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CALSHRM LEGISLATIVE REPORT

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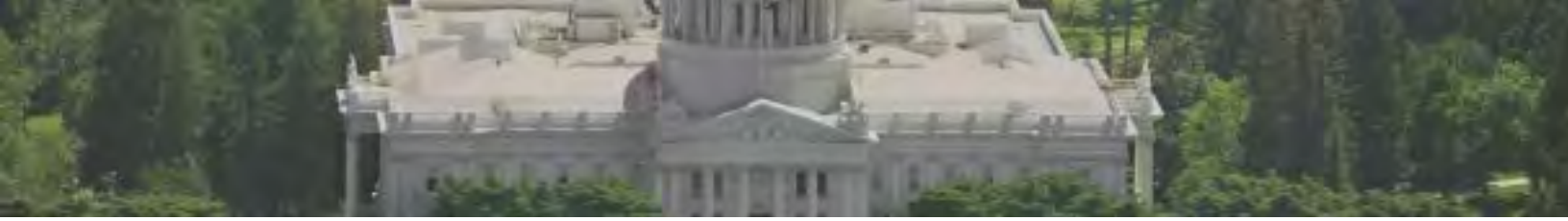
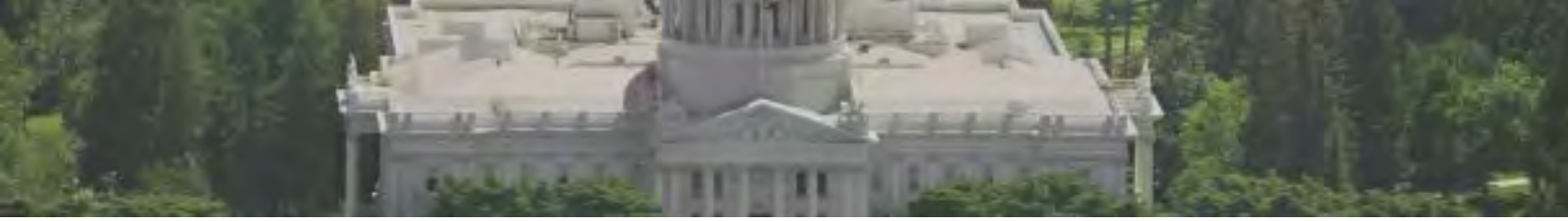


On October 13, 2019, the deadline for Governor Gavin Newsom to sign or veto new laws expired, bringing the 2019 California Legislative session to a conclusion. As expected, there were a number of new employment laws enacted in 2019, including laws to:

- Codify the California Supreme Court's *Dynamex* ruling regarding independent contractors while identifying various exemptions (AB 5);
- Prohibit mandatory pre-employment arbitration agreements for violations of the Fair Employment and Housing Act (FEHA) and/or Labor Code (AB 51);
- Delay the new harassment training deadlines for smaller employers and non-supervisory employees from January 1, 2020 to January 1, 2021 and to clarify that employees who received sexual harassment training in 2018 need not be re-trained in 2019 (SB 778);
- Amend the FEHA to preclude racial discrimination related to hairstyles (SB 188);
- Extend the statute of limitations for FEHA claims from one to three years (AB 9)
- Further expand workplace lactation accommodation requirements (SB 142);
- Update the requirements and procedures for reporting serious workplace injuries (AB 1804 and AB 1805);
- Require employers to provide up to an additional thirty days of unpaid leave for organ donations (AB 1223);
- Authorize employers and/or co-workers to petition for gun violence restraining orders (AB 61);
- Amend the California Consumer Privacy Act to temporarily exclude information gathered by employers in the employment context (AB 25); and
- Prohibit so-called "no rehire" provisions in employment-related settlement agreements (AB 749).
- Require employers provide additional notices related to deadlines for flexible spending accounts (AB 1554); and
- Prohibit employers from requiring employees to bring their mail in election ballots to work (AB 17).

In addition to these new statewide laws, the minimum wage for California and for many municipalities will increase again on January 1, 2020.

Governor Newsom also vetoed several bills to create Labor Code protections for sexual harassment victims (AB 171), to allow private civil actions related to employee time off due to



unexpected events (AB 1478), to materially expand the statute of limitations for Labor Code retaliation claims (AB 403), and to require all employers to distribute "Worker Bill of Rights" information (AB 589). It is possible some of these vetoed bills will return in 2020.

Below is an overview of the new laws California employers must prepare which, unless otherwise indicated, take effect on January 1, 2020:

NEW LAWS

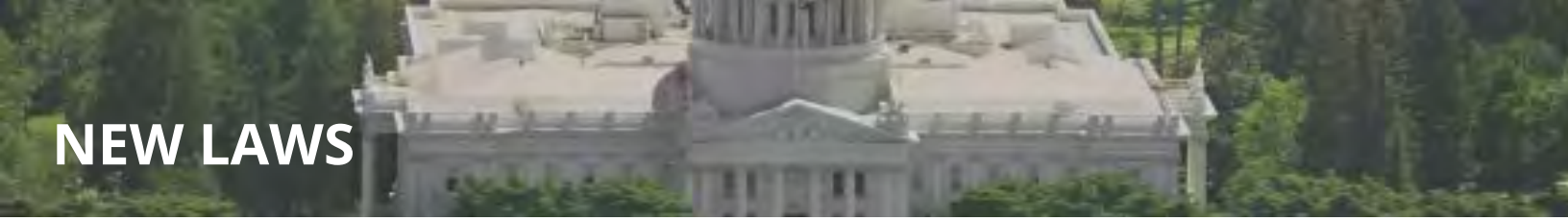
Harassment/Discrimination/Retaliation

Ban on Mandatory Arbitration for FEHA and Labor Code Claims (AB 51)

This law responds to concerns that employers conceal sexual harassment through mandatory arbitration agreements and non-disparagement provisions. Accordingly, new Labor Code section 432.6 precludes employers from requiring applicants, current employees or independent contractors to agree as a condition of employment, continued employment, or the receipt of any employment-related benefit to waive any right, forum, or procedure related to any violations of the Fair Employment and Housing Act (FEHA) and the Labor Code, including the right to file a claim with a state or law enforcement agency. It also precludes employers from threatening, retaliating, or discriminating against any employee or applicant (including terminating their application for employment) who refuses to consent to the waivers prohibited under this section. It also specifies that any agreement requiring an employee to opt out of a waiver or to take any affirmative action to preserve their rights will be considered a condition of employment.

This prohibition applies to any contracts for employment entered into, modified or extended on or after January 1, 2020. By its terms, it should also not apply to existing agreements entered into before January 1, 2020, at least not until those agreements are modified or extended. It also does not apply to post-dispute settlement agreements or negotiated severance agreements.

New Government Code section 12953 specifies that it shall be an unlawful employment practice, thus implicating the FEHA, for an employer to violate proposed new Labor Code section 432.6.



NEW LAWS

Lastly, prevailing plaintiffs who enforce their rights under this section would be entitled to recover their reasonable attorney's fees and injunctive relief (e.g., reinstatement, nullification of the improper contract provisions, etc.)

Although AB 51 does not mention arbitration specifically, it is clearly intended to essentially prohibit mandatory arbitration for not only FEHA claims, but also Labor Code claims. To escape an almost certain forthcoming preemption challenge, the law's author states this bill does not preclude arbitration agreements for FEHA and Labor Code claims, but simply precludes employers from requiring them as a condition of employment, or retaliating against employees who choose not to agree to arbitration.

