects a former or current employer from liability for defamation when answering an inquiry from a prospective employer as to whether or not the employer would rehire the applicant, and allows the employer to state whether the decision is based upon the current or former employer's determination that the applicant engaged in sexual harassment

Senate Bill 820

- **An act to add Section 1001 to the Code of Civil Procedure, relating to civil procedure**
- Addresses agreements settling lawsuits or administrative complaints and **voids** contractual provisions that would prevent a party from disclosing "factual information" about sexual harassment or related retaliatory conduct
- A claimant may request a provision in the agreement that conceals all of his or her identifying information. The accused, however, has **no such protection**

Senate Bill 1123

- **An act to amend, repeal, and add Sections 3301, 3302.1, 3303, and 3303.3 of, and to add Sections 3302.2 and 3307 to, the Unemployment Insurance Code, and making an appropriation therefor, relating to paid family leave**
- This act helps active duty military service members and their families by expanding the scope of the Family Temporary Disability Insurance Program. SB 1132 expands the program to include time off to attend to a "**qualifying exigency**" arising related to an individual's spouse, registered domestic partner, parent, or child who is an active duty member of the US Armed Forces.
 - These exigencies can include addressing any issue that arises from a call or order, attendance in an official ceremony, program, or event sponsored by the military, or arranging for alternative childcare for a child when the active duty or call necessitates a change in the existing childcare arrangement
- Only affects "**covered active duty members**" meaning members that are deployed in a foreign country
- Goes into effect on January 1, 2021

Senate Bill 1300

- **An act to amend Sections 12940 and 12965 of, and to add Sections 12923, 12950.2, and 12964.5 to, the Government Code, relating to employment**
- Makes it **far easier** for employees to bring harassment lawsuits.
- Formally adopts the standard in Justice Ruth Bader Ginsburg's concurrence in *Harris v. Forklift Systems* that a sexual harassment plaintiff "need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job."
- Expressly provides that a single incident of harassment is sufficient to create a triable issue of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment

- Amends the FEHA to address agreements required as a condition of employment, and makes it an unlawful employment practice to require employees to release FEHA claims or to keep mum about “unlawful acts in the workplace,” **unless the agreement is a negotiated resolution** of a lawsuit, an agency complaint, or an internal complaint brought by an employee, in which case the employer can still get a release and require confidentiality concerning allegedly unlawful acts (to the extent the confidentiality provisions are not otherwise unlawful by means of AB 3109 and SB 820)

Senate Bill 1343

- **An act to amend Sections 12950 and 12950.1 of the Government Code, relating to employment**
- Beginning January 1, 2020, mandates that all employers with five or more employees are required to provide one hour of mandatory sexual harassment and discrimination training to non-supervisory employees and all supervisors at least two hours of training.
- Employees need to be re-trained every 2 years following the initial training deadline
- See SB 778 below which altered SB 1343

THE FOLLOWING BILLS PASSED IN 2019

Assembly Bill 51

- **An act to add Section 12953 to the Government Code, and to add Section 432.6 to the Labor Code, relating to employment**
- Applies to contracts entered into, modified, or extended **on or after January 1, 2020**
- Prohibits 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)
 - Also prohibits employers from using voluntary opt-out clauses to avoid the reach of the bill
 - i.e. the law guts arbitration agreements by forbidding employers to require employees or job applicants to “waive any right, forum, or procedure for a violation” of the FEHA or the Labor Code
- Creates a new private right of action under FEHA – any violation of the various provisions in AB 51 will be subject to the private right of action under FEHA
- Makes actionable any threatened or actual retaliation against an individual who refuses to consent to the forbidden requirements. Also authorizes injunctive relief and attorney’s fees to any plaintiff who proves a violation

Senate Bill 707

- **An act to amend Sections 1280 and 1281.96 of, and to add Sections 1281.97, 1281.98, and 1281.99 to, the Code of Civil Procedure, relating to arbitration**
- Requires an employer or drafter of an arbitration agreement to pay the costs and fees associated with the arbitration.
 - Failure to pay the fees could constitute **material breach** of the arbitration agreement, or the employee could withdraw the claim from arbitration, or be entitled to attorney’s fees and costs.

