CALSHRM LEGISLATIVE REPORT – OCTOBER 2018

By: Michael S. Kalt, CalSHRM Government Affairs Director
Wilson Turner Kosmo LLP
mkalt@wilsonturnerkosmo.com
Telephone: 619-236-9600
https://twitter.com/michaelkalt_law

LEGISLATIVE SUMMARY

The 2018 California Legislative Session ended with the expiration of the September 30th deadline for Governor Jerry Brown to sign or veto any bills. Not surprisingly, a number of significant employment bills were enacted in 2018, with #MeToo-related issues dominating the legislative agenda. New employment laws enacted during 2018 that California employers should consider include those that will:

- Require employers with five or more employees provide harassment training for both supervisory and non-supervisory employees (SB 1343);
- Impose new limits on settlement agreements regarding sexual harassment claims, including prohibiting confidentiality and non-disparagement provisions (SB 820 and SB 1300);
- Re-define legal standards for sexual harassment litigation, including making it more difficult to obtain summary judgment (SB 1300);
- Extend defamation protections for good faith sexual harassment allegations, workplace investigations and references (AB 2770).
- Expand workplace lactation accommodation requirements, including to prohibit usage of a bathroom for employees to express milk (AB 1976);
- Clarify various aspects of California's ban on prior salary history inquiries (AB 2282);
- Impose new limits during criminal record background checks (SB 1412); and
- Require larger, publicly-traded California corporations to have a certain number of female directors (SB 826).

There were also some significant bills that failed passage in 2018, including those that would have required larger employers to submit annual pay reports (SB 1284), authorized individual liability for FEHA retaliation (SB 1038), increased paid sick leave accrual/usage limits (AB 2841) required employers to accommodate medical marijuana (AB 2069) and banned mandatory arbitration agreements for most employment claims (AB 3080). Since the current two-year legislative cycle has closed, these particular bills are "dead" for now, but whether they will be proposed again in 2019 remains to be seen.

There were also a number of significant municipal-level developments, including San Francisco's prior salary history ban and "ban the box" amendments taking effect, as well as

numerous cities increasing their particular minimum wages further beyond the statewide minimum wage (which will also increase on January 1, 2019).

Below is an overview of the new statewide laws enacted in 2018, and a quick overview of some municipal-level employment developments that also occurred in 2018 or will take effect in 2019. Unless otherwise indicated, any new statewide laws take effect January 1, 2019.

NEW LAWS

Expanded Sexual Harassment Training Requirements (SB 1343)

Presently, so-called AB 1825 harassment training applies only to larger employers (i.e., with 50 or more employees) and only requires this training for supervisory employees. This law responds to concerns these limitations exclude most employers from providing any mandatory harassment training, and precludes arguably the most vulnerable employees (i.e., non-supervisory employees) from receiving any training.

Accordingly, amended Government Code section 12950.1 will require that by January 1, 2020, employers with five or more employees (including temporary or seasonal employees) provide the AB 1825 harassment training to all employees, not just supervisory employees, within six months of their hire. However, the mandatory harassment training for non-supervisory employees is for one hour rather than the two hours for supervisory employees. The employer may provide this training in conjunction with other training provided to the employees. The training may also be completed by the employee individually or as part of a group presentation, and may be completed in shorter segments, as long as the applicable hourly requirement is met.

The California Department of Fair Employment and Housing (DFEH) will be required to develop a one-hour and a two-hour sexual harassment online training video (depending on whether for supervisory or non-supervisory employees) and make it available on its web site, to develop these materials in at least six languages (English, Spanish, Simple Chinese, Korean, Tagalog and Vietnamese) and to provide them to an employer upon request. This online training will include an interactive feature requiring the viewer to periodically respond to questions in order for the online training course to continue playing.

Employers will have the option to develop its own training modules or to direct employees to view the DFEH's training video. An employer who develops their own training module may also direct employees to view the DFEH's online training course and this shall be deemed to have satisfied the employer's training obligations under this section. Any questions resulting from the online training course would be directed to the employer's Human Resources Department or equally qualified persons within the DFEH.

The DFEH will also be responsible for providing a method for employees who have completed the training to save electronically and print a certificate of completion.

Employers who provide this harassment training after January 1, 2019, are not be required to provide additional training and education by the January 1, 2020 deadline, but thereafter must provide such harassment training to all California employees every two years.

Beginning January 1, 2020, for seasonal and temporary employees, or employees hired to work for fewer than six months, an employer must provide training within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first. However, where the temporary employee is employed by a temporary services provider (as defined in Labor Code section 201.3) to perform services for clients, the temporary services provider and not the client shall provide the training.

Beginning January 1, 2020, sexual harassment prevention training for migrant and seasonal agricultural workers (as defined in 29 U.S.C. 1801, et seq.) shall be consistent with the training for nonsupervisory employees under Labor Code section 1684(a)(8).

