LABOR LAW UPDATE

YOUR LABOR

OF LOVE

A NEW WAVE OF CALIFORNIA EMPLOYMENT LAWS FOR 2020

BY MARK E. TERMAN

More than 300 bills introduced in the 2019 California Legislative session mention "employer," compared to 589 bills in 2018. While most bills bogged down or died in the Legislature, many of the bills—which likely would have been vetoed by former Gov. Jerry Brown—were signed into law by first-term Gov. Gavin Newsom, ushering in a new wave of more regulation of employers in the Golden State.

The following are essential elements of many key state Assembly Bills (AB) and Senate Bills (SB) that became law Jan. 1 (unless otherwise noted) and affect private employers.

Independent Contractor Classification Gauntlet

Establishing lawful independent contractor classification in California has never been certain or simple, as it can bypass legal rights and benefits available only to employees. The same set of facts could yield a different outcome depending on the tests applicable in court or a specific state agency.

The cornerstone of most tests has been the 1989 California Supreme Court decision, *Borello & Sons, Inc., v. Department of Industrial Relations*. *Borello* cast multiple factors to evaluate independent contractor classification. The primary focus is the degree of

control (or right to control) exercised by the hiring entity over the manner and means of the workers' performance. Secondary factors include whether the worker performs services for companies other than the hiring entity, purchases his or her own equipment or tools, sets his or her own hours, contracts for discrete units of work rather than an indefinite time, hires his or her own helpers/employees, and assumes risk for profit and loss.

AB 5 codifies and expands a new standard: the "ABC test," established in 2018 by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*. The ABC test presumptively considers all workers to be employees and forces a hiring business to bear the burden of proving each of the following criteria for proper independent contractor classification:

A. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under contract for the performance of the work and in fact;
B. The worker performs work outside the usual course of the hiring entity's business; *and*
C. The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

Similar to the right-of-control prong under *Borello*, Part A of the ABC test focuses on whether the worker, in contract and in practice, exercises autonomy over the performance of the contracted services. Part C focuses on whether the employee actually engages in an established business for him or herself.

Part B is more difficult to establish. It focuses on whether the services rendered under contract are beyond the scope of the hiring entity's usual course of business. The *Dynamex* Court clarified this to mean whether the work performed is distinguishable from that which an employee of the company would be expected to perform.

The ABC test applies to claims based on the Labor Code and Unemployment Insurance Code and, by July 1, it also will apply to Workers' Compensation Code claims. AB 5 *does not* apply to other claims, such as those under the Fair Employment and Housing Act that resides in the Government Code.

AB 5 also establishes seven groupings, covering about 50 industry-specific professions, trades and relationships, for which the ABC test does not apply, but are instead subject to *Borello* and other contractor classification criteria in the statute. Many of these exemptions are highly specific with multi-part criteria and definitions. The exemptions include licensed accountants, insurance agents, physicians, lawyers, engineers, securities broker-dealers and investment advisers, and workers in certain other professional service and business sectors. One sector that did not receive an exemption: The gig economy.

This bill amends Sec. 3351 of the Labor Code, adds Sec. 2750.3 to the Labor Code, and amends secs. 606.5 and 621 of the Unemployment Insurance Code.

Establishing lawful independent contractor classification in California has never been certain or simple, as it can bypass legal rights and benefits available only to employees.

More Time to Sue Employers

Pursuit of claims alleging employment discrimination, harassment and retaliation under the California Fair Employment and Housing Act requires filing of a verified complaint with the Department of Fair Employment and Housing (DFEH). Once the DFEH issues a "private right to sue letter," the claimant has one year to sue in civil court. Prior law provided that a timely DFEH complaint must be filed within one year from the date upon which the unlawful practice occurred.

AB 9 extends the deadline to three years. As a practical matter, employers can now be sued over alleged wrongs under FEHA that occurred four or more years earlier.

This bill amends secs. 12960 and 12965 of the Government Code.

Arbitration Agreements Under Siege

AB 51 prohibits employers from requiring any applicant for employment or any employee to waive any right, forum or procedure for a violation of any provision of the FEHA or other specific statutes governing employment (such the Labor Code) as a condition of employment, continued employment or the receipt of any employment-related benefit. As a practical matter, AB 51 bans *mandatory* arbitration agreements in California. The bill also prohibits employers from threatening, retaliating or discriminating against, or terminating any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum or procedure for a violation of specific statutes governing employment.

Anticipating federal pre-emption challenge, AB 51 states that nothing in the bill is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act. In a lawsuit filed Dec. 6, 2019, the Chamber of Commerce of the United States and other plaintiffs asked the federal court to enjoin AB 51 based on federal preemption.

This bill adds Sec. 12953 to the Government Code and Sec. 432.6 to the Labor Code.

