

2019 cali for nia

LEAD ADVOCATE IMPACT

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**EMPLOYMENT LAW AND LEGISLATIVE FORECAST
STATE LEGISLATIVE & HR CONFERENCE**

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EMPLOYMENT LAW AND LEGISLATIVE FORECAST

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Session Objectives

- Provide an overview of currently pending employment bills potentially affecting Human Resources Professionals
- Identify how these bills may change current policies
- Discuss tips for providing HR-input into the legislative process

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The California Outlook



- Continued one-party rule in Sacramento
 - sizable “super majorities” in both legislative chambers
 - new Governor from same party
- Recent trends: approximately 20 new employment laws annually between 2011 to 2018 (slight decrease in 2018)
- Recent trends: CA municipalities increasingly enacting employment laws

California vs. Washington, D.C.

- Democrats control the California Governor's Mansion and the Republicans control the White House.
- CA has a new governor



2019 Legislative Calendar

04/26/19 - Last day Policy Committees vote on fiscal bills

05/31/19 - Last day bills pass first legislative chamber

09/09/19 - Last day to amend bills

09/13/19 - Last day second legislative
chamber to pass bills

10/13/19 - Last day Governor sign/veto bills

01/01/20 - (Most) news laws take effect



Resources for Monitoring Legislation

LEAD
ADVOCATE
IMPACT

- SHRM (<https://www.shrm.org>)
- CalSHRM
 - Twitter: @CalSHRM
@MichaelKalt_law
@SHRMCAJason
 - “One Voice Newsletter” (<http://calshrm.org/one-voice.html>)
- California Legislative (<http://leginfo.legislature.ca.gov/>)
- NCSL (<https://www.ncsl.org>)

Legislative Themes

- 2017 – “Resisting” President Trump



- 2018 - #MeTOO

#MeTOO

- 2019 – If at first you don’t succeed...

“To be continued...”

Harassment Training Deadline Clarification (AB 778)

- SB 1343 extends harassment training to (a) almost all employers; and (b) to non-supervisory employees by 1/1/2020
- Confusion exists regarding duty to retrain supervisors trained in 2018 in 2019 (DFEH FAQ suggests re-training required)
- SB 778 would clarify no duty to retrain employees trained in 2018 until after 12/31/20
- CalSHRM position: Support



Additional Sexual Harassment Protections (AB 171)

- Amends Labor Code section 230 to prohibit discrimination/ retaliation against sexual harassment victims (along with victims of sexual assault, stalking, domestic violence)
- Creates 90-day presumption of retaliation in favor of any such victims for employment changes after employer learns of status (Note: no duty to make complaint to be protected)
- Vetoed in 2018 (AB 3081)



Time-Off for Harassment Victims and Family (AB 628)

- Amends Labor Code section 230 to prohibit discrimination/ retaliation against sexual harassment victims who take time off for legal relief (along with victims of sexual assault, stalking, domestic violence)
- Similarly amends Labor Code section 230.1 to require employers with 25+ employees to provide time off work for specific purposes to sexual harassment victims (along with victims of sexual assault, stalking, domestic violence)
- Extends job-protected leave for both purposes to a victim's "family members" (as defined)
- Vetoed in 2018 (AB 3081)

Joint Responsibility for Labor Contractor Harassment (AB 170)

- Amends FEHA to require client employers and labor contractors to share “responsibility” and “liability” for “harassment”
- Would apply broadly to all harassment (not just sexual) and regardless whether the harasser employed by the client or labor contractor
- Both entities have responsibility to address any harassment and can be liable if fail to take prompt and effective remedial measures once knew or should have known
- Prohibits client employer from shifting responsibility to labor contractor
- Vetoed in 2018 (AB 3081)



Veterans' Hiring Preference (AB 160)

- Current: FEHA recognizes limited veterans' hiring preference for "Vietnam-era" veterans and as defense against "sex" discrimination
- Proposal: Expand FEHA's current veterans' hiring preference to all qualified veterans and as defense to all discrimination claims
- Employers must comply with certain requirements, including applying uniformly and not as pretext
- CalSHRM/SHRM support



Preventing Race Discrimination Related to Hairstyles (SB 188)

- Amends FEHA's definition of race to include "traits historically associated with race including...hair texture and protective hairstyles."
- NYC's new guidelines suggest possible "Grooming Policy" employer violations:
 - Prohibiting twists, locks, braids, etc.
 - Requiring altering hairstyle to conform to appearance standards
- "Traits" broader than hairstyles?