"Omnibus" Sexual Harassment Bill (SB 1300)

This law makes numerous changes to the FEHA. First, it expands the content of so-called AB 1825 harassment training. While Government Code section 12950.1 presently requires employers with 50 or more employees to provide two hours of harassment training to supervisory employees within certain time frames, new Government Code section 12950.2 will allow this training to include "bystander intervention training." "Bystander intervention training" is defined to mean providing information and practical guidance to enable bystanders to recognize potentially problematic behaviors, and provide the motivation, skills, and confidence to intervene as appropriate.

While the FEHA presently provides that employers may be liable for the acts of non-employees with respect to sexual harassment of employees, applicants, unpaid interns or volunteers, SB 1300 extends that liability to any form of harassment, not just sexual.

Third, it adds new Government Code section 12964.5 to prohibit employers from requiring the execution of a "release of a claim or a right" under the FEHA in exchange for a raise, bonus, or as a condition of employment or continued employment. "Release of a claim or right" includes requiring an individual to sign a statement averring they do not possess any claim or injury against the employer, and includes the right to file and pursue a civil action or complaint with, or otherwise notify, a state agency, public prosecutor, law enforcement agency or any court or other governmental entity.

It also precludes employers from requiring an employee to sign a non-disparagement agreement or other document prohibiting an employee from disclosing information "about unlawful acts in the workplace," including but not limited to sexual harassment.

It also nullifies any such improper "releases" or "non-disparagement provisions" as contrary to

public policy.

However, this section does not apply to a negotiated settlement agreement to resolve an underlying claim under FEHA that has been filed by the employee in court, before an administrative agency, alternative dispute resolution forum or through an employer's internal complaint process. "Negotiated" means that the agreement is voluntary, deliberate and informed, provides consideration to the employee and the employee is given notice and an opportunity to retain an attorney or is represented by an attorney.

It also amends the FEHA's costs provisions which presently authorize the court to award a prevailing party reasonable attorney's fees and costs, including expert witness fees. As amended, a prevailing defendant will be precluded from being awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so. It also specifies that this limitation on the defendant's costs recovery applies notwithstanding the provisions of Code of Civil Procedure section 998 (i.e., if the defendant offered a pre-judgment offer to compromise greater than the plaintiff's trial recovery.)

Lastly, this law contains a number of Legislative declarations concerning the appropriate legal standard courts should consider when evaluating harassment claims. These include that harassment cases are rarely appropriate for summary judgment, that a single instance of harassment may be sufficient for a hostile work environment claim, and that courts should not apply the so-called "stray remarks" doctrine developed under federal law.

Prohibition on Confidentiality in Sexual Harassment Settlement Agreements (SB 820)

This law responds to concerns that nondisclosure provisions in sexual harassment settlement agreements conceal and perpetuate harassing behavior. Accordingly, new Code of Civil Procedure section 1001 will prohibit settlement agreement provisions preventing the disclosure of "factual information related to a claim filed in a civil action or a complaint filed in an administrative action" regarding: (1) sexual assault (as defined) (2) sexual harassment under the Unruh Act, (3) workplace sexual harassment, sex discrimination or retaliation against a person for reporting sex harassment or discrimination under the FEHA; or (4) harassment or discrimination based on sex, or retaliation, by the owner of a housing accommodation (as defined). It further prohibits the court from entering any stipulation or order that restricts the disclosure of information in a manner that conflicts with this new section.

Any settlement agreement containing such provisions entered into on or after January 1, 2019 will be deemed void as against public policy.

This general prohibition does not apply to nondisclosure provisions regarding the identity of the claimant (or facts that would lead to the discovery of their identity), if requested by the claimant, as opposed to the employer or defendant, unless a government agency or public official is a party

to the settlement agreement. It also does not prohibit provisions precluding the disclosure of the amount paid in settlement of a claim (as opposed to the "factual information" underlying the claim).

Targeting Provisions Precluding Sexual Harassment-Related Testimony (AB 3109)

This bill seeks to limit the use of nondisclosure provisions in contracts or settlement agreements precluding a sexual harassment victim from shedding light on this misconduct. Accordingly, new Civil Code section 1670.11 will render void and unenforceable any contractual or settlement agreement provision entered into on or after January 1, 2019 that waives a party's right to testify in any proceeding concerning alleged criminal conduct or sexual harassment by the other party or the other party's employees/agents when the testifying party has been required or requested to attend by court order/subpoena or by written request by an administrative agency or the legislature. This new section does not eliminate all non-disclosure agreements, and does not enable a signatory to simply voluntarily show up and speak at a public hearing, but it will enable them to do so in response to a subpoena or written request.