More Penalties for Failure to Pay Wages

In addition to existing penalties that an employee may recover for an employer's failure to timely pay wages, **AB 673** amends Labor Code Sec. 210 to permit an action to recover statutory penalties against the employer to recover unpaid wages. Sec. 210 provides that for any initial violation, the employer is subject to $100 for each failure to pay each employee. For each subsequent violation, or any willful or intentional violation, the employer is subject to $200 for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld.

The bill authorizes an employee to either recover these statutory penalties under these provisions or enforce civil penalties under Labor Code Sec. 2699(a) (i.e., the Private Attorneys General Act of 2004), but not both for the same violation.

This bill amends Labor Code Sec. 210.

AB 1805 adds that employers may report via an online mechanism when it is established by the Division of Occupational Safety and Health; existing law requires employers to report serious occupational injury, illness or death to the Division immediately by telephone or email.

'No Rehire' Prohibited in Settlement Agreements

AB 749 prohibits "no-rehire" clauses in dispute-related settlement agreements. Specifically, it "prohibits an agreement to settle an employment dispute from containing a provision that prohibits, prevents or otherwise restricts a settling party that is an aggrieved person, as defined, from working for the employer against which the aggrieved person has filed a claim or any parent company, subsidiary, division, affiliate or contractor of the employer." This bill defines "aggrieved person" as someone "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."

With that said, AB 749 does permit no-rehire clauses in two situations: (a) a settlement agreement with an employee whom the employer has determined in good faith has engaged in sexual harassment or sexual assault; and (b) in severance or separation agreements unrelated to employment disputes.

This bill clarifies that an employer may choose not to rehire a former employee if it had a legitimate, nondiscriminatory or non-retaliatory reason for terminating the employee's employment.

This bill adds Chapter 3.6 (commencing with Sec. 1002.5) to Title 14 of Part 2 of the Code of Civil Procedure.

Additional Leave for Organ Donors

Under prior law, private employers with 15 or more employees must permit an employee to take a leave of absence with pay, not exceeding 30 business days in a one-year period, for the purpose of organ donation.

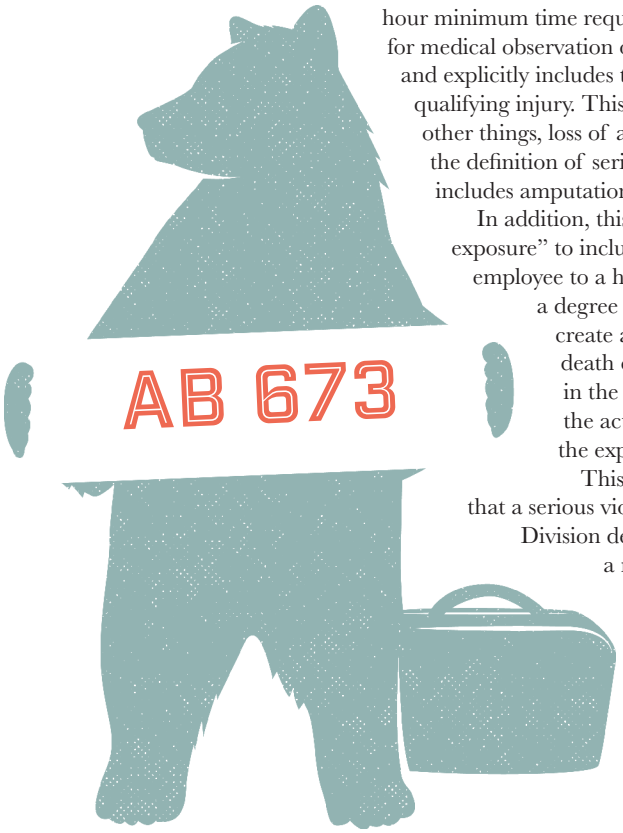
AB 1223 requires such employers to grant an employee *an additional* unpaid leave of absence, not exceeding 30 business days in a one-year period, for the purpose of

organ donation. The one-year period is measured from the date the employee's leave begins and shall consist of 12 consecutive months.

This bill amends secs. 89519.5 and 92611.5 of the Education Code, Sec. 19991.11 of the Government Code, and Sec. 1510 of the Labor Code, and adds secs. 10110.8 and 10233.8 to the Insurance Code.

Serious Occupational Injuries and Illnesses

AB 673 amends Labor Code Sec. 210 to permit an action to recover statutory penalties against the employer to recover unpaid wages.



Existing law requires employers to report serious occupational injury, illness or death to the Division of Occupational Safety and Health (Division) immediately by telephone or email. **AB 1805** adds that employers may report via an online mechanism when it is established by the Division.

This bill amends Sec. 6409.1 of the Labor Code.

