

California Employment Law A Year In Review

February 13, 2019

PRESENTED BY

Aaron Colby

aaroncolby@dwt.com

EMPLOYMENTLAW.DWT.COM

“ME TOO” DEVELOPMENTS

FEHA AMENDMENTS

- Employers liable for *any kind* of unlawful harassment by non-employees where the employer knew or should have known of the harassment and failed to take appropriate corrective action
- Employers cannot require an employee to release a FEHA claim in exchange for a raise or bonus or as a condition of employment or continued employment
- Employer cannot require an employee to sign a non-disparagement agreement or other document by which the employee would be restrained from disclosing information about unlawful acts at work
- Provides guidance on bystander intervention training
- Adds declarations of Legislature’s intent regarding application of anti-harassment laws
 - Single incident may be sufficient to create a triable issue as to the existence of a hostile work environment
 - Harassment cases are rarely appropriate for disposition on summary judgment
 - Legal standard for sexual harassment does not vary by type of workplace

“ME TOO” DEVELOPMENTS

Settlement Agreements Regarding Claims of Sexual Assault, Sexual Harassment, Gender Discrimination, and Related Retaliation

- Cannot have provisions that prevent disclosure of factual information regarding claims of sexual assault, sexual harassment, gender discrimination or related retaliation
- Parties still allowed to agree not to disclose the settlement amount
- Claimant may request that the settlement agreement limit the disclosure of his/her identity or facts that would lead to the discovery of his/her identity.
- Addresses agreements settling lawsuits or administrative complaints (as opposed to claims asserted in an internal complaint or demand letter)

“ME TOO” DEVELOPMENTS

Sexual Harassment Training for All Employees and Small Employers

- Training requirement expanded to include employers with at least 5 employees
- All employers must provide at least one hour of training to non-supervisory employees by January 1, 2020, and once every 2 years thereafter

“ME TOO” DEVELOPMENTS

Freedom to Testify About Criminal Conduct and Sexual Harassment

- Cannot include a provision in any agreement that prevents a party to the agreement from testifying about criminal conduct or sexual harassment when that party has been required or requested to testify at a proceeding pursuant to a court order, subpoena, or written request from an administrative agency or the Legislature
- Addresses contracts generally, so includes employment agreement, settlement agreement, arbitration agreement

“ME TOO” DEVELOPMENTS

Statute of Limitations for Sexual Assault Claims

- Statute of limitations for filing a civil sexual assault action is:
 - 10 years after the alleged assault, OR
 - 3 years after the plaintiff discovered or reasonably should have discovered that an injury or illness resulted from the alleged assault,
 - Whichever is later

“ME TOO” DEVELOPMENTS

Female Directors on Corporate Boards

- Publicly-held domestic and foreign corporations with principal executive offices in California must have a minimum of one female director on their boards by the end of 2019
- By the end of 2021, these corporations must meet the following minimums
 - 6 or more directors → at least 3 female directors
 - 5 directors → at least 2 female directors
 - 4 or less directors → 1 female director
- Secretary of State must publish statistical information on its website concerning the gender composition of the Boards of Directors of publicly-held corporations

PAY HISTORY

- Employers need not provide pay scales except to applicants, upon their request, who have completed an initial interview
- Neither current employees nor every applicant are entitled by law to pay scale information
- Employers may ask job applicants about their “salary expectations”
- Employers may make compensation decisions based on a current employee’s salary so long as any wage differential is justified by one or more specified factors, such as a seniority system or merit system

PAYROLL RECORDS

- Employees have a right to inspect, copy, and ***now also receive*** their payroll records within 21 days of a request
- Upon request, employers must provide a copy of pay statements, as opposed to requiring the employee to copy payroll records themselves

U.S. SUPREME COURT UPHOLDS CLASS ACTION WAIVERS

- Class waivers in arbitration agreements between employers and employees are enforceable under the Federal Arbitration Act (FAA)
- Class waivers are a tool to limit costly and protracted class action litigation, but there are still cons of such waivers
- Arbitration agreements must be bi-lateral and well-written, and satisfy any applicable requirements of state law

NEW CALIFORNIA TEST FOR EVALUATING INDEPENDENT CONTRACTOR STATUS

Dynamex (California Supreme Court)

- “ABC test” for determining whether an individual is an “employee” for purposes of the California Wage Orders
- Worker will be deemed to be an “employee” unless the hiring company can prove:
 - Worker is free from the control and direction of the company
 - Worker performs work that is outside the usual course of the company’s business; **AND**
 - Worker is customarily engaged in an independently established trade, occupation or business

USE OF EMPLOYEE NON-SOLICITATION AGREEMENTS LIMITED

AMN Healthcare (CA Ct of Appeal)

- Recruiting company's attempt to ban its former recruiters from recruiting away its current employees was a violation of California's long-standing public policy favoring competition and employee mobility
- Decision suggests that all employers in California (not just recruiters) need to be extremely careful when including these types of provisions going forward

CALCULATING BONUS PAYMENTS INTO THE OVERTIME RATE

Alvarado v. Dart Container Corp. of California (CA Supreme Ct)

- When a nonexempt employee receives a non-discretionary flat-sum bonus during a single pay period, the overtime rate should be based on the employee's *straight time hours* worked during the pay period in which the bonus is earned, and not the employee's *total hours worked* during the pay period
- Employers who continue to use total hours worked in their calculations (which is permitted under federal law) run the risk of being found to have underpaid their employees

“ROUNDING” EMPLOYEES’ HOURS WORKED REMAINS RISKY IN CALIFORNIA

- Employers who elect to round employee time must prove that their rounding policies are:
 - Neutral on their face; **AND**
 - Policies do not result in any loss of pay to employees
- Because the 2nd factor can only be determined by post-payment analysis, any violation will have already occurred before the employer can identify the problem
- Recommend policy that provides payment for time actually worked, coupled with clear rules for the recording of time

NEW STATE REGULATIONS ON NATIONAL ORIGIN DISCRIMINATION

- Provide expansive definitions of “national origin” and “national origin group”
- Clarify permissible and prohibited types of employer policies governing English language proficiency and permissible and prohibited inquiries regarding immigration status
- Detail prohibited forms of harassment based on national origin

CHANGES TO MINIMUM WAGE LAWS

- Effective January 1, 2019, the *California statewide minimum wage* increased to
 - \$12.00 for employers with 26 or more employees
 - \$11.00 for employers with fewer than 26 employees.
- To maintain exempt status, executive, administrative, and professional employees, new salary threshold is \$960 per week, or ***\$49,920 per year***
- To maintain exempt status, commissioned inside salespeople must earn ***more than \$18*** per hour (and may have to make more in commissions)

CHANGES TO MINIMUM WAGE LAWS

- Employers should examine employee compensation to ensure that low-wage workers earn at least the required minimum wage. They should also review compensation for exempt employees to ensure that exempt employees receive at least twice the minimum wage. If an employee does not, the employer should consider whether to (1) increase compensation so that the salary threshold is satisfied or (2) reclassify the employee as nonexempt.