

New California Employment Laws for 2020

2019 was a banner year for Governor Gavin Newsom. The Governor signed numerous bills into law, most of which are **not** employer friendly. For an in-depth analysis of how each law might affect your organization, contact your Hanson Bridgett labor and employment lawyer and/or join us for our Annual Client Seminars on January 28, 2020 (Walnut Creek), January 29, 2020 (Sacramento), or January 30, 2020 (San Francisco). Unless otherwise indicated, each new law takes effect on January 1, 2020.

Wage and Hour

Independent Contractor Worker Status (AB 5): On September 18, 2019, Governor Gavin Newsom signed into law AB 5 - a bill that expands a 2018 California Supreme Court case *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*. *Dynamex* reduced an employer's ability to classify a worker as an independent contractor. Stating that "[t]he misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class and the rise in income inequality," AB 5 takes broad strokes at California workforces to remedy that apparent wrong. It specifically codifies the "presumption" of employee status and adopts *Dynamex's* ABC test, which provides that a worker is an employee, unless an employer can demonstrate the following:

"a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that **all** of the following conditions are satisfied:

(A) The person is free from the 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.

(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."



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AB 5 specifically exempts certain professions and job categories, such as licensed insurance agents, certain health care professionals, registered securities broker-dealers or investment advisers, direct salespersons, real estate licensees, commercial fishermen, and workers providing licensed barber or cosmetology services. AB 5 applies retroactively, so it is important that employers review with their counsel any workers for whom they issue an IRS form 1099 to assure that the workers pass the ABC test. For more information, [see our latest update on AB 5 here](#).

Failure to Pay Wages: Penalties (AB 673): AB 673 creates a private right of action for employees to recover penalties for late payment of wages through the Private Attorneys General Act (PAGA). The employee will have the option to either pursue a private right of action under PAGA or recover statutory penalties for the same violation – but not both. AB 673 also removes the authority from the Labor Commissioner to recover penalties in an independent action.

Labor Commissioner Authority Expanded to Order Restitution of Amounts Owed (SB 688): The Labor Commissioner can now order restitution if an employer is found to pay less than the contract wage (even if in excess of minimum wage). Previously, the Labor Commissioner could only seek wages for less than minimum wage violations and overtime.

Harassment and Discrimination

Fair Employment and Housing Act Administrative Exhaustion Extension (AB 9): AB 9 significantly extends the period within which an individual may file a discrimination complaint with the Fair Employment and Housing Act (FEHA) from one to three years.

Hairstyle Discrimination Prohibition (SB 188): SB 188 expands the FEHA's definition of race to include traits historically associated with race, including, but not limited to, "hair texture and protective hairstyles." Protective hairstyles include, but are not limited to, braids, locks, and twists.

Sexual Harassment Training Deadline Extension (SB 778): SB 778 extends the deadline for non-supervisory employee training to January 1, 2021 and confirms that those supervisors who received training in 2019 do not need to be trained again until two years after, i.e. sometime in 2021.

Sexual Harassment Training: Construction and Temporary Employees (SB 530): SB 530 extends the date by when seasonal, temporary, and/or other employees hired to work less than six months to January 1, 2021. An employer that employs workers pursuant to a construction industry multiemployer collective bargaining agreement can satisfy the sexual harassment training requirement by demonstrating that an employee has received the training within the past two years.

Damages Affected By Gender, Race, or Ethnicity (SB 41): SB 41 applies to personal injury and wrongful death cases, and prohibits any reduction in damages resulting from an estimation, measure, or calculation of past, present, or future damages for lost or impaired earning capacity that is based on a person's race, ethnicity, or gender.

Workplace Accommodation and Paid Family Leave

Lactation Accommodation (SB 142): The legislature continues to refine and expand the rights of employees who express milk in the workplace. SB 142 provides that every employer must provide a reasonable amount of break time sufficient for an employee to express breast milk as well as provide the employee with a room or other location to express milk in private. This location must:

- not be a restroom;
- be in close proximity to the employee's work area;
- allow for privacy, including being shielded from view and free from intrusion of others while expressing milk;
- be safe, clean, and free of hazardous materials;
- provide for a surface to place a breast pump and personal items;
- contain a place to sit;
- have access to electricity or an alternative devices allowing for the operation of an electric or battery-powered breast pump.

In addition, the employer must provide access to a sink and refrigerator (or cooler if a refrigerator cannot be provided).

Employers are required to develop and implement a policy regarding lactation accommodations, and make such policies readily available for employees. Denying a lactation break or requisite space subjects an employer to a \$100 penalty per violation.

SB 142 exempts employers with fewer than 50 employees, if the employer can demonstrate that the requirement posed an undue hardship by causing the employer significant difficulty or expense. Even if the employer demonstrates an undue hardship, the employer is still required to make reasonable efforts to provide the employee with the use of a room or other location, other than a stall, in close proximity to the employee's work area.