Under existing law, "serious injury or illness" is defined as requiring inpatient hospitalization for a period in excess of 24 hours for purposes of reporting serious occupational injury or illness to the Division. AB 1805 removes the 24-hour minimum time requirement, excludes those for medical observation or diagnostic testing, and explicitly includes the loss of an eye as a qualifying injury. This bill deletes, among other things, loss of a body member from the definition of serious injury and, instead, includes amputation.

In addition, this bill redefines "serious exposure" to include exposure of an employee to a hazardous substance in a degree or amount sufficient to create a realistic possibility that death or serious physical harm in the future could result from the actual hazard created by the exposure.

This bill also establishes that a serious violation exists when the Division determines that there is a realistic possibility that death or serious injury could result from the actual hazard created by the condition alleged in the complaint.

This bill amends secs. 6302 and 6309 of the Labor Code.

More Paid Family Leave Benefits

California Paid Family Leave (PFL) is a partial wage replacement administered by the Employment Development Department and funded by mandatory employee payroll deduction. Entitlement to a leave of absence is determined by other law and employer policies. Effective July 1, **SB 83** increases PFL benefits from six weeks to eight weeks.

This bill amends, repeals, or adds multiple sections of the Government Code, Labor Code and Unemployment Insurance Code.

Added Lactation Accommodation

Under existing law, employers must make reasonable efforts to provide an employee who wishes to express breast milk with the use of a room or other location, other than a bathroom, in proximity to the employee's work area for the employee to express milk in private for the employee's child.

Employers also are required to provide such employees a reasonable amount of break time that will, if possible, run concurrently with any break time already provided to the employee. Break time for an employee that does not run concurrently with paid rest breaks need not be paid.

SB 142 requires that employers provide a reasonable amount of break time to accommodate an employee desiring to express breast milk for the employee's infant child "each time" the employee has need to express milk. SB 142 also requires that employers provide a lactation room or location for the employee to express milk in private that is:

- Safe, clean and free of hazardous materials, as defined.
- Contains a surface to place a breast pump and personal items.
- Contains a place to sit.
- Has access to electricity or alternative devices, including, but not limited to, extension cords or charging stations, needed to operate an electric or battery-powered breast pump.

Employers also must provide access to a sink with running water and a refrigerator or another cooling device suitable for storing milk in proximity to the employee's workspace. A temporary lactation location can be provided, due to the employer's operational, financial or space limitations, that's in proximity to the employee's work area and otherwise compliant. Employers also must develop and implement a policy regarding lactation accommodation and make it available to employees.

Smaller employers, those with fewer than 50 employees, may seek an exemption under SB 142 by demonstrating an undue hardship, though a

MORE THAN 300 BILLS INTRODUCED IN THE 2019 California Legislative session mention "employer," compared to **589 BILLS** IN 2018. While most bogged down or died in the Legislature, many of the bills were signed into law by first-term Gov. Gavin Newsom, ushering in a new wave of more regulation of employers in the Golden State.

reasonable effort must be made to provide a place for an employee to express milk in private. An employer in a multi-tenant building or multi-employer worksite may comply by providing a space shared among multiple employers within the building or worksite if such employers cannot provide a lactation location within their own workspace.

This bill amends secs. 1030, 1031, and 1033 of the Labor Code, and adds Sec. 1034 to the Labor Code.

Respect the CROWN

FEHA guards against discriminatory employment practices, including hiring, promotion and termination of employment based on certain protected characteristics, including race, unless based on a *bona fide* occupational qualification or applicable security regulations. **SB 188**, known as the Create a Respectful and Open Workplace or Natural Hair (CROWN) Act expands the definition of "race" to include traits historically associated with race such as hair texture and protective hairstyles, such hairstyles as braids, locks and twists.

SB 707 permits an employee to withdraw from arbitration—and sue to court instead—when the employer has failed to pay fees or costs to initiate the arbitration within 30 days after the due date.

This bill amends sec. 212.1 of the Education Code and sec. 12926 of the Government Code.

Payment of Motion Picture and Print Shoot Employee Final Wages

Under existing law, an employer who discharges an employee must pay the employee's final wages at the time of termination, and may be subject to a waiting time penalty for failing to do so. Currently, an exception exists for employees engaged in the production or broadcasting of motion pictures such that an employer can pay without penalty the employee's final pay by the next regular payday. **SB 671**—effective Sept. 5, 2019—establishes a similar provision for print shoot employees.

This bill amends secs. 203, 203.1, and 220 of the Labor Code, and adds Sec. 201.6 to the Labor Code.

Consequences of Late Payment of Arbitration Fees

SB 707 permits an employee to withdraw from arbitration—and sue to court instead—when the employer has failed to pay fees or costs to initiate the arbitration within 30 days after the due date.