Extended Statute of Limitations for FEHA Complaints (AB 9)

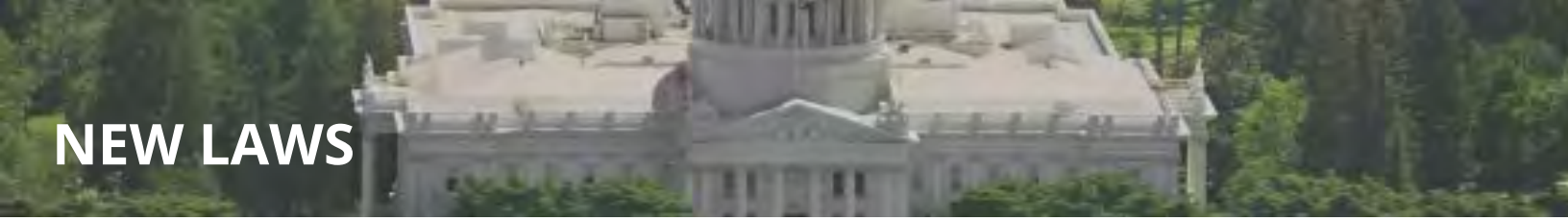
Government Code section 12960 presently requires employees to file an administrative charge with the DFEH within one year from the date an unlawful employment practice occurs. This law extends this deadline from one year to three years, but retains a one-year limitations period for filing Unruh Act-related claims against businesses. It also makes conforming changes to the provision allowing employees an additional period up to 90 days if they first obtain knowledge of the facts of the alleged unlawful practice after the limitations period had expired. This extended limitations period will not revive already lapsed claims, and defines "filing a complaint" as filing an intake form with the DFEH, with the operative date of a subsequently-filed verified complaint relating back to the filing of the intake form.

It also amends section 12965 to clarify that the DFEH's one-year period to investigate an employee's complaint and decide whether to bring a civil action starts from the filing of a verified complaint, rather than simply an intake form.

FEHA Amendments for "Protective Hairstyles" (SB 188)

Responding to concerns that many existing dress and grooming codes have a disparate impact on African Americans, this new law amends the definition of "race" under FEHA to include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles." Protective hairstyles, in turn, is defined as "including, but is not limited to, such hairstyles as braids, locks, and twists."

According to the bill's author, this provision invalidates: (1) dress/grooming provisions that



explicitly preclude such hairstyles; and (2) facially neutral dress/grooming provisions that employers enforce by precluding such hairstyles.

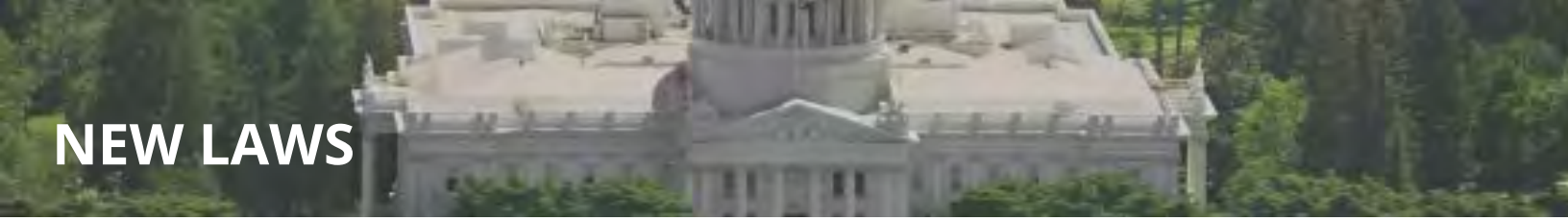
New York City recently adopted similar guidelines to protect the rights of employees to maintain natural hair or hairstyles closely associated with their racial, ethnic or cultural identities, including the same specific protections for locks, twists and braids. https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf

Delay of and Clarification for New Sexual Harassment Training Deadlines (SB 778)

In 2018, California unanimously enacted SB 1343, which extended so-called AB 1825 harassment training in two material respects: (1) it required employers with five or more employees (rather than 50 employees) to provide this training; and (2) it required employers to train both supervisors and non-supervisory employees. However, as the contemplated January 1, 2020 compliance date approaches, several ambiguities have arisen including whether employees trained in 2018 need to be retrained in 2019 and when training must be provided to non-supervisory employees after their hire.

Governor Newsom has signed SB 778 and it is immediately effective. SB 778 modifies or clarifies California's new harassment training requirements contained in Government Code section 12950.1 in three respects. First, it extends the deadline for most employers to comply with the new harassment training requirements from January 1, 2020 to January 1, 2021. This extension will provide additional time for those larger employers who previously trained their supervisors to train their non-supervisory employees, and for smaller employers to train both their supervisory and non-supervisory employees. As a practical matter, it also provides additional time after the DFEH training materials are published in late 2019 for employers to determine whether to use them or to develop their own training modules.

Second, the new January 1, 2021 deadline removes the prior concern that supervisors trained in 2018 must be retrained in 2019 to meet the 2020 deadline. It also specifically provides that employers who provide legally-sufficient training in 2019—whether to comply with the previously announced January 1, 2020 deadline or because they simply still wish to do so earlier —will not be required to provide any further refresher training or education until two years thereafter. Further, it specifies that moving forward, employers must provide this sexual harassment training and education to each California employee once every two years.



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Third, SB 778 specifies that non-supervisory employees must be trained within six months of hire, thus harmonizing it with a similar rule requiring supervisors be trained within six months of assuming a supervisory position.

This law is immediately effective due to its urgency clause.

Extended Training Deadlines for Temporary/Seasonal Employees and Modified Training Requirements for Construction Employees (SB 530)

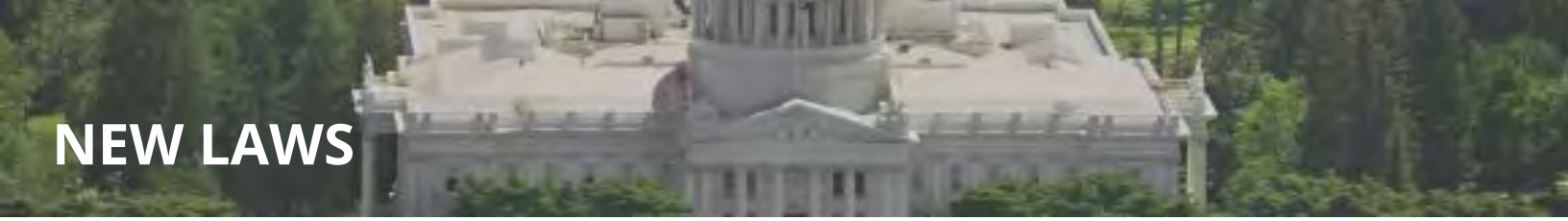
In addition to the training requirements applicable to most employers, SB 1343 had also enacted training deadlines unique to temporary/seasonal employers. Specifically, Government Code section 12950(h) had required that temporary, seasonal or other employees hired to work less than six months needed to be trained within the earlier of 30 days or 100 hours worked after hire. While SB 778 had extended until January 1, 2021 the deadline for most employers to comply with SB 1343's expanded harassment requirements, it had not extended the January 1, 2020 deadline for temporary/seasonal employees, which many assumed had been simply a legislative oversight. SB 530 corrects this and provides that "beginning January 1, 2021" (rather than January 1, 2020), temporary, seasonal or short-term employees must be provided this harassment training.

Secondly, it identifies a procedure whereby employers to a multi-employer collective bargaining agreement in the construction industry may satisfy the harassment training requirements by virtue of the training an employee has received through another employer to the multi-employer agreement.

Targeting "Implicit Bias" in Certain Industries (AB 241-242)

AB 242 develops new implicit bias training for members of the judicial branch. Specifically, all court staff who interact with the public would be required take two hours of implicit bias training every two years. The Judicial Council will be tasked with developing this training. The California State Bar will also be tasked with adopting regulations regarding mandatory MCLE training for attorneys to include implicit bias training for each MCLE compliance period beginning January 31, 2023 and thereafter.

AB 241 requires the Board of Registered Nursing and the Physician Assistant Board to develop by January 1, 2022 regulations regarding implicit bias in treatment, and require associations (i.e., education providers, etc.) to comply with these provisions.