Paid Family Leave Expansion and Task Force (SB 83): Effective **July 1, 2020**, California's Paid Family Leave (PFL) wage replacement benefit will increase to eight weeks from six weeks within any twelve-month period. SB 83 allows *state* government employees that pay into the Nonindustrial Disability Insurance (NDI) program to receive six weeks of paid family leave. SB 83 also provides for the establishment of a task force for developing a proposal to increase paid family leave benefits to a full six months by 2021-22 for parents to care for and bond their newborn or newly adopted child. The proposal is expected to address job protections for employees, wage replacement rates up to 90 percent for low-wage workers, and provide a plan to implement and fund expanded paid family leave benefits.

Organ Donation Leave of Absence (AB 1223): AB 1223 requires employers to grant employees an *unpaid* leave of absence, not to exceed 30 days in one-year period, for the purpose of organ donation. This benefit is in addition to the existing 30 business days *paid* leave for an employee who is an organ donor. Public employees must first exhaust all available sick leave before taking that unpaid leave.

Settlement Agreements

Settlement Agreements Cannot Restrict Re-Employment (AB 749): AB 749 prohibits settlement agreement provisions that prevent an employee from seeking re-employment with the employer with whom the employee is settling the claim, unless the employer made a good faith determination that the employee engaged in sexual harassment or sexual assault.

Arbitration

Arbitration Prohibition (AB 51): Employers will no longer be able to *compel* applicants or employees into arbitration for state discrimination and Labor Code claims. Former Governor Brown vetoed a nearly identical bill, AB 3080, believing it preempted by the Federal Arbitration Act, so we may see some

challenges to AB 51. In the meantime, AB 51 makes actionable any threatened or actual retaliation against an individual who refuses to sign an arbitration agreement for these specified claims.

Arbitration Agreement Fees/Costs (SB 707): SB 707 imposes monetary sanctions on an employer or drafter of an arbitration agreement who compels arbitration or materially breaches an arbitration agreement, which includes failure to pay any cost or fee associated with arbitration. If the employee brings an action, the statute of limitations with regard all claims brought or that relate back to any claim brought in arbitration are tolled.

Privacy – Required Notices Regarding Use of Personal Data

California Consumer Privacy Act (AB 25): AB 25 amended the California Consumer Privacy Act (CCPA) to require businesses to provide consumers (including employees and applicants) with notices about what categories of information they collect about them and its purpose for collecting said information. These notices must be provided *before or at the time of collection*.

Industry Specific Trainings (Construction and Medical)

Occupational Safety and Health Training for Valley Fever (AB 203): Construction employers operating in counties where Valley Fever is "highly endemic" must provide annual training on the fungal disease to employees before employees begin work that is reasonably anticipated to cause substantial dust disturbance.

Implicit Bias Training in the Medical Field (AB 241): By January 1, 2022, all continuing education courses for physician and surgeons must include lessons on implicit bias in medical treatment. AB 241 requires the Board of Registered Nursing and Physician Assistant Board to adopt regulations requiring implicit bias training. Continuing education providers must comply with these regulations beginning January 1, 2023.

Health Facilities Notice Requirement (AB 1695): AB 1695 requires a licensee of a skilled nursing facility, at least 90 days prior to the finalization of a sale, transfer of operation, or other change or transfer of ownership interests, to give written notice of proposed changes to residents. A licensee that fails to comply with the notification requirement is liable for a civil penalty of \$100 per day for each day the notice is delayed. This is only applicable to license applications submitted after **July 1, 2020**.

AB 1695 also prohibits a prospective transferee, in the capacity of a prospective licensee, during a 60-day transition period, from discharging an employee without cause, other than the nursing home administrator and the director of nursing. In addition, during this 60-day transition period, employers are prohibited from reducing an employee's wages, benefits, or other terms and conditions of employment as a result of the transfer or change of ownership. Applicable to license applications submitted after **January 1, 2020**.

AB 1695 does *not* apply to skilled nursing facilities that are operated as a distinct part of an acute care hospital.

Miscellaneous

Reporting Occupational Injuries and Illnesses (AB 1804): AB 1804 requires employers to report serious workplace injuries, illnesses, or death immediately by telephone or through an online platform that will be developed by the Division of Occupational Safety and Health. Until the online platform is developed,

employers should make these reports by telephone and/or email, as an employer may be fined up to \$5,000 for noncompliance.

Workplace and School Gun Violence Restraining Orders (AB 61): Beginning September 1, 2020, AB 61 authorizes an employer, coworker who has substantial and regular interactions with the person and approval of their employer, or an employee or teacher of a secondary or postsecondary school, with the approval of the school administrator, to file a petition for an *ex parte*, one-year, or renewed gun violence restraining order. This gun violence restraining order will prohibit the subject of the petition from having in their custody or control, owning, purchasing, possessing, or receiving, or even attempting to purchase or receive, a firearm or ammunition when it is shown that there is a substantial likelihood that the subject of the petition poses a significant danger of self-harm or harm to another in the near future by having in their custody or control a firearm, and that the order is necessary to prevent personal injury to the subject of the petition or another.

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