Ban On Arbitration Agreements (AB 51)

- Preclude any mandatory waivers of “rights, forums, or procedures” for FEHA and Labor Code violations (i.e., arbitration agreements)
- Prohibits retaliation (including termination of application) for applicant or employee who refuses to sign improper waiver
- Prevailing plaintiffs entitled to injunctive relief and attorneys’ fees

Ban On Arbitration Agreements (AB 51) [Cont'd]

- Prohibits conditioning employment upon employee's or independent contractor's agreement not to report sexual harassment suffered, witnessed or observed
- New rules would be contained in Labor Code provisions, but violations also constitute "unlawful employment practices" under FEHA
 - PAGA exposure?
- Vetoed in 2018 (AB 3080)



Additional Arbitration-Related Penalties (SB 707)

- Employer's failure to pay arbitration fees breaches agreement and waives ability to compel arbitration
- Employee would have option to withdraw from arbitration and return to court, or proceed with arbitration but severe sanctions upon employer

Additional FEHA Changes

- Extend statute of limitations from one to three years for all FEHA claims (AB 9)
- Delete FEHA's preemption provision regarding local ordinances (AB 218)
- Industry-specific harassment/implicit bias training (AB 547, AB 241-243)

Lactation Accommodation Requirements (SB 142)

- Expands lactation accommodation requirements beyond new changes (AB 1976)
- Requires employees provide reasonable break time each time employee needs to express milk
- Reiterates location shall not be a bathroom and must be close to work area and shielded from view/intrusion
- Identifies specific physical requirements, including providing place to sit/place breast pump, and with access to electricity, water and refrigeration
- Reaffirms rules for “temporary lactation locations” and permits shared spaces for multi-tenant buildings

Lactation Accommodation Requirements (SB 142) [Cont'd]

- Requires employers to have written lactation accommodation policy and include in handbook and provide to employees upon hire or upon request for policy or parental leave
- Employers must respond in writing if cannot accommodate and retain requests for three years (with Labor Commissioner and employee access)
- Adopts new retaliation protections with daily civil penalties (\$100) for each lactation break not provided and other violations
- Authorizes Labor Commissioner complaints and private lawsuits
- Vetoed in 2018 (SB 937)

Paid Family Leave

- Governor Newsom has identified Paid Family Leave (PFL) as a legislative priority
- Various legislative proposals pending, including to:
 - Increase to twelve weeks of PFL (AB 1224)
 - Provide 100% wage replacement (AB 196)

CFRA and Parental Leave Expansions (SB 135)

- Would expand CFRA coverage from employers with 50+ employees to 5+ employees
- Would eliminate 1,250 hours service and 12 months service requirements and require only 180 days service
- Would also eliminate requirement of 50 employees within 75 miles of workplace

CFRA and Parental Leave Expansions (SB 135 – Cont'd)

- Would expand “family care” leave to include grandparents, grandchildren, siblings, domestic partners and a “designated person”
- Would expand “parents” to include “parents-in-law” and “children” to include “children-in-law”
- “Designated Person” means person employee identifies at time of leave request, but employer can limit to one designation every 12 months

CFRA and Parental Leave Expansions (SB 135 – Cont'd)

- “Family care” leave to also include due to “qualifying exigencies” related to Armed Forces service
- Would eliminate current “same employer” cap of 12 weeks leave total for both parents
- Repeal (as no longer necessary) the New Parent Leave Act enacted in 2017 (SB 63)

CFRA Leave for Part-Time Employees (AB 1224)

- Reduces the current 1,250 service hours requirement for CFRA eligibility to 900 hours for 12 weeks CFRA leave
- Would not change other CFRA eligibility requirements (e.g., employer size, etc.), but what about SB 135 impact?
- Increase from 6 weeks to 12 weeks for PFL benefits if two qualifying events in the same year

Paid Sick Leave Changes (AB 555)

- Increases current state-wide paid sick leave requirements to 5 days/40 hours usage annually and to 10 days/80 hours for accrual and carryover
- Corresponding changes to alternative accrual methods beyond default accrual rule of “one hour per 30 hours worked” if 40 hours accrued by 200th day
- Expanded permitted uses for paid sick leave:
 - Employee’s organ/bone marrow donation
 - Public health emergency closures of employee’s workplace or child’s school/daycare



Paid Sick Leave Changes (AB 555 – Cont'd)

- Employers prohibited from requiring documentation verifying use of first 5 days/40 hours of PSL/PTO
- Good news: partial preemption of municipal-level PSL ordinances



