Legal Updates FOR 2020

Governor Gavin Newsom recently signed a number of bills that will affect California employers in 2020. Most significantly, the new laws codified the ABC test for independent contractors, clarified sexual harassment training requirements and deadlines for employers, and created stricter enforcement of employment arbitration agreements.

In the wake of Assembly Bill 5, employers will need to exercise additional care when determining whether to hire workers as employees or as independent contractors. Using the below analysis of the controversial new California law, employers should re-examine their current and future relationships with independent contractors.

AB 5 codifies the California Supreme Court's ruling in *Dynamex Operations West, Inc. (2018) 4 Cal. 5th 903*, which changed the test used to determine whether California workers are employees or independent contractors. AB 5 codifies the "ABC" test established in Dynamex, and specifically exempts certain occupations, industries and contractual relationships. The "ABC" test presumes that all workers are employees, and places the burden on the hiring business to establish the following factors in order to classify a worker as an independent contractor:

- (A) the worker is free from the control and direction of the hirer in connection with the performance of the work;
- (B) the worker performs work that is 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 for the hiring entity.

If the hiring business fails to establish any of these factors, the worker

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will be classified as an employee. Extreme care and caution should be used with regard to classification of all independent contractors. Accordingly, some public agencies are rightly reviewing their independent contractor agreements to determine whether those contractors are still considered independent contractors under AB 5.

Expansion of Lactation Accommodation Requirements (SB 142): This bill expands existing law relating to lactation accommodation and adds a number of new requirements for the space itself, including access to running water, refrigeration to store milk, and electricity or charging stations for electric or battery-operated breast pumps. The bill also provides for additional break time to express milk, policy requirements and penalties under the Labor Code for violations.

Statute of Limitations for FEHA Claims Extended to Three Years (AB 9): Under existing law, the California Fair Employment and Housing Act (FEHA) requires that an employee alleging discrimination, harassment, or retaliation must first file a verified complaint with the Department of Fair Employment and Housing (DFEH) before filing a civil action in court. Currently, the employee has a one (1) year statute of limitations to file their DFEH complaint. AB 9, known as the Stop Harassment and Reporting Extension (SHARE) Act, extends the deadline to file a claim with the DFEH to three (3) years. Employers should note that AB 9 does not revive claims that have

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Just an FYI!

As recently highlighted by the New York Times, a new phrase emblematic of the real or perceived "War between the Generations" has gone viral: "OK, Boomer!" The phrase, popularized on the Internet and, in particular, Twitter by Generation Z and Millennials, has been used to dismiss baby boomers' thoughts and opinions, sometimes viewed by younger generations as paternalistic or just out of step.

And, the phrase isn't just living in Twitter feeds and the comments sections of opinion pieces. There is "OK, Boomer!" merchandise and, just last week, a 25 year-old member of the New Zealand Parliament used the phrase

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already lapsed under the current one-year statute of limitations rule. Employers should remember to *Document! Document! Document! (And save those documents!)*

Sexual Harassment Training Requirements — Compliance Period Extended

Under SB 778, an employer with five or more employees must provide at least two hours of training and education regarding sexual harassment to all supervisory employees and at least 1 hour of training to all nonsupervisory employees by January 1, 2021. Thereafter, the training must be given again once every two years. SB 778 also requires the training be provided within six months of hire or within six months of the assumption of a supervisory position.

SB 778 clarifies that employees who are trained in 2019 do not need to be trained again until two years have passed (sometime in 2021, after the January 1, 2021, deadline). The bill also includes an urgency clause making the legislation effective immediately.

Extension of California Paid Family Benefits from Six to Eight Weeks

For claims that start on or after July 1, 2020, California's Paid Family Leave ("PFL") benefits will extend from six weeks to eight under SB 83. PFL is not a leave entitlement; rather, employees who are eligible to take leave through paid sick leave or the Family Medical Leave Act ("FMLA")/ California Family Right Act ("CFRA"), or who are otherwise granted leave by the employer, are then eligible to apply for wage replacement benefits through PFL.

The San Francisco Paid Parental Leave Ordinance, which requires employers to pay "supplemental compensation" for the full period that a covered employee receives PFL to bond with a child, will extend from six to eight weeks accordingly.

RECENT COURT DECISION

Labor Code §1102.5
Nejadian v. County of Los Angeles, 40 Cal. App. 5th 703 (2019)

Patrick Nejadian sued his former employer, the County of Los Angeles, for age discrimination and retaliation and was awarded $300,000 on the retaliation claims (arising under the FEHA and the Labor Code); the jury found no liability on the age discrimination claim. The Court of Appeal reversed the judgment on the ground that Nejadian had failed to present sufficient evidence to support his claims. The Court held that under Cal. Lab. Code § 1102.5(c), an employee is required to show that the activity in question actually would result in a violation or noncompliance with a statute, rule, or regulation, which is "a quintessentially legal question" for the trial court. Once it is determined by the court that the activity would result in a violation or noncompliance with a statute, rule, or regulation, the jury must then determine whether the plaintiff refused to participate in that activity and, if so, whether that refusal was a contributing factor in the defendant's decision to impose an adverse employment action on the plaintiff.

In reviewing the evidence presented, the Court determined that "Nejadian mostly referred to the activities in generalities" and failed to present sufficient evidence to show that the activities in question would result in a violation of any specific state, federal, or local statute, rule, or regulation. Similarly, the alleged retaliation under the FEHA did not constitute protected activity because the conversation in which he told a coworker that he felt discriminated against based upon his age "was part of an informal discussion between coworkers, and [the coworker] did not report Nejadian's statement to management."

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to dismiss a fellow lawmaker's perceived heckling during a debate about climate change.

While many may find "OK, Boomer!" a harmless way to point out generational differences, the phrase's popularity could lead to problems once it creeps into the workplace. Age (over 40) is a protected category under both California law (i.e., the Fair Employment and Housing Act) and federal law (i.e., the Age Discrimination in Employment Act). Whether the speaker is well-intentioned or not, dismissive attitudes about older workers could form the basis of claims for discrimination and/or harassment. And, as one radio host recently opined, the phrase "OK, Boomer!" may be regarded by some as an outright slur.

Generation Z and Millennial employees understand that using derogatory or dismissive comments related to gender, race, religion, national origin, disability and sexual orientation are inappropriate. Yet, for some reason, some may not have made the leap with regard to insidious/disparaging comments about a co-worker's age. Given the prevalence of age discrimination lawsuits, employers should take heed and consider reminding their workforce about the impropriety of this and other age-related phrases, and train their employees to leave the generation wars at the door.

More on this subject can be found right here on page 39.