Expanded Sexual Harassment Liability in Business, Service, or Professional Relationships (SB 224)

In addition to the FEHA, which governs workplace sexual harassment, Civil Code section 51.9 prohibits sexual harassment in various business, service, or professional relationships that are either specifically identified in the statute or that are "substantially similar" to those identified. Responding to recent high-profile sexual harassment allegations, this law specifically identifies investors, elected officials, lobbyists, and directors or producers as the types of individuals who can be liable for sexual harassment occurring within the business, service, or professional relationship. It also removes the previous requirement that an individual who brings a cause of action for sexual harassment would need to demonstrate that this relationship would not be easy to terminate.

Responding to concerns that some harassers use the prospect of future work to initiate unwelcome sexual harassment, this law also imposes liability upon individuals who hold themselves out as being able to help the plaintiff establish a business, service or professional relationship with the defendant or a third party.

It also amends the FEHA (specifically Government Code sections 12930(f)(2) and 12948) to authorize the DFEH to handle sexual harassment complaints arising from these non-employer relationships and to specify that it will be an unlawful practice under FEHA for a person to aid or conspire in the denial of rights in Civil Code section 51.9.

New Defamation Protections for Sexual Harassment Complaints, Investigations and References (AB 2770)

This law addresses concerns that a fear of potential defamation liability dissuades harassment complaints from being made or from being investigated, or dissuades former employers from advising prospective employers about a former employer's sexually harassing behavior. Accordingly, it amends Civil Code section 47(c) to provide conditional protections against defamation claims for sexual harassment allegations and investigations. Specifically, it provides that the so-called "common interest" privilege applies to statements made "without malice" relating to a complaint of sexual harassment by an employee to an employer based upon credible evidence. It also applies to subsequent communications by the employer to other "interested persons" during a sexual harassment investigation.

Perhaps most significantly for employers, it amends Civil Code section 47(c) to provide a so-called "safe harbor" against defamation liability allowing employers to provide information during reference checks involving employees who previously engaged in sexually harassing behavior. While this section previously provided immunity for non-malicious responses as to whether the employee in question was eligible for rehire, this amendment now allows the employer or their agent to indicate whether the decision to not rehire is based upon the employer's determination that the former employee engaged in sexual harassment. In light of this latter amendment, employers will need to consider whether they will provide this additional information if contacted, and whether they will request this information when undertaking reference checks.

Harassment and Discrimination Protections in Building and Construction Trade Apprenticeships (AB 2358)

While California law presently prohibits discrimination and harassment in apprenticeship training programs based on certain factors, this industry-specific law will expressly prohibit discrimination in any building and construction trade apprenticeship program based on the same protected categories enumerated in FEHA. These non-discrimination protections will apply to the following ten items: (1) recruitment, outreach and selection procedures; (2) hiring or placement, upgrading, periodic advancement, promotion, demotion, transfer, layoff, termination, right of return from layoff, and rehiring; (3) rotation among work processes; (4) imposition of penalties or other disciplinary action; (5) rates of pay or any other form of compensation and changes in compensation; (6) conditions of work; (7) hours of work and hours or training provided; (8) job assignments; (9) leaves of absence, sick leave, or any other leave, and (10) any other benefit, term, condition or privilege associated with apprenticeship.

Apprenticeship programs will also be required to take certain steps (e.g., designating a compliance officer, etc.) to oversee this commitment to preventing harassment and discrimination and to retain certain records reflecting these efforts. The Administrator of

Apprenticeships will look to the FEHA and the DFEH's interpretive guidance when implementing these programs.

Human Trafficking Awareness Training for Hotel Employees (SB 970)

Reflecting the Legislature's recent focus on combatting human trafficking, this amends the FEHA to require certain employers (i.e., hotels and motels, but not bed and breakfast inns [as defined under the Business and Professions Code]) to provide training regarding human trafficking. Specifically, by January 1, 2020, covered employers must provide at least 20 minutes of classroom "or other interactive training and education" regarding human trafficking awareness to each employee likely to interact or come into contact with victims of human trafficking and employed as of July 1, 2019, and to each such employee within six months of their employment in such a role. After January 1, 2020, employers must provide such human trafficking awareness training to such employees every two years. (Covered employers who have already provided this training after January 1, 2019 will be exempted from the January 1, 2020 deadline but would be required to provide the biannual training thereafter).

Employees deemed "likely to interact or come into contact with human trafficking" must include those that have recurring interactions with the public, including those in the reception area, housekeepers, bellhops, and drivers. The mandated training must include the following: (1) the definition of human trafficking and commercial exploitation of children; (2) guidance on how to identify individuals most at risk for human trafficking; (3) the difference between labor and sex trafficking specific to the hotel sector; (4) guidance on the role of hospitality employees in reporting and responding regarding human trafficking; and (5) the contact information of appropriate agencies. Employers are not precluded from providing additional training beyond these requirements, and are also permitted to use information provided by certain specified federal agencies, including the Department of Justice.