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Harassment Training for Janitorial Service Workers (AB 547)

Known as the Janitor Survivor Empowerment Act, this law enacts specific harassment training rules related to the janitorial service industry, including requiring peers to provide direct training on harassment prevention for janitors. It also requires employers, upon request, to provide a copy of all training materials used during the training and require employers to use a qualified organization from the list maintained by the Department of Industrial Relations.

Employers will need to maintain records for three years identifying the names and addresses of all employees engaged in rendering janitorial services for the employer.

"Employer" will mean any person employing at least one covered worker or otherwise engaged by contract, subcontract or franchise agreement for providing janitorial services by one or more covered workers.

Harassment Poster Requirement for Educational Institutions (AB 543)

While the Education Code presently requires educational institutions to display its sexual harassment policy in a prominent location, this law expands these notice protections to include not only employees, but also students. Accordingly, it requires each educational institution to create and conspicuously display a poster notifying pupils of the institution's written policy on sexual harassment. As with many other poster requirements, this law specifies many of the formatting requirements for this poster but otherwise directs that it contain "age appropriate" and "culturally relevant" information.

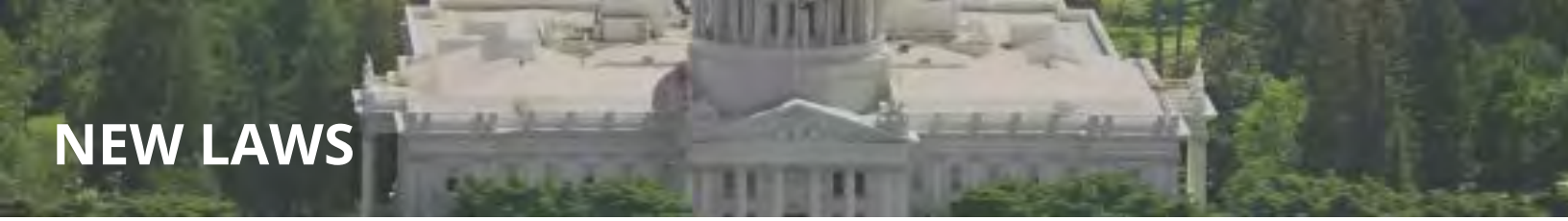
Ban on Political Funds to Settle Sexual Harassment Claims (SB 71)

This law precludes campaign funds from being sued for judgments or settlements, and prohibits such funds from being used to reimburse a candidate or elected officer for a penalty, judgment or settlement related to a claim of sexual assault, sexual abuse or sexual assault in any civil, criminal or administrative proceeding.

<u>Independent Contractor Standard</u>

Codification of *Dynamex's* "ABC" Test for Independent Contractors (AB 5)

In 2018, the California Supreme Court issued its landmark decision in *Dynamex Operations West,*



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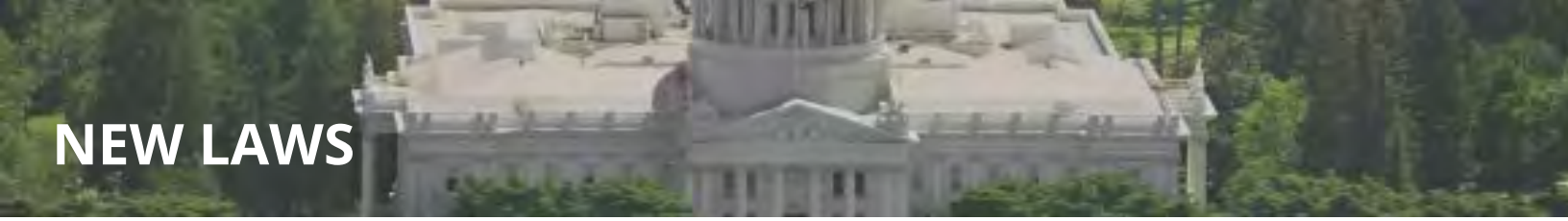
Inc. v. Superior Ct. (2018) 4 Cal.5th 903 articulating a new legal test (the so-called "ABC Test") for determining whether someone is an independent contractor or an employee. This ruling dominated the current legislative session, and it appears likely there will be additional legislative developments in future years as employee and employer groups continue to negotiate future changes. Broadly speaking, AB 5 states the Legislature's intent to codify the *Dynamex* decision, thus protecting it from legislative or judicial rollback, while also enacting several additional significant changes.

First, new Labor Code section 2750.3 makes clear that *Dynamex's* ABC Test for independent contractors applies to all provisions of the Labor Code, the Industrial Welfare Commission's Wage Orders or the Unemployment Insurance Code unless those provisions discussing an "employee" specifically contain an alternative definition. Thus, an individual providing labor or services shall be considered an employee absent all of the following "ABC" factors being met: (A) the person is free from control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) the person performs work that is outside the usual course of the hiring entity's business; and (C) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

In this regard, it both codifies *Dynamex's* "ABC Test" generally, and then expands it beyond simply the Wage Orders at issue in *Dynamex* to also apply to the Labor Code and the Unemployment Code. However, to the extent any provision of the Labor Code, Wage Order or Unemployment Insurance Code presently have different definitions of "employer," "employee," or "independent contractor," then AB 5 does not affect those more specific provisions. A court will also have the discretion to apply the so-called pre-existing *Borello* standard for classification purposes if the court determines the "ABC Test" cannot be applied to a particular context based upon grounds other than these more specific definitions of "employer," "employee" and independent contractor" currently existing in the Labor Code, Wage Order or Unemployment Insurance Code.

Due to the significant opposition to *Dynamex*'s holding, AB 5 also contains many significant potential exceptions from the ABC Test.

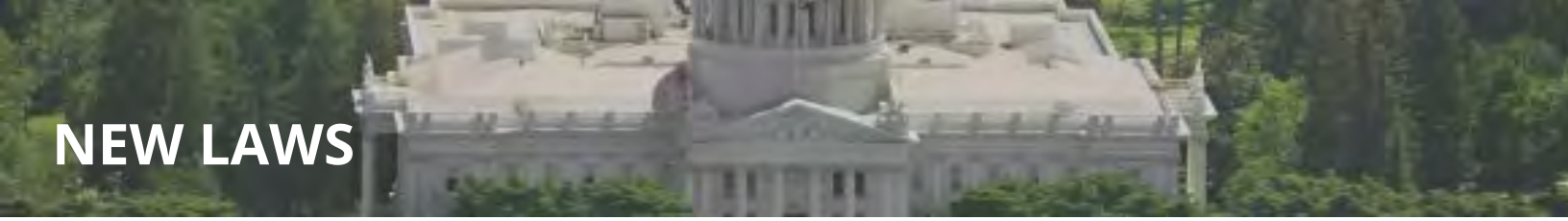
First, subsection (b) specifically enumerates various occupations that remain governed by the *Borello* standard rather than the ABC Test provided they are listed in this subsection and satisfy



the accompanying definitions or standards. These occupation-specific exemptions include: (1) persons or organizations licensed by the Department of Insurance (as specified); (2) a physician and surgeon dentist, podiatrist, psychologist, or veterinarian licensed by the State of California (as specified) performing professional or medical services to or by a health care entity (as defined), unless covered by a collective bargaining agreement; (3) "licensed professionals" such as lawyers, architects, engineers, private investigators or accountants with an active license from the State of California; (4) a securities broker-dealer or investment advisor or their agents and representatives registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority or State of California (as specified); (5) a direct sale representative as described in Unemployment Insurance Code section 650, so long as the conditions for exclusion from employment under that section are met; (6) until January 1, 2023, for commercial fisherman (as defined) working on an American vessel; and (7) until January 1, 2021, newspaper distributors and newspaper carriers (as defined).