- Requires a private arbitration company to collect and report aggregate demographic data regarding the ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation of all arbitrators

Assembly Bill 9

- **An act to amend Sections 12960 and 12965 of the Government Code, relating to employment**
- Extends the deadline to file workplace complaints with the Department of Fair Employment and Housing, from one year to three. It does not revive lapsed claims.

Assembly Bill 5

- **An act to amend Section 3351 of, and to add Section 2750.3 to, the Labor Code, and to amend Sections 606.5 and 621 of the Unemployment Insurance Code, relating to employment, and making an appropriation therefor**
- Codifies the “ABC” test for employee status adopted in the California Supreme Court’s 2018 decision in *Dynamex Operations West, Inc. v. Superior Court*
 - In *Dynamex*, the Court held that in order to defeat claims arising under California’s Wage Orders premised on independent contractor misclassification, a defendant must prove **(A)** the worker is free from control and direction of the hirer in connection with performing the work, both under contract and in fact; **(B)** the worker performs work outside the usual course of the hiring entity’s business; and **(C)** the worker customarily engages in an independently established trade, occupation, or business of the same nature as the work performed for the hirer
- The bill expands the reach of *Dynamex* by making the “ABC” test the default test for **all** Labor Code, Unemployment Insurance Code and Wage Order claims
 - The bill also broadens potential liability to businesses that are found to have misclassified independent contractors by empowering the State AG and certain city attorneys to pursue injunctions against businesses suspected of misclassifying independent contractors
- Transforms a large proportion of independent contract workers into employees, such as delivery and transportation drivers, based on new criteria for classification.
- The new criteria hold that if contractors are directed by employers on what to do and how many hours to work, are in the same line of business as the company and are not independently established, they will be **reclassified as employees**
- The law also holds some workers as exempt from the law including insurance brokers, doctors, dentists, lawyers, architects, engineers, accountants and real estate agents

Assembly Bill 749

- **An act to add Chapter 3.6 (commencing with Section 1002.5) to Title 14 of Part 2 of the Code of Civil Procedure, relating to civil actions**
- Prohibits settlement agreements that restrict an employee’s right to seek employment with the employer with whom the employee is settling a claim.
- Previously, a common stipulation in settlements between employers and employees would contain “no rehire” provisions which would bar the person from ever again applying for work with the company anywhere in the country

Senate Bill 778

- An act to amend Section 12950.1 of the Government Code, relating to employment, and declaring the urgency thereof, to take effect immediately
- Look to **SB 1343** above, passed in 2018, to see how it relates to **SB 778**
- Modifies **SB 1343** which requires that employers with five or more employees provide supervisory employees with 2 hours of sexual harassment training and non-supervisory employees 1 hour of training every 2 years.
 - The provisions remain in place; however, **SB 778** extends the deadline for sexual harassment training of non-supervisory employees from January 1, 2020 until January 1, 2021 and confirms that those supervisors who received 2018 training need not be trained again until 2020

Senate Bill 142

- An act to amend Sections 1030, 1031, and 1033 of, and to add Section 1034 to, the Labor Code, relating to employment
- Look to **AB 1976** above, passed in 2018, to see how it relates to **SB 142**. Essentially this is a repeat and even more broad
- Mandates an employer to provide a lactation room or another location which fulfills that purpose with access to a sink and refrigerator.
 - Cannot be a bathroom. Must be close to employee's work area. Shielded from view. Free from intrusion of other employees.
 - The replacement lactation location must also be safe, clean and free of hazardous materials, contain a surface to place materials, contain a place to sit and have access to electricity or resources necessary to operate a breast pump
 - If a multipurpose room is used for lactation and other uses, lactation must take precedence over the other uses
- Denial of lactation break time or space will be a violation under rest period laws, and subjects the employer to a \$100 penalty per violation
 - Contains an anti-retaliation provision and will also require an employer to develop and implement a policy regarding any lactation accommodations, and make it readily available to employees
- There is an undue hardship exemption for employers with fewer than 50 employees