The failure to provide this training shall not "by itself" result in the employer's or employee's liability to human trafficking victims. The DFEH will also have the authority to issue an order requiring compliance.

Harassment and Eating Disorder Training for Talent Agencies (AB 2338)

This industry-specific bill requires talent agencies provide educational materials regarding sexual harassment prevention, retaliation and reporting resources, and nutrition and eating disorders to their artists. Amongst other things, the talent agency must provide these education materials within 90 days of representation or agency procurement of an engagement, whichever comes first. The sexual harassment educational materials shall include, at a minimum, the components specified in DFEH Form 185, and the nutritional educational materials shall include, at a minimum, the components specified in the National Institute of Health's Eating Disorders Internet web site.

Similarly, regarding minors in the entertainment industry, the minor and their parent/legal guardian must receive and complete training in sexual harassment prevention, retaliation and reporting resources. This harassment prevention training shall be provided by a vendor on-site, electronically, via internet web site or other means.

Lactation Area Cannot be a Bathroom (AB 1976)

Presently, Labor Code section 1031 requires employers to make reasonable efforts to provide an employee with the use of a room or other location "other than a toilet stall" for purposes of expressing milk at work. Responding to concerns this language permitted usage of a bathroom, as opposed to simply a toilet stall, for lactation purposes, amended Labor Code section 1031 makes clear that an employer must make reasonable efforts to provide an employee with the use of a room or other location, other than a bathroom. In doing so, it conforms the Labor Code to the federal Affordable Care Act which specifies that the space for lactation purposes cannot be a bathroom.

However, if an employer can demonstrate to the department that the "other than a bathroom" requirement would impose an undue hardship when considered in relation to the size, nature or structure of the employer's business, the employer shall still make reasonable efforts to provide a location other than a toilet stall in close proximity to an employee's work area.

This law also specifies that an employer may comply with these requirements by providing a "temporary lactation location" if all of the following conditions are met: (1) the employer is unable to provide a permanent lactation location because of operational, financial or space limitations; (2) the temporary lactation location is private and free from intrusion while an employee expresses milk; (3) the temporary lactation location is used only for lactation purposes while an employee expresses milk; and (4) the temporary lactation location otherwise meets California requirements concerning lactation accommodation.

Similarly, it provides that an agricultural employer (as defined) will comply with this section if it provides an employee wanting to express milk with a private, enclosed, and shaded, including, but not limited to, the air-conditioned cab of a truck or tractor.

Required Number of Female Directors for California Corporations (SB 826)

This law requires that by no later than the close of the 2019 calendar year, each publicly held, domestic or foreign corporation with its principal executive offices in California must have at least one female on its board of directors. The corporation will be permitted to increase the number of directors on its board to comply with this requirement. By the close of the 2021 calendar year, the corporation must have at least two female directors if the corporation has five authorized directors or three female directors if the corporation has six or more authorized directors.

For purposes of these requirements, "female" means "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth." A "publicly held corporation" means a corporation with "outstanding shares listed on a major United States stock exchange."

The law also requires the Secretary of State to publish various reports on its web site documenting the number of corporations in compliance with these provisions, and to impose fines for non-compliance. The Secretary of State may impose fines for violating this section of $100,000 for the first violation and $300,000 for each subsequent violation. Each director seat required by this section to be held by a female which is not held by a female during at least a portion of a calendar year shall count as a violation, but a female director having held a seat for at least a portion of the year shall not be a violation.

Clarifications Regarding Ban on Prior Salary History Inquiries (AB 2282)

In 2017, California enacted AB 168 precluding employers from inquiring about prior salary history and requiring employers to provide upon reasonable request by an applicant a pay scale for a position. However, employers have subsequently raised numerous questions, including who is considered "an applicant," what is a "pay scale" and what constitutes a "reasonable request?"

This law is intended to clarify several of the provisions and terms used in AB 168. Specifically, it amends Labor Code section 432.3 to define "pay scale" as a "salary or hourly wage range." It also defines "reasonable request" as a "request after an applicant has completed an initial interview with the employer," and further defines "applicant" and "applicant for employment" as "an individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position." It also adds new subsection (i) specifying that section 432.3 does not prohibit an employer from asking an applicant about his or her salary expectation for the position.

In 2015, California amended its Equal Pay Act (Labor Code section 1197.5) to state that "prior salary shall not, by itself, justify any disparity in compensation." This law strikes that language and makes clear that prior salary history "shall not justify <u>any</u> disparity in compensation." It further makes clear that while an employer may make a compensation decision based on a current employee's existing salary, any wage differential resulting from that compensation decision must be justified by one or more of the specified factors in section 1197.5 (e.g., seniority system, merit system, etc.).