Next, subsection (c) provides that the *Borello* standard rather than the ABC Test will apply for "professional services" provided the individual (which can include a sole proprietorship or business entity) (a) performs specifically-enumerated services and (b) satisfies the six-factor test below. These "professional services" may include: (1) marketing (as defined, including to meant the contracted work is original and creative, and depends on the individual's invention, imagination or talent); (2) human resources administrator (as defined, including to mean the contracted work is predominantly intellectual and varied); (3) travel agent services (as defined); (4) graphic design; (5) grant writer; (6) fine artist; (7) enrolled agents licenses by the United States Department of the Treasury; (8) payment processing agents through independent sales organizations; (9) photographers or photojournalists (except motion picture employees) who did not provide licensed content submissions to the putative employer more than 35 times per year; (10) freelance writers, editors, editors or newspaper cartoonists who did not provide "submissions" (as defined) to the putative employer more than 35 times per year; and (11) until January 1, 2022, licensed estheticians, manicurists, barbers or cosmetologists who satisfy additional enumerated criteria (e.g., set own rates and set own hours, etc.).

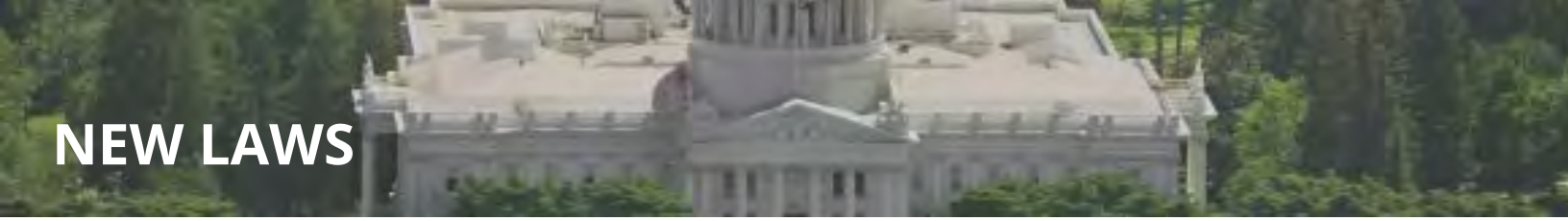
For this "professional services" exemption to apply, the hiring entity must also demonstrates that all of the following factors are satisfied: (1) the individual maintain a business location which may be the individual's residence, separate from the hiring entity (although the individual could choose to also perform services at the hiring entity's location); (2) for work performed more than



six months after AB 5 takes effect, the individual has a business license in addition to any required professional license or permits for them to practice in their profession; (3) the individual has the ability to set or negotiate their own rates for the services performed; (4) the individual has the ability to set their own hours aside from the project completion date and reasonable business hours; (5) the individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to potential customers as available to perform the same types of work; and (6) the individual customarily and regularly exercises discretion and independent judgment in the performance of the services.

Next, subsection (d) exempts from new Labor Code section 2750.3 and *Dynamex*'s holding the following professions governed by the California Business and Professions Code: (1) real estate licensees licensed by the State of California (as defined); and (2) repossession agencies licensed under Business and Professions Code section 7500.2 (provided other enumerated factors are also present).

Subsection (e) then enumerates a potential exception for bona fide "business to business" contracting relationships in which case the *Borello* test applies to the "business service provider" provided the contracting business satisfies the test enumerated in this subsection. Specifically, the contracting business must establish all of these criteria: (1) the business service provider is free from the control and direction of the contracting business entity in connection with the work performance, both under the contract and in fact; (2) the business service provider is providing services directly to the contracting business rather than the contracting business's customers; (3) the contract with the business service provider is in writing; (4) the business service provider has any business licenses or business tax registrations required in the jurisdiction where the work is performed; (5) the business service provider maintains a business location separate from the business or work location of the contracting business; (6) the business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed; (7) the business service provider actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity; (8) the business service provider advertises and holds itself out to the public as available to provide the same or similar services; (9) the business service provider provides its own tools, vehicles and equipment to perform the services; (10) the business service provider can negotiate its own rates; (11) consistent with the nature of the work, the business service provider can set its own hours and work location; and (12) the business service provider is



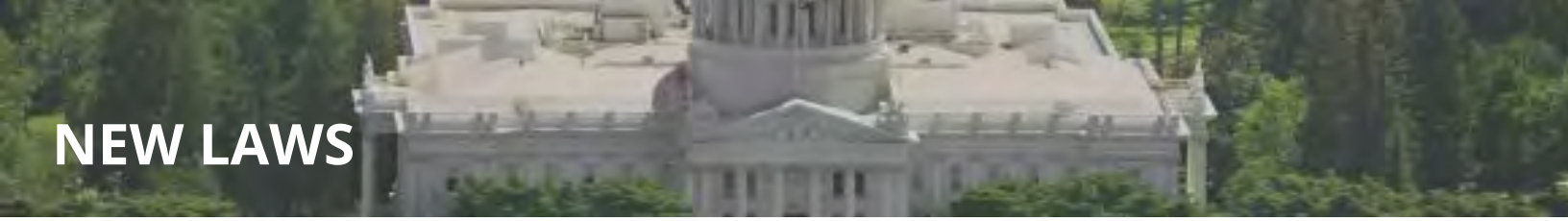
not performing the type of work for which a license is required from the Contractor's State License Board.

Notably, this "business to business" exception only potentially applies to a business entity and not to an individual worker who performs labor or services for a contracting business. The ABC Test will apply to determine whether an individual working for a business service provider is an employee or an independent contractor of the business service provider.

Finally, subsections (f), (g) and (h) enumerate potential exemptions from the ABC Test (in which case the *Borello* standard would govern) for construction industry subcontractors (as defined), "referral agencies" (as defined) and in the "motor club" context. Please note, each of these three potential industry-specific exemptions contain their own criteria and definitions which should be consulted further if the reader believes they might otherwise apply.

An ongoing debate exists whether the original *Dynamex* holding clarified or changed the law and, thus, whether it applies retroactively. AB 5 attempts to answer this question by specifically providing that its codification of *Dynamex* in new Labor Code section 2750.3 (as least as to wage order and Labor Code violations) is simply declaratory of existing law. However, for the various exemptions subsections contained in subsections (b) through (h) (discussed above), AB 5 states that the exemptions shall apply retroactively to existing claims and actions "to the maximum extent permitted by law." AB 5 also states that its provisions, including the potential exceptions from the general application of *Dynamex*, shall not permit an employer to reclassify anyone from an employee to an independent contractor as of January 1, 2019.

Lastly, and perhaps partially in response to business entities who refuse to accept *Dynamex*, AB 5 authorizes particular law enforcement officers (e.g., the Attorney General and some city attorneys) to pursue injunctive relief "to prevent the continued misclassification of employees as independent contractors." Thus, in addition to the significant monetary liability flowing from misclassification, this provision seemingly potentially permits the State of California to force non-compliant employers to reclassify independent contractors as employees.



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Wage and Hour

California's Minimum Wage Increases Again (SB 3)

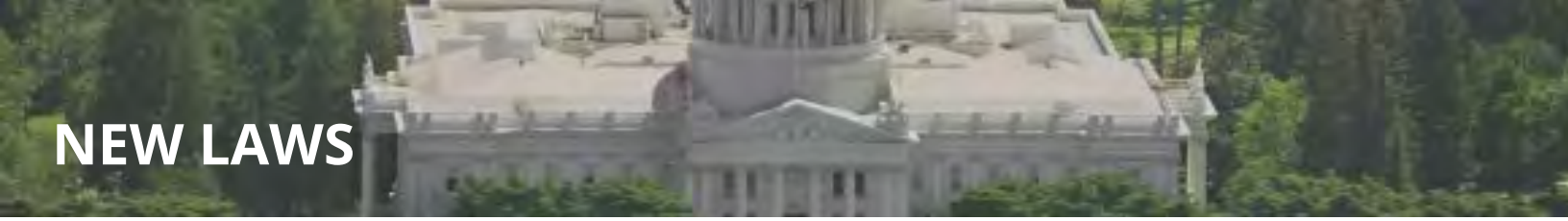
In 2016, California enacted SB 3, authorizing annual minimum wage increases until it reaches $15.00, and identifying a two-tiered schedule for the effective dates of these increases depending on whether the employer has more than 25 employees. On January 1, 2020, the minimum wage for employers with 26 or more employees will increase to $13.00 per hour, meaning the salary threshold for exemption purposes will be $54,080 annually. On January 1, 2020, the minimum wage for employers with 25 or fewer employees will increase to $12.00 per hour, and the salary threshold exemption for those employers will be $49,920 annually.

