

New 2020 Labor Laws Affecting California Employers

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Of the 2,625 bills introduced in the Legislature this year, 1,042 bills reached Governor Gavin Newsom's desk. He signed 870 and vetoed 172 — and many of those signed will affect California employers.

Some bills made significant changes to California employment law, such as the much-publicized independent contractor bill, Assembly Bill (AB) 5. Others made small but important changes of which employers must be aware, such as those changing the mandatory harassment prevention training deadlines.

The governor also vetoed several CalChamber-opposed bills, including AB 589, which would have created overly burdensome requirements for employers to post and provide employees with a “Worker’s Bill of Rights,” among other things. The governor also vetoed Senate Bill (SB) 218, which would have amended the Fair Employment and Housing Act (FEHA) to allow local governments in Los Angeles County to enact their own anti-discrimination ordinances similar to the FEHA, creating uncertainty, inconsistency and confusion regarding the FEHA’s application and interpretation.

New laws have been passed in recruiting and hiring; discrimination, harassment and retaliation protections; leaves of absence and benefits; workplace safety; arbitration; privacy; and wage and hour. Unless otherwise noted, the new laws take effect on January 1, 2020.

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Recruiting and Hiring

If you use or are considering using independent contractors, pay close attention to AB 5 below — it just might impact your workforce. And if you’re in the entertainment industry and employ minors, a different new law may affect you.

Codifying the ABC Test

One of the most significant and widely publicized bills to emerge from this year’s Legislature was AB 5, which codifies and expands the “ABC test” that’s used to distinguish employees from independent contractors under the Industrial Welfare Commission (IWC) Wage Orders. The ABC test was established by the California Supreme Court’s decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903 (2018) (*Dynamex*). AB 5 codifies this test and expands its application to the Labor and Unemployment Insurance Codes.

Under the ABC test, a worker is classified as an employee unless the employer can establish **all three** of the following:

- A. The worker is free from the hiring entity's control and direction in connection with the performance of the work, both under the contract for the performance of the work and in actually performing the work;
- B. The worker performs work that's 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.

AB 5 carves out numerous exceptions from the ABC test for various industries. If an exception is applicable, the more flexible common law multi-factor "Borello test" typically applies, focusing on the entity's control over the worker. While some of the exceptions detailed in the bill provide clarity for certain professions/industries, several are complex and subject to numerous criteria. Employers should consult with legal counsel on the potential application of exceptions under AB 5 and the different classification standards.

Assembly Bill 5 codifies the ABC test and expands its application.

Employing Minors in the Entertainment Industry

Current law regulates the employment of minors in the entertainment industry and requires a specified certification from a physician and surgeon for an infant younger than one month to be employed on any motion picture set or location. AB 267 expands the certification requirements for infants to cover any employment in the "entertainment industry," which the bill defines broadly to include any type of motion picture using any format (film, television, commercial), by any medium (theater, television, photography, advertising, etc.).

Discrimination, Harassment and Retaliation Protections

California's Legislature is still working toward increasing employee protections for 2020; it extended the amount of time a harassment or discrimination victim has to file a complaint, as well as expanded both lactation accommodation requirements and anti-discrimination laws. The Legislature also passed several bills related to harassment prevention training.

Statute of Limitations

Under current law, individuals have one year to file a complaint with the Department of Fair Employment and Housing (DFEH) for purported FEHA violations, such as discrimination, harassment and retaliation. Failure to comply with this administrative requirement means an individual cannot pursue FEHA claims in court. AB 9 **extends the statute of limitations to three years.**

This bill is a repeat of 2018's AB 1870, which Governor Edmund G. Brown Jr. vetoed, stating at the time that the one-year filing deadline "not only encourages prompt resolution while memories and evidence are fresh, but also ensures that unwelcome behavior is promptly reported and halted." Given this statute of limitations extension, it will become especially important for employers to keep detailed, accurate and contemporaneous employment-related documentation.

Harassment Prevention Training

In August, SB 778 was passed and went into effect, clearing up remaining issues from SB 1343, 2018's bill that made significant changes to California's harassment prevention training requirements, namely greatly increasing the number of employers who must provide training and establishing a training deadline of January 1, 2020. SB 778 pushed the original harassment training deadline back one year; now, employers with five or more employees must provide one hour of sexual harassment prevention training to nonsupervisory employees and two hours of such training to supervisors **by January 1, 2021**.

Employers who provided training to employees in 2019 aren't required to provide it again until two years from the time the employee was trained. Employers who provided training in 2018 must provide training in 2020 to maintain the two-year cycle and comply with the new deadline. Employers who trained employees in 2017 under the prior training law should provide training in 2019 in order to maintain their two-year training cycle.

Senate Bill 778 pushed the original harassment training deadline back one year — to January 1, 2021.

SB 778 didn't change the training timeline for seasonal and temporary workers, which requires that employers must provide training to such workers within 30 days or 100 hours of employment beginning January 1, 2020 — but SB 530 pushed the requirement out one year. Under the new law, employers must provide training to seasonal and temporary workers beginning January 1, 2021.

SB 530 also requires the Division of Labor Standards Enforcement (DLSE) to develop harassment and discrimination prevention policy and training standard recommendations for use by employers in the construction industry. It also clarifies how employers in the construction industry with workers under a multi-employer collective bargaining agreement may satisfy training requirements.

Lastly, AB 547 requires the director of the Department of Industrial Relations (DIR) to establish a training advisory committee; this committee will assist in compiling a list of qualified organizations and trainers employers will be required to use in providing biennial sexual violence and harassment prevention training to janitorial employees.

Lactation Accommodation

California passed another lactation accommodation bill to expand the requirements beyond the 2018 bill. Currently, employers must provide a location other than a bathroom for lactation accommodation. SB 142, modeled after San Francisco's lactation accommodation ordinance, creates expanded accommodation requirements for employers. Specifically, a lactation room must be close to the employee's work area, shielded from view and free from intrusion. The room itself must:

- Be safe, clean and free of toxic or hazardous materials;
- Contain a surface to place a breast pump and other personal items;
- Contain seating; and
- Have access to electricity.

The employer also must provide access to a sink with running water and a refrigerator suitable for storing breast milk close to the employee's workspace.

SB 142 also requires employers to create and implement a lactation accommodation policy, including publishing the policy in the employee handbook and providing the policy when an employee asks about or requests parental leave.

The 2018 bill included an undue hardship exemption, which SB 142 keeps in place but limits to employers with fewer than 50 employees.

Discrimination

Under the FEHA, it's unlawful to discriminate on the basis of race — and SB 188 expands the law to prohibit discrimination against employees and students based on their natural hairstyles. Per the bill, workplace dress codes and grooming policies that prohibit certain hairstyles can have a disparate impact on race and may be a proxy for racial discrimination.

The bill specifically amends the definition of "race" under the FEHA and the California Education Code to include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles," such as "braids, locks, and twists."

Employers should review their workplace dress code and grooming policies to ensure they abide by this amendment, and consult legal counsel for any necessary changes.

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Retaliation, Whistleblower Protection

Under existing whistleblower protection law, employers can neither prevent an employee from nor retaliate against an employee for providing information or testimony to a public body that's conducting an investigation