Clarified and Tightened Exceptions to "Ban the Box" Limitations (SB 1412)

In recent years, including in the "ban the box" law implemented in 2017 (AB 1008), California has enacted various limitations on an employer's ability to obtain or consider information related to an applicant's or employee's conviction history. However, Labor Code section 432.7 has also

identified various exceptions from these general prohibitions, including if the inquiries are required by other state or federal law.

Responding to concerns these exceptions were either insufficiently clear or too broad, this law amends the exceptions presently contained in subsection (m) of Labor Code section 432.7. More importantly, it tightens several of these exceptions and limits their consideration to only "particular" convictions, the goal being to prevent the consideration of convictions other than those that would specifically bar the applicant from holding the desired position. Specifically, it is intended to address concerns that employers who were authorized to obtain and consider information about particular disqualifying convictions were running more general conviction history checks that allowed them to obtain and potentially consider items, including expunged or judicially dismissed convictions, beyond the particular disqualifying conviction.

Accordingly, it specifies these "ban the box"-type limitations do not prohibit an employer from asking an applicant about, or seeking from any source information regarding, a particular conviction of the applicant if, pursuant to state or federal law, (1) the employer is required to obtain information regarding the "particular" conviction of the applicant, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated or judicially dismissed following probation; (2) the applicant would be required to possess or use a firearm in the course of employment; (3) an individual with that "particular" conviction is prohibited by law from holding the position sought, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated or judicially dismissed following probation; or (4) the employer is prohibited by law from hiring an applicant who has that "particular" conviction, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.

It further defines "particular conviction" as a "conviction for specific criminal conduct or a category of criminal offenses prescribed by any federal law, federal regulation or state law that contains requirements, exclusions, or both, expressly based on that specific criminal conduct or category of criminal offenses."

It also clarifies this new law would not prohibit employers required by state, federal or local law to conduct criminal background checks for employment purposes, or to restrict employment based on criminal history from complying with these requirements. It also allows an employer to seek or request an applicant's criminal history that has been obtained pursuant to procedures otherwise provided for under federal, state or local law. Finally, it specifies that it applies to an employer, regardless of whether a public agency or private individual or corporation.

California's Minimum Wage Increases Again (SB 3)

In 2016, California enacted SB 3, authorizing annual minimum wage increases until it reaches $15.00, and identifying a two-tiered schedule for the effective dates of these increases depending on whether the employer has more than 25 employees. On January 1, 2019, the minimum wage

for employers with 26 or more employees will increase to $12.00 per hour, meaning the salary threshold for exemption purposes will be $49,970 annually. On January 1, 2019, the minimum wage for employers with 25 or fewer employees will increase to $11.00 per hour, and the salary threshold exemption for those employers will be $45,760 annually.

Inspection of Payroll Records (SB 1252)

Although Labor Code section 226 states that employers must permit an employee to inspect or copy certain payroll-related records, some employers were apparently requiring the employees to make their own copies, notwithstanding the statute's language authorizing the employer to charge the employee for the actual copying costs incurred by the employer. This law amends section 226 to clarify that the employee has the right to inspect or "receive a copy" of these records, meaning the employer must make the copies if the employee requests. As a reminder, the failure by an employer to permit the employee to inspect or receive a copy of these records within the statutory deadline entitles the employee to receive a $750 penalty from the employer.

On-Duty Rest Periods Permitted for Certain Unionized Employees at Petroleum Facilities (AB 2605)

The California Supreme Court decision in *Augustus v. ABM Security Services, Inc.,* (2016) 2 Cal.5th 257 held that "on-call" or "on-duty" rest periods do not satisfy an employer's obligation to relieve employees of all work-related duties and employer control. Responding to concerns this ruling would mean certain safety-sensitive positions would not be able to effectively respond in an emergency situation, this law provides a temporary, industry-specific exemption for certain unionized employees. Specifically, it would until January 1, 2021, allow the usage of so-called on-duty/on-call rest/recovery periods to employees that (1) hold a safety-sensitive position at a petroleum facility that must respond to emergencies and must carry a communications device or remain on premises; (2) the position is governed by Wage Order 1; and (3) the employee is subject to a collective bargaining agreement containing specifically-enumerated provisions.

If the non-exempt employee is affirmatively required to interrupt their rest period to address an emergency, another rest period must be permitted in a reasonably prompt manner and, if not, the employer shall pay the employee one hour of pay at the employee's regular rate of pay for the missed meal period. The employer will also be required to list on the itemized wage statement the total hours or pay owed to the employee resulting from the missed rest period.

This law was deemed emergency legislation and is immediately effective.