Municipality Minimum Wage Changes

In addition to the state-wide minimum wage increases effective January 1, 2020, many cities will increase their minimum wage beyond the state-wide minimum in 2020 as follows:

2020 Minimum Wage Increases

City	Minimum Wage	Effective date
Alameda	$15.00	July 1,2020
Belmont	$15.00	January 1, 2020
Cupertino	$15.00	January 1, 2020
El Cerrito	$15.00	January 1, 2020
Emeryville	$16.42 est.*	July 1, 2020
Fremont	$13.50 (1-25 employees) $15.00 (26+ employees)	July 1, 2020
Long Beach	$12.00 (1-25 employees) $13.00 (26+ employees)	July 1, 2020
Los Altos	$15.40	January 1, 2020
Los Angeles (city)	$14.25 (1-25 employees) $15.00 (26+ employees)	July 1, 2020
Los Angeles County	$15.00	July 1,2020
Malibu	$14.25 (1-25 employees) $15.00 (26+ employees)	July 1, 2020
Milpitas	TBD**	July 1, 2020
Mountain View	TBD*	January 1, 2020



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Oakland	TBD*	January 1, 2020
Palo Alto	$15.40	January 1, 2020
Pasadena	$14.25 (1-25 employees) $15.00 (26+ employees)	July 1, 2020
Redwood City	$15.38	January 1, 2020
Richmond	TBD*	January 1, 2020
San Diego	$13.00	January 1, 2020
San Francisco	TBD*	July 1, 2020
San Jose	$15.25	January 1, 2020
San Leandro	$15.00	July 1,2020
San Mateo	$15.38	January 1, 2020
Santa Clara	TBD*	January 1, 2020
Santa Monica	$14.25 (1-25 employees) $15.00 (26+ employees)	July 1, 2020
Sunnyvale	TBD*	January 1, 2020

*Tied to Consumer Price Index.

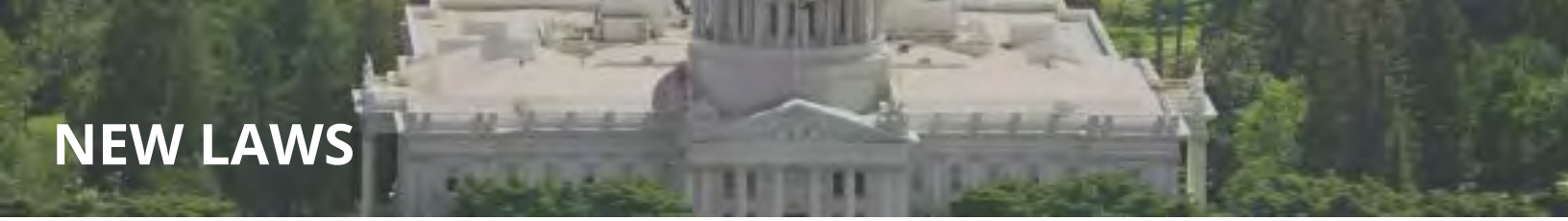
**Based on Bay Area Consumer Price Index Increase, and will be announced by April 1, 2020.

Expanded Remedies for Pay Day Violations (AB 673)

Labor Code section 210 governs the penalties available if an employer violates the rules regarding "pay days," and currently authorizes statutory penalties of $100 for any initial violation (and $200 for each subsequent violation) for late payment of wages. However, section 210 presently authorizes only the Labor Commissioner to recover this penalty, with a percentage shall being paid to the Labor and Workforce Development Agency.

Responding to concerns that the current remedy of penalties only recoverable by the Labor Commissioner is an insufficient deterrent, this law amends section 210 to specify that this penalty may be recovered either by the employee as a statutory penalty pursuant to Labor Code section 98, or by the Labor Commissioner under Labor Code section 98.3.

Alternatively, the employee may also recover the civil penalty through a Private Attorneys General Act (PAGA) action, but they cannot recover statutory penalties under these provisions and under PAGA for the same violation.



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In 2017, the California Legislature enacted Labor Code section 204.11 identifying specific payday rules for barbers and cosmetologists licensed under the Barbering and Cosmetology Act, but did not at that time amend section 210 to identify statutory penalties if an employer violated those industry-specific payday rules. Accordingly, AB 673 amends section 210 to fix that omission.

Enforcement Mechanisms for Labor Commissioner Citations Relating to Retaliation Complaints (SB 229)

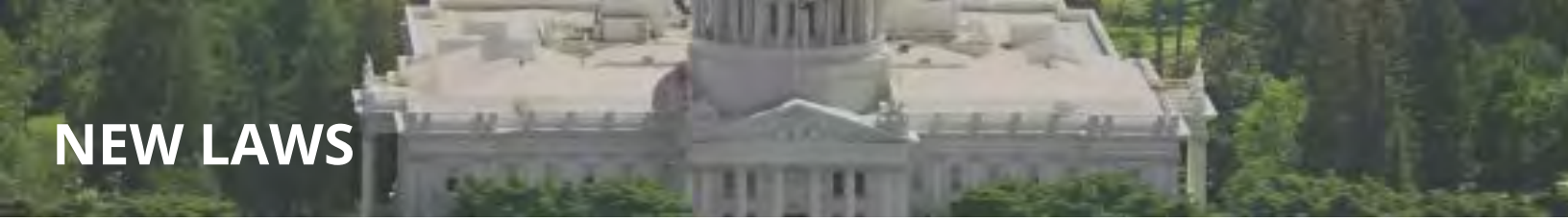
In 2017, California enacted SB 306 to provide greater protections against retaliation after filing a wage-related claim, including authorizing the Labor Commissioner to issue citations and obtain injunctive relief addressing retaliation concerns during the investigative process. This law is intended to build upon SB 306, by aligning the process for enforcement, review, and appeals with the existing process the Labor Commissioner uses for unpaid wage claims (e.g., contained in Labor Code sections 98, 98.1 and 98.2).

For instance, while SB 306 had authorized the Labor Commissioner to issue citations, it had not expressly created an enforcement mechanism for these citations. Accordingly, SB 229 outlines a process through which the Labor Commissioner may convert an unpaid monetary citation or order into a money judgment. It also sets forth how the Labor Commissioner can convert any non-monetary orders (e.g., reinstatement, etc.) into judicial orders.

It also provides greater detail about how an employer facing a Labor Commissioner order for unlawful retaliation may challenge it in superior court through a petition for a writ of mandate. Notably, while an employer bond for judicial review purposes must include the amounts owed for the underlying violations (e.g., minimum wages, lost wages, overtime compensation, etc.), this bond currently need not include penalties and accrued interest. Concerned that this omission left an employee not fully compensated if the superior court affirms the Labor Commissioner's award, SB 306 requires the appeal bond to also include penalties, interest and any other monetary relief.

Specific Payday Rules for UC Regents Employees (SB 698)

This law amends Labor Code section 204 to identify specific payday rules for employees of the Regents of the University of California. Specifically, employees on a monthly payment schedule must be paid within five days after the close of the monthly payroll period, and employees paid on a more frequent payment schedule must be paid in accordance with the pay schedule announced



by the University of California in advance. These new payday rules will not prohibit Regents' employees from choosing to distribute their paychecks throughout the year rather than only during pay periods worked.