Increased Time-Off for Organ Donations (AB 1223)

- Current: employers must provide paid leave up to five days for bone marrow donations and up to thirty days for organ donation to another person
- Proposed: require employers provide additional thirty days unpaid leave for organ donations (no changes proposed regarding bone marrow donations)



Tax Relief For Student Loan Assistance (AB 152)

- Current: an employee may exclude from state income up to \$5,250 per year in *educational assistance* provided by their employer (i.e., current educational assistance)
- Proposal: exclude up to \$5,250 per year from an employee's state income amounts that are paid or incurred by an employer for the payment of principal or interest on a qualified education loan incurred by the employee (i.e., prior student loans)
- Clarifies annual \$10,500 limit for employer assistance for prior student loan debt and current educational expenses
- CalSHRM/SHRM support (AB 152 and federal version [H.R. 1043/S. 460])

Annual Pay Data Reports (SB 171)

- Requires employers with 100+ employees that submit EEO-1 to annually submit “pay data reports” to the DFEH
- Submit by 3/31/21 and annually thereafter
- Employers must identify by race, ethnicity and sex the number of employees in 10 specific job categories
- Employers must similarly identify number of employees whose pay was in “pay bands” used by the U.S. Department of Labor Statistics

Annual Pay Data Reports (SB 171) [Cont'd]

- Employers must also identify each employee's total earnings for 12-month period (per W-2)
- For part-time employees, employers must identify total hours worked in each "pay band"
- Employers may submit "clarifying remarks"
- Employers may use previously-submitted EEO-1
- Vetoed in 2018 (SB 1284)

Gender Identity/Expression Pay Equity (AB 758)

- Current: Labor Code § 1197.5 precludes paying less to employees of opposite “sex” for substantially similar work
- Proposal: “sex” to include “gender,” including gender identity and expression



Additional Labor Code Remedies

- Expand from six months to three years the period to file Labor Commissioner complaint (AB) 403
- Amend whistle-blower statute (L.C. § 1102.5) to permit “plaintiffs” to recover attorneys fees (AB 403)
- Allow “affected employees” to recover civil penalties for wage-related violations (AB 673)

PAGA Reform Proposals

- For wage statement-related PAGA actions, limit attorneys' fees to 25% if settlement greater than \$50,000 (AB 443)
- "Cure" period (65 days) proposed for itemized wage statement violations if monies otherwise due paid (AB 789)

Preventing “Document Servitude” (AB 589)

- Prohibits employers from knowingly destroying/confiscating employee passports/immigration documents/government identification (with \$10,000 penalty plus civil/criminal penalties)
- Employers must also post a notice and provide each employee a DLSE-created “Worker’s Bill of Rights”
 - to all employees hired before July 1, 2019
 - after July 1, 2020, to applicant’s pre-employment authorization
- Employers must retain signed copies/acknowledgments for 3 years
- Vetoed in 2018 (AB 2732)

Medication-Assisted Treatment Protections (AB 882)

- Prohibits all employers from discharging employee if sole reason was positive drug test for prescribed medication
- Appears broader than prior medical marijuana-related proposals



Codification of “*Dynamex*” (AB 5)

- Codifies *Dynamex*’s “ABC Test” to all Labor Code provisions and Wage Order provisions (unless specifically stated otherwise)
- Only statutory exceptions (so far):
 - Licensed insurance agents
 - Licensed surgeons/physicians
 - Licensed securities brokers
 - Direct sales representative
- Multiple other proposals pending (AB 71 and SB 238)



“No Re-Hire” Provisions Targeted (AB 749)

- Would prohibit any employment-dispute settlement agreement provision precluding an “aggrieved person” from working for employer (or affiliates)
- Provisions after 1/1/20 would be void and unenforceable

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Consumer Report Clarification (AB 1008)

- Current: while the FCRA allows a one-time blanket disclosure for recurring reports, CA's ICRAA is ambiguous
- AB 1008 would amend the ICRAA to permit employers to obtain a one-time authorization for ongoing updates

Preventing Employer Voter Intimidation (AB 17)

- Preclude employers from requiring or requesting employers bring vote-by-mail ballot to work to cast vote
- Civil penalties up to \$10,000 per violation



“Spot Bills” to Watch

- PAGA (AB 440)
- “Working hours” (SB 734)
- DLSE Enforcement (AB 674, AB 789)
- Contractual Provisions (AB 2804)
- Retaliation (SB 672)