Later Meal Periods Proposed for Certain Commercial Drivers (AB 2610)

Labor Code section 512 generally prohibits an employer from requiring an employee to work more than five hours per day without providing a thirty minute meal period, and also authorizes

the Industrial Welfare Commission to adopt orders permitting meal periods to commence after six hours of work if consistent with the health and welfare of affected employees. This law amends section 512 to specifically allow commercial drivers employed by a motor carrier transporting nutrients and byproducts from a commercial feed manufacturer under certain specified conditions (e.g., in rural areas), to commence a meal period after six hours of work provided the driver's regular rate of pay is at least one-and-a-half times the minimum wage and the driver receives overtime compensation under Labor Code section 510. The law's author states this flexibility will enable drivers to find a safe place to stop rather than pulling over in unsafe areas.

PAGA Exemption Provided for Certain Unionized Construction Workers (AB 1654)

While broader efforts to reform the Labor Code Private Attorneys General Act of 2004 (PAGA) have repeatedly failed, this law provides an exemption from some unionized construction workers. Under new Labor Code section 2699.6, construction workers covered by a collective bargaining agreement that was in effect at any prior to January 1, 2025 and that contains specifically-enumerated provisions will be exempt from PAGA. This exemption, however, will expire on the date the collective bargaining agreement expires or on January 1, 2028, whichever is earlier.

Potential Joint Liability for Employers that Contract with Port Drayage Service Providers (SB 1402)

In 2014, California enacted AB 1897 to allow a "client employer" to be held jointly liable for the wage and hour violations of a labor contractor under certain circumstances. This industry-specific law attempts to address alleged wide-spread misclassification in the port drayage motor carrier industry (i.e., short-haul transportation of cargo from a port) by holding "customers" (as defined) with 25 or more employees jointly liable for wage and hour violations of the labor contractor providing the port drayage driver. Simply summarized, the DLSE will to publish a list of trucking companies with unsatisfied judgments against them for labor law violations, and a customer who subsequently contracts with a listed entity will be jointly liable for any wage and hour violations with respect to the drivers hauling freight for the customer.

This law has a number of industry-specific definitions as well as notice procedures and a mechanism for the customer to avoid liability by cancelling its contract, so any potentially affected employers or port drayage operators may wish to review this law in further detail.

Publicly-Available Injury and Illness Reports (AB 2334)

Highlighting the ongoing tension between California and the federal government, this law will potentially impose new reporting obligations on employers regarding workplace illnesses and injuries. For background, in 2016 the United States Department of Labor adopted the Improve Tracking of Workplace Injuries and Illnesses Act proposed by the Obama Administration, but in

2017 this same agency under the Trump Administration proposed a rule to relax these heightened reporting requirements for workplace injury and illnesses.

In response, this law adds new Labor Code section 6410.2 to require Cal-OSHA to monitor the United States OSHA's efforts to implement the previously-proposed federal regulations regarding electronic submission of workplace injury and illness data. If Cal-OSHA determines that the federal OSHA has eliminated the previously-proposed regulation to require employers to electronically submit this information, then Cal-OSHA will be required within 120 to convene an advisory committee to identify the changes necessary to protect the goals of the Improve Tracking of Workplace Injuries and Illnesses Act, as proposed by the Obama Administration.

It also clarifies that an OSHA "occurrence" for record-keeping violations continues until the violation is corrected, the division discovers the violation or the duty to comply with the requirement is no longer applicable. In other words, whereas Cal-OSHA could previously issue recordkeeping violation citations for six months after an injury, this new definition will extend this limitations period.

Whistleblower Retaliation Protections for Legislative Employees (AB 403)

Responding to multiple high-profile sexual harassment claims in the Legislature, this law prohibits interference with the right of legislative employees to make protected disclosures of ethics violations and prohibits retaliation against employees who have made such protected disclosures. It also establishes a procedure for legislative employees to report violations of these prohibitions to the Legislature, and imposes civil and criminal liability on an individual violating these protections. It also imposes civil liability on any entity that interferes with, or retaliates against, a legislative employee's exercise of the right to make a protected disclosure.

California Agencies Publish Resources Regarding AB 450, and District Court Enjoins Portions of It

Taking effect January 1, 2018, California's Immigrant Worker Protection Act (AB 450) has continued to generate headlines as the federal government increases worksite enforcement to ensure employment eligibility. For background, AB 450: (1) imposed new limits on the ability of California employers to voluntarily provide worksite access to immigration authorities; (2) imposed new notice and posting requirements on employers; and (3) enacted significant statutory penalties.