Specific Payday Rules for "Events Employees" for Professional Baseball Teams (SB 286)

This law adds new Labor Code section 201.8 to clarify the payday rules for "events employees" (as defined) at "professional baseball venues" and/or "professional baseball teams." It largely reiterates the generally applicable rules that these employees are entitled to be paid on the next regular payday unless they quit or are terminated, but clarifies that they are otherwise continuously employed despite the conclusion of an event or series of events (e.g., a single game or concert, a home stand or the end of the team's season). This law is apparently in response to plaintiff attorneys' suggestions that final wages were otherwise immediately due following each single event, home stand, or conclusion of a season.

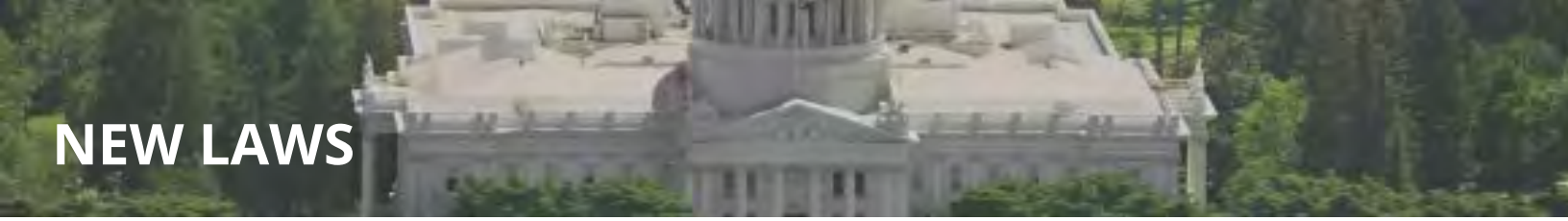
Wage Payment Rules for "Print Shoot" Employees (SB 671)

This industry-specific law creates special final wage deadlines for "print shoot employees," defined as an individual hired for a period of limited duration to render services relating to or supporting a print shoot. Modeled upon similar rules for other motion picture industry employees, new Labor Code section 201.6 provides that a print shoot employee is entitled to receive payment of the wage earned and unpaid at the time of termination by the next regular payday (as defined), rather than immediately. The employer may mail these wages to the employee or make them available at a location specified by the employer in the county where the employee was hired or performed labor.

This law is effective immediately.

Employing Infants in the Entertainment Industry (AB 267)

This law amends Labor Code section 1308.8 and extends its current requirements for infants under the age of one month working "on any motion picture set or location" to the "entertainment industry" more broadly. Specifically, it precludes infants under the age of one month from working in the entertainment industry (as defined) absent certification from a physician or surgeon board certified in pediatrics as to the infant's medical ability to withstand the potential risks of such employment.



NEW LAWS

Leaves of Absence/Time Off/Accommodation Requirements

Lactation Accommodation Requirements (SB 142)

Even though California just amended its lactation accommodation requirements in 2018 (AB 1976) to generally require employers provide a space other than a bathroom and guidelines for temporary lactation locations, the Legislature has now enacted a much broader law that the author states is intended to align California with federal law in several respects.

Amongst other things, while Labor Code section 1030 presently requires employers to provide a reasonable amount of break time to express milk, this law specifies the employer must provide a reasonable amount of break time each time the employee needs to express milk.

Secondly, while Labor Code section 1031 presently requires the employer "make reasonable efforts" to provide a location "other than a bathroom" (following the adoption of AB 1976), this law requires the employer to provide such a location (not simply "make reasonable efforts") and specifically enumerates many physical requirements for this location, including adopting some specific requirements in the San Francisco Lactation Accommodation Ordinance, which took effect on January 1, 2018. For instance, it reiterates that this location shall not be a bathroom and shall be in proximity to the employee's work area, shielded from view, and free from intrusion while the employee is lactating.

It also requires that the lactation room or location comply with all of the following requirements, including that the lactation room or location: (1) be safe, clean, and free of hazardous materials (as defined in Labor Code section 6382) ; (2) contain a surface to place a breast pump and personal items; (3) contain a place to sit; and (4) have access to electricity or alternative devices (e.g., extension cords, charging stations, etc.) to operate an electric or battery-operated breast pump. Employers must also provide access to a sink with running water and a refrigerator suitable for storing milk in close proximity to the employee's workspace (or an alternative cooling device suitable for storing milk if a refrigerator cannot be provided). And where the lactation room is a multipurpose room, the use of the multipurpose room for lactation purposes shall take precedence over other uses during the period it is in use for lactation purposes.

For employers in multi-tenant buildings who cannot provide a lactation room within its own workspace, they may provide a shared space amongst multiple employers that otherwise

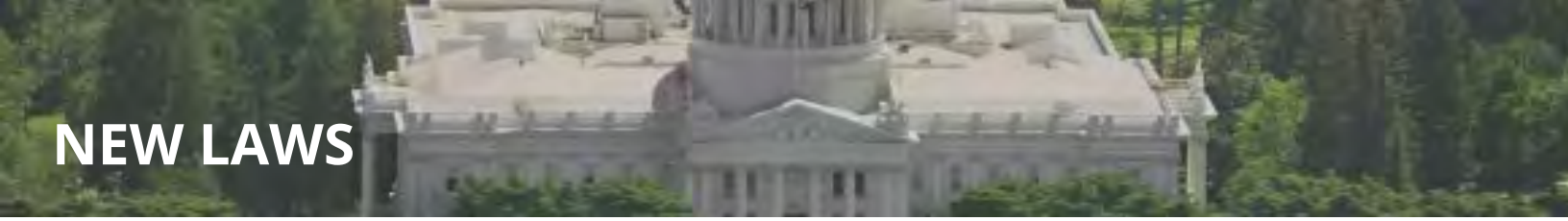
complies with these requirements.

Recognizing that some employers may not be able to meet these new requirements due to operational, financial or space limitations, employers may comply by designating a temporary lactation location. In this regard, SB 142 essentially retains the "temporary lactation location" requirements enacted in 2018 (AB 1976) including that the location it is not a bathroom, is in close proximity to the employee's work area, is shielded from view, is free from intrusion while the employee is expressing milk, and otherwise complies with Labor Code section 1031.

While Labor Code section 1031 presently provides an undue hardship exemption to all employers provided they meet the standards identified, federal law limits its undue hardship exemption to employers with 50 or more employees. To align California with federal law, SB 142 adopts the federal undue hardship standard. Thus, it applies only to employers with fewer than 50 employees and requires they demonstrate any of these lactation location requirements would impose an undue hardship by causing the employer significant expense or operational difficulty when considered in relation to the size, financial resources, nature or structure of the employer's business.

New Labor Code section 1034 also requires employers to develop and implement a lactation accommodation policy including the following specific provisions: (1) notice of the employee's right to lactation accommodation; (2) identification of the process to request accommodation; (3) the employer's obligations to respond to such requests; and (4) the employee's right to file a complaint with the Labor Commissioner. Employers must include this policy within their handbook or sets of policies made available to employees, and to distribute to employees upon hire or when an employee makes an inquiry about or requests parental leave. Employers who cannot provide break time or a legally-sufficient lactation location shall provide a written response to an employee's accommodation request.

This law also adds retaliation protections for employees who request lactation accommodation, and amended Labor Code section 1033 specifies that the denial of reasonable break time or adequate space to express milk shall be deemed a failure to provide a rest period in accordance with Labor Code section 226.7. While section 1033 presently authorizes a civil penalty of $100 for each violation, this law specifies the Labor Commissioner may award this penalty for each day an employee is denied reasonable break time or adequate space to express milk. Employees are also



entitled to file complaints with the Labor Commissioner, in which case they may seek reinstatement, actual damages, and appropriate equitable relief.

Lastly, it new building standards must be developed for future construction and remodels using the San Francisco Lactation in Workplace Ordinance as a starting point.