EMPLOYERS SHOULD CONSIDER how these new laws impact their workplaces, then review and update their personnel and document retention policies and practices with the advice of experienced attorneys or human resource professionals.

This bill also requires the court to impose a monetary sanction on the employer who materially breaches an arbitration agreement, and authorizes the court to impose other sanctions.

This bill amends secs. 1280 and 1281.96 of the Code of Civil Procedure and adds secs. 1281.97, 1281.98 and 1281.99 to the Code of Civil Procedure.

New Deadline for Added Sexual Harassment Training

Years ago, AB 1875 required employers of 50 or more employees to provide anti-sexual harassment training to supervisors every two years and to new supervisors within six months of their becoming a supervisor. Legislation in 2018 expanded that requirement such that employers who employ five or more employees, including temporary or seasonal employees, are required to provide two hours of anti-sexual harassment training to all supervisors and managers, and at least one hour of anti-sexual harassment training to all non-supervisory employees by Jan. 1, 2020, and once every two years thereafter.

SB 778—signed as an emergency measure on Aug. 30, 2019—modified and extended to Jan. 1, 2021, the deadline of 2018 legislation. New, nonsupervisory employees must be provided the training within six months of hire and new supervisory employees be provided the training within six months of the assumption of a supervisory position. The bill also clarifies that an employer who provided this training in 2019 is not required to provide it again until two years thereafter. **SB 530** clarifies that the Jan. 1, 2021, deadline applies to seasonal, temporary or other employees hired to work for less than six months.

This bill amends secs. 12950.1 of the Government Code.

Effective July 1, SB 83 increases paid family leave from 6 weeks to 8 weeks.

Minimum Wage Still Rising

As part of legislation enacted in 2015, the state minimum wage increased on Jan. 1, to $13 per hour for employers with 26 or more employees and to $12 per hour for employers of 25 or fewer employees. It will continue to increase annually until $15 per hour is reached by Jan. 1, 2022, for the larger (26-plus employees) employers and by Jan. 1, 2023, for smaller employers.

Changes in state—but not local—minimum wage also affect classification of most exempt workers. In addition to strict "duties tests" for administrative, executive and professional wage and hour exemptions, a salary of at least *twice* the state minimum wage must be paid to meet the "salary basis test."

By Jan. 1, the annualized salary rate that employers with 26 or more employees must pay to meet the exempt salary requirement will advance to $54,080, up from $49,920. For employers with smaller workforces, the exempt salary requirement will move to $49,920, up from $45,760.

Each state increase also impacts retailers who rely on the inside-sales exemption, which requires that employees be paid at least 1.5 times the state minimum wage, and at least half of their other earnings be from commissions.

Municipalities continue to create and increase their own minimum wage for companies with employees working in their jurisdiction. Employers must pay the higher of the state *or* local minimum wage. Increases effective Jan. 1 include Mountain View and Sunnyvale ($16.05), Los Altos and Palo Alto ($15.40), Redwood City ($15.38), Cupertino ($15.35), Belmont ($15.00) and San Diego ($13).

By July 1, the city of Los Angeles minimum wage for employers with 26 or more employees will be $15. Los Angeles employers with fewer employees must pay at least $14.25 per hour by July 1. Local minimum wage for employees in San Francisco, currently $15.59 per hour, will be adjusted on July 1 based on the annual Consumer Price Index increase.

Employers should monitor the requirements to assure compliance in each municipality they have employees working in. A good starting place is the UC Berkeley Labor Center Inventory of U.S. City and County Minimum Wage Ordinances: http://laborcenter.berkeley.edu/minimum-wage-living-wage-resources/inventory-of-us-city-and-county-minimum-wage-ordinances/.

Overtime Exemption for Some Computer Professionals

Labor Code Sec. 515.5 contains an overtime pay exemption for highly skilled computer professionals who spend more than half of their working time in top-level intellectual or creative work that requires the exercise of discretion and independent judgment, such as software engineers and programmers, and systems designers and analysts.

To qualify for exemption, the employee also must be paid at least a certain amount per hour or, alternatively, a salary equal to that hourly rate. Each year, the California Department of Industrial Relations sets that pay rate based on the California CPI increase. For 2020, the rate is $46.55 per hour or $96,968.33 annual salary (i.e., $8,080.71 monthly).

What's Next?

Employers should consider how these new laws impact their workplaces, then review and update their personnel and document retention policies and practices with the advice of experienced attorneys or human resource professionals. CPA

Mark E. Terman is a partner with Drinker Biddle & Reath LLP and national vice chair of the firm's Labor and Employment Group. You can reach him at drinkerbiddle.com.

SB 142 requires that employers provide a reasonable amount of break time to accommodate an employee desiring to express breast milk for the employee's infant child "each time" the employee has need to express milk.