The first of the new posting/notice requirements is implicated when immigration agencies provide notice of an intent to inspect I-9 forms or other employment records. Under that circumstance, new Labor Code section 90.2 requires employers that receive a Notice of Inspection of I-9 records or other employment records by an immigration agency to post notice of this impending inspection. This notice must be posted within 72 hours of receiving notice of the inspection in the language the employer normally uses to communicate employment-related

information to employees. This notice must also include: (1) the name of the immigration agency conducting the inspection; (2) the date the employer received notice; (3) the nature of the inspection, if known; and (4) a copy of the Notice of Inspection of I-9 Employment Eligibility Verification Forms for the inspection to be conducted.

Fortunately perhaps, AB 450 directed the Division of Labor Standards Enforcement (DLSE) to develop and publish on its website a template posting that employers may use to satisfy this pre-inspection notice of a forthcoming inspection by a federal immigration agency of I-9 forms or other employment records. In 2018, the DLSE published this sample template on its website at: http://www.dir.ca.gov/DLSE/LC_90.2_EE_Notice.pdf. Employers are permitted to use this DLSE-provided template or to develop their own version provided it contains all the statutorily-required information.

The California Labor Commissioner and the California Attorney General also published "joint guidance" on AB 450 in the form of Frequently Asked Questions available at: https://oag.ca.gov/sites/all/files/agweb/pdfs/immigrants/immigration-ab450.pdf.

In a separate development, a United States District Court enjoined those portions of AB 450 that had eliminated an employer's ability to provide consent to a federal immigration agency's access to the employer's property or records. While previously the agency could obtain access through either a judicial warrant/subpoena or an employer's consent, AB 450 had eliminated the employer's ability to consent and required the agency to have a judicial warrant/subpoena. The District Court's ruling returned the employers ability to consent to the agency's access, but employers should continue to monitor legal developments on this point.

Expedited Enforcement of ALRB Awards (AB 2751)

California's Agricultural Labor Relations Act of 1975 grants agricultural employees the right to form and join labor organizations and engage in collective bargaining, and creates the Agricultural Labor Relations Board (ALRB) to administer and enforce this act, including certifying elections and issuing remedies for unfair labor practices. Responding to concerns about delayed ALRB enforcement, new Labor Code section 1149.3 requires the ALRB to process to final board order all decisions with monetary remedies owed to employees, including those requiring a compliance proceeding, within one year of a finding of liability, unless certain exceptions apply.

It also creates new mediation and conciliation timeline requirements for appealing or disputing a final decision of the ALRB. Specifically, it provides that within 60 days of an ALRB order adopting the collective bargaining provisions in a mediator's report, either party or the board may file an action for enforcement despite any pending legal challenge. It also requires immediate implementation of an ALRB order adopting a mediator's report by the parties regardless of any pending legal challenges. It also requires a party seeking to stay a final ALRB

order to present clear and convincing evidence of success on appeal and irreparable harm to either an appellant or petitioner.

Family Leave Benefits for Military-Related Purposes (SB 1123)

This law expands California's "paid family leave" provisions beginning January 1, 2021 to allow an employee to receive wage replacement benefits for time off due to qualifying exigencies (as defined) related to the service by the employee's spouse, domestic partner, child or parent in the United States armed service. Employees seeking such benefits from the Employment Development Department may be required to provide copies of the active duty orders or other military-issued documentation confirming the family member's service.

Paid Family Leave Changes (AB 2587)

California's so-called "paid family leave" benefit provides up to 12-weeks' wage replacement benefits funded through the state disability compensation program to allow employees to take time off to care for a seriously ill family member or to bond with a minor child. Presently, Unemployment Insurance Code section 3303.1 authorizes an employer to condition an employee's receipt of these benefits by requiring the employee to take up to two weeks of earned but unused vacation leave before receiving benefits. This law eliminates that authorization and condition the requirement to make it conform to a similar law passed in 2016 (AB 908).

MUNICIPAL-LEVEL EMPLOYMENT DEVELOPMENTS

San Francisco's Salary History Ban Ordinance Differs Slightly From AB 2282

Effective July 1, 2018, San Francisco's Consideration of Salary History Ordinance both provided the basis for the state law AB 2282 discussed above, and contains some differences from state law, which are pertinent to San Francisco employers as well as may be potentially instructive in interpreting or further amending the state law. The key differences are that San Francisco's ordinance:

(1) prohibits employers from providing the salary history of current or former employees without written authorization or unless publicly available (employers should review and update their reference policy to include this requirement);

(2) requires employers to post a notice from the San Francisco Office of Labor Standards Enforcement about these protections at every work location;

(3) expressly allows background checks (which the state law implicitly does) but also makes clear that if a background check reveals salary history it cannot be considered;

(4) like the state law allows discussion of salary expectations, but more directly specifies that this permits discussion of various benefits (e.g., stock options, etc.) which the employee may forfeit if leaving the current employer;

(5) contains protections against retaliation (including refusal to hire) for refusing to provide salary information; and

(6) has a number of specific statutory penalties.