Increased Leave Time for Organ Donation Purposes (AB 1223)

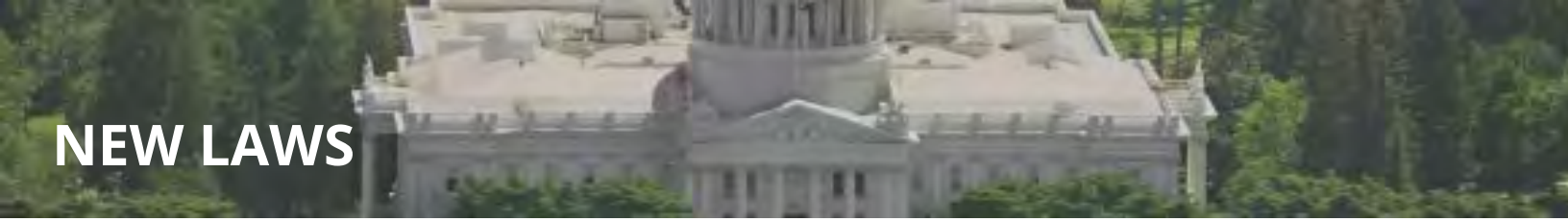
Since 2010, Labor Code section 1510 has required private and public employers to allow employees to take a paid leave of absence of up to 30 business days within a one-year period for the purpose of donating an organ to another person, and up to five business days for bone marrow donations. This law requires private and public employers to grant an employee an additional unpaid leave of absence of up to 30 business days within a one-year period for organ donations. As with the prior leaves for organ or bone marrow donation purposes, the one-year period for this extended unpaid leave for organ donation purposes is measured from the date the employee's leave begins and shall consist of 12 consecutive months.

State employers are also required to grant an employee who has exhausted all sick leave an additional unpaid leave of absence up to 30 business days in a one-year period for organ donation purposes.

To further encourage organ donations, this law prohibits certain insurance policies issued or renewed after January 1, 2020 from denying coverage, limiting the amounts or types of coverage, or charging different rates because the insured is a living organ donor.

Conforming CFRA Change for "Flight Crew" Employees (AB 1748)

This law amends the California Family Rights Act (CFRA) to conform to the federal Family Medical Leave Act (FMLA) service requirement for airline flight employees. Accordingly, under new subsection (u) to Government Code section 12945.2, flight deck or cabin crew members of an air carrier will be eligible for CFRA leave if they have 12 months of service, they have worked or been paid for 60% of the applicable monthly guarantee or equivalent annualized over the preceding 12-month period, and the employee has worked or been paid for a minimum of 504 hours during the preceding 12 months. The DFEH is also authorized to adopt regulations to calculate leave available to flight crew employees under these provisions.



NEW LAWS

Paid Family Leave Benefits Extended to Eight Weeks (SB 83)

This law extends the duration of so-called Paid Family Leave benefits from six weeks to eight weeks beginning July 1, 2020, for purposes of caring for a "seriously ill family member" or to bond with a minor child within one year of birth or placement. As part of Governor Newsom's "Parents Agenda," it also expresses an intent to convene a task force to develop a proposal by November 2019 to extend the duration of Paid Family Leave benefits to six months by 2021-22 for parents to care for and bond with their newborn or newly adopted child.

Alternative Paid Family Leave Forms (AB 406)

This law requires the Employment Development Department, beginning January 1, 2025, to distribute the application for "Paid Family Leave" in all non-English languages spoken by a substantial number of non-English speaking applicants. It seeks to address an inconsistency in that many brochures and notices for Paid Family Leave are in various languages but the application itself is presently only in English.

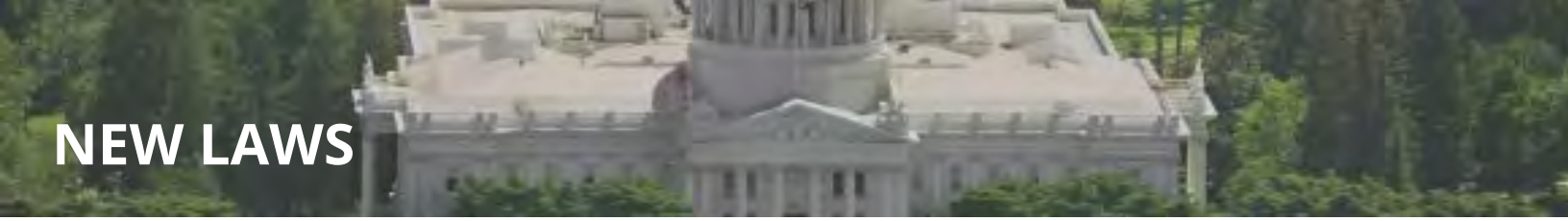
<u>Miscellaneous</u>

Employment-Related Gun Restraining Orders (AB 61)

While California law presently authorizes family members or family members or law enforcement officers to seek gun violence restraining orders (GVRO's), this law expands who can petition the court for GVRO to include employers and co-workers. Specifically, effective September 1, 2020, amended Penal Code sections 18150, 18170, and 18190 will authorize either employers or co-workers that have regularly interacted with the subject for one year and has the employer's approval to petition *ex parte* for a general GVRO, a one-year GVRO or a renewal of a GVRO. While the requirements vary slightly, the party seeking the GVRO must present evidence showing both the subject poses a significant danger and that the GVRO is necessary to prevent personal injury and less restrictive alternatives are insufficient.

"No Rehire" Provisions Limited (AB 749)

Continuing the recent trend of legislatively limiting settlement agreement provisions, this law prohibits any settlement agreement related to an employment dispute from preventing or restricting the "aggrieved person" from obtaining future employment with the employer against



whom the claim was filed, or any parent company, subsidiary, division, affiliate, or contractor of the employer. Any such provision in an agreement entered into or after January 1, 2020 shall be deemed void as a matter of law and against public policy.

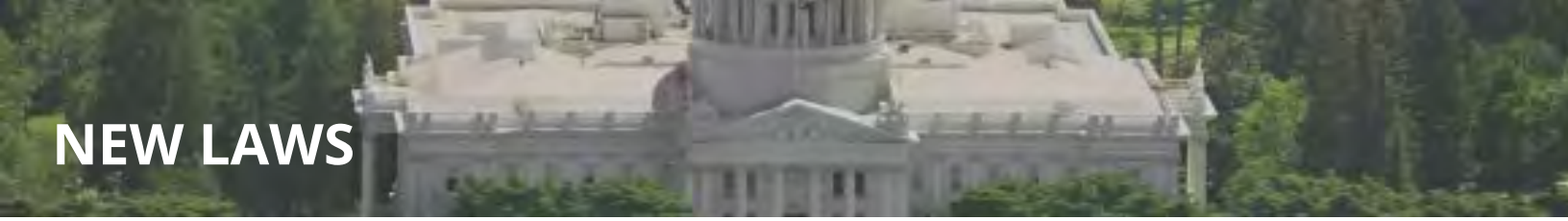
An "aggrieved employee" is defined as the person who has filed a claim against the person's employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process.

However, this law does not preclude the employer and aggrieved person from making an agreement to end a current employment relationship. It also does not preclude provisions restricting the aggrieved person from future employment with the settling employer if the employer has made a good faith determination the person engaged in sexual harassment or sexual assault. The inability to contractually preclude an employee from being rehired also does not require the employer to employ or rehire a person if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the relationship or refusing to rehire the person.

California Consumer Privacy Act to Temporarily Exclude Most "Employees" (AB 25)

Enacted in 2018 and taking effect in 2020, the California Consumer Privacy Act of 2018 (CCPA) will enable "consumers" to request from covered businesses (discussed below) the personal information the business collects or sells about the consumer, and to request that the business delete any personal information collected about them. Responding to concerns the broadly worded CCPA would apply to information about employees and enable them to request their employer delete information about them (e.g., a sexual harassment charge made against the employee), this law provides a one-year partial exclusion form the CCPA for employees acting within their scope as an employee.

Specifically, Civil Code section 1798.145(g)(1) specifies the CCPA does not apply to personal information gathered by an employer in three specific circumstances. First, it does not apply to personnel information collected by a business in the course of that person acting as a job applicant, employee, owner, director, officer, medical staff member or contractor of that business to the extent this personal information is collected and used by that business solely within the context of that person's role or former role of that business. In a similar manner, it does not apply to personnel information gathered by a business about these individuals that is either "emergency contact information" or that is necessary for the business "to retain to administer



benefits" for another natural person, provided this information is collected and used solely for purposes of "having an emergency contact on file" or in the "context of administering those benefits."

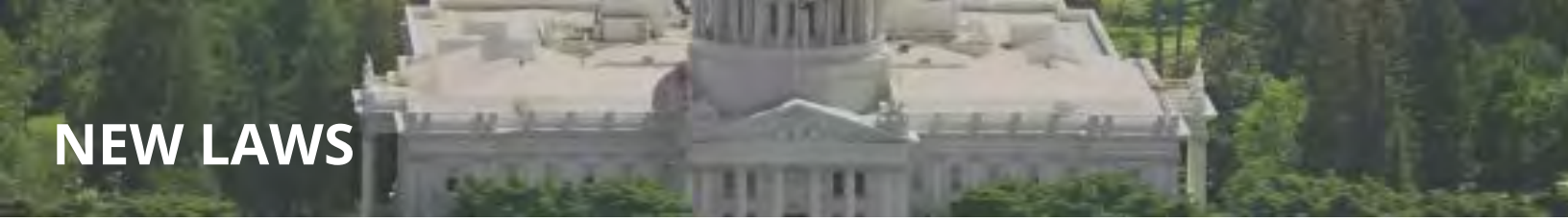
However, this exception does not obviate the employer's need to provide by January 1, 2020 any notices under section 1798.100 regarding the purpose for gathering this information, and does not preclude an employee from bringing a civil action if any employer violates the CCPA generally. More importantly, because the legislature contemplates further and more long-term amendments of the CCPA to balance these employee and employer interests, this exception will expire on January 1, 2021, essentially giving the Legislature one year to craft further amendments.

Notably, the CCPA does not apply to all "businesses." Rather, it generally (with exceptsion) only applies to a for-profit business that does business in the State of California (even if physically located outside of California), collects personal information or has such information collected on its behalf, and by itself or with others processes that data. In addition, the business must meet one of the following: (a) gross annual revenue exceeding $25 million; (b) receives, sells or shares (as defined) the personal information of more than 50,000 consumers, households or devices, or (3) derives more than half of its annual revenue from selling consumers' personl information.

Note also, the CCPA is almost certain to be amended further in 2020 – in fact, such further amendments is the primary purpose of the one year exemption from some of its provisions – and the California Attorney General is also supposed to provide clarifying regulations in 2020. (There were also further new laws amending the CCPA more generally (*see* AB 1355) that do not involve its "employer"-related provisions and are beyond the scope of this report, but potentially covered businesses may want to consider them). Lastly, and to reiterate, AB 25 simply provides a one year exemption from the provisions noted above so covered businesses may wish to track further potential amendments clarify and to consider how to comply if the deadlines are not further extended, and also consider how they will comply with any other applicable CCPA deadlines that have not been extended by AB 25.

New Penalties for an Employer's Breach of Arbitration Agreement (SB 707)

This law attempts to address concerns that after forcing an employee to compel arbitration employers are strategically failing to pay arbitration-related fees, thus stalling the proceedings. Accordingly, it implements new penalties if an employer fails to pay, within 30 days of their due



date, the fees to initiate or to maintain arbitration proceedings for employment or consumer claims.

New Code of Civil Procedure sections 1281.97 and 1281.98 will deem such an employer in material breach of the arbitration agreement and in default of the arbitration, thus waiving the employer's right to compel or proceed with arbitration. The employee will then have the option to withdraw the claim from arbitration and proceed in an appropriate court, or continue the arbitration but with the employer paying the employee's attorneys' fees involved with the arbitration. If the employee elects to proceed with court action, the statute of limitations will be deemed tolled during the prior pendency of the arbitration for any claims brought in arbitration or that relate back to any claim brought in arbitration. The court will also be required to order monetary sanctions against an employer deemed in breach, and have the authority to award additional sanctions, including limits on discovery, evidentiary and potentially terminating sanctions.

Employer Notices Regarding Flexible Spending Accounts (AB 1554)

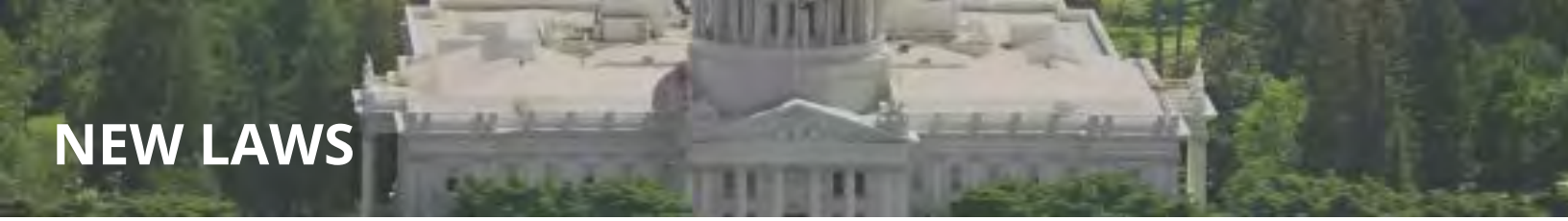
Responding to concerns that employees are forfeiting funds not spent by year-end for flexible spending accounts, this law requires employers to notify employees participating in a flexible spending account (including dependent care flexible spending accounts, health flexible spending accounts, or adoption assistance flexible spending accounts) of any deadlines to withdraw funds before the plan year ends. Employers must provide this notice by two different forms, one of which may be electronic, and may consist of the following non-exclusive means: (1) email; (2) telephone; (3) text message; (4) postal mail; or (5) in-person notification.

Precluding Employer Voter Intimidation (AB 17)

Entitled the Voter Protection Act, this law adds new Election Code section 14002 to preclude employers from requiring or requesting that an employee bring their vote by mail ballot to work or cast their vote by mail ballot at work. However, it does not prohibit an employer from encouraging an employee to vote. The Secretary of State or any public prosecutor with jurisdiction may seek civil fines up to $10,000 per violation against any employer who violates these protections.

Updated OSHA Requirements for Reporting Serious Occupational Injuries (AB 1804)

While employers presently must submit a report of serious injury, illness or death to the Division



of Occupational Safety and Health by telephone or email, this law deletes the "or email" requirement and instead directs the employer to use "a specified online mechanism established by the Division" for reporting purposes, or a telephone. This proposed change flows from concerns that employer reports via email may omit details, hampering OSHA investigations. However, until the online mechanism is available, the employer may continue to use telephone or email.

Changes to OSHA's Definition of "Serious Injury or Illness" (AB 1805)

To align California reporting laws with the currently more expansive federal law, this law recasts slightly the definitions of "serious injury or illness" and "serious exposure" for purposes of triggering an employer's duty to notify the Division of Occupational Safety and Health. For instance, it removes the 24-hour minimum time requirement for qualifying hospitalizations (other than for medical observation or diagnostic testing), and includes the loss of an eye as a qualifying injury and include amputation (rather than loss of a body member). The term "serious exposure" is also re-defined to include exposure to a hazardous substance creating a "realistic possibility" (rather than the current "substantial probability") that death or serious physical harm in the future could result from the actual hazard created by the exposure.

Whistleblower Protections Expansion to State or Local Contracting Agency (AB 333)

This law adds new Labor Code section 1102.51, extending the protections in California's whistleblowing statute (Labor Code section 1102.5) to state and local independent contractors and contracted entities tasked with receiving and investigating complaints from facilities, services and programs operated by state and local government. It also clarifies that these retaliation prohibitions apply to the state or local contracting agency.