San Francisco Amends its Ban-the-Box Law, Effective October 1, 2018

As is often the case, the City of San Francisco had actually enacted its own version of a ban-the-box law governing an employer's ability to conduct criminal history checks well before California's statewide version (AB 1008) took effect. In April 2018, the San Francisco Board of Supervisors amended this Fair Chance Ordinance (effective October 1, 2018) both to conform its version with the statewide version where needed, but also then to expand its version.

For instance, whereas the San Francisco Ordinance has previously allowed a criminal conviction check either after a live interview or a conditional offer, the amendments now permit a criminal conviction check only after a conditional offer, thus aligning it with the statewide version.

The amended ordinance is now also broader, applying to employers with five or more persons rather than the 20 or more persons when originally enacted. Second, while the original version had allowed inquiries about convictions involving decriminalized behavior (e.g., non-commercial use of marijuana) that were less than seven years old, the amended version prohibits any inquiries about or consideration of convictions for decriminalized behavior, regardless of how recent. While the original version had no authorized statutory penalties for a first violation, the amendments now authorize a penalty up to $500 for the first penalty, and sharply higher penalties for subsequent violations.

Additional information about the amended San Francisco Fair Chance Ordinance is available at: https://sfgov.org/olse/fair-chance-ordinance-fco

Municipality Minimum Wage Changes

In addition to the state-wide minimum wage increases effective January 1, 2019, many cities increased their minimum wage in 2018 and/or will do so in 2019.

On July 1, 2018, California municipalities increased their minimum wages as follows:

Southern California	Effective Date of New Minimum Wage	New Minimum Wage—25 or Fewer Employees	New Minimum Wage—26 or More Employees
Los Angeles (LAX employees)	7/1/2018	$13.75 (with benefits) $18.99 (without benefits)	$13.75 (with benefits) $18.99 (without benefits)
Los Angeles	7/1/2018	$12.00	$13.25
Los Angeles County (Unincorporated areas)	7/1/2018	$12.00	$13.25
Malibu	7/1/2018	$12.00	$13.25
Pasadena	7/1/2018	$12.00	$13.25

Southern California	Effective Date of New Minimum Wage	New Minimum Wage—25 or Fewer Employees	New Minimum Wage—26 or More Employees
Santa Monica	7/1/2018	$12.00	$13.25

Northern California	Effective Date of New Minimum Wage	New Minimum Wage—25 or Fewer Employees	New Minimum Wage—26 or More Employees
Berkeley	10/1/2018	$15.00	$15.00
Emeryville	7/1/2018	**(55 or fewer employees)** $15.00	**(56+ employees)** $15.69
Milpitas	7/1/2018	$13.50	$13.50
San Francisco	7/1/2018	$15.00	$15.00
San Leandro	7/1/2018	$13.00	$13.00
San Mateo County (County contractors)	7/1/2018	$16.00	$16.00

A number of municipalities will also increase their minimum wage requirements in 2019 as follows:

2019 Minimum Wage Increases

City	Minimum Wage	Effective Date
Berkeley	TBD*	July 1, 2019
Cupertino	$15.00	January 1, 2019
El Cerrito	$15.00	January 1, 2019
Emeryville	$16.00 est.*	July 1, 2019
Los Altos	$15.00	January 1, 2019
Los Angeles City	$13.25 (1–25 employees) $14.25 (26+ employees)	July 1, 2019
Los Angeles (Unincorporated)	$13.25 (1–25 employees) $14.25 (26+ employees)	July 1, 2019
Malibu	$13.25 (1–25 employees) $14.25 (26+ employees)	July 1, 2019
Milpitas	$15.00	July 1, 2019
Mountain View	TBD*	January 1, 2019
Oakland	TBD*	January 1, 2019
Palo Alto	$15.00	January 1, 2019
Pasadena	$14.25**	July 1, 2019
Richmond	$15.00 (no medical benefits) $13.50 (medical benefits)	January 1, 2019
San Diego	TBD*	January 1, 2019
San Francisco	TBD*	July 1, 2019
San Jose	$15.00	January 1, 2019
San Leandro	$14.00	July 1, 2019
San Mateo	$15.00 (for-profit)	January 1, 2019

City	Minimum Wage	Effective Date
	$13.50 (non-profit)	
Santa Clara	$15.00	January 1, 2019
Santa Monica	$13.25 (1–25 employees) $14.25 (26+ employees)	July 1, 2019
Sunnyvale	TBD*	January 1, 2019

*Tied to Consumer Price Index.

**Requires further action by the City Council and City Manager, including presentation and review of a report summarizing the impact of the city-wide minimum wage, and subsequent amendment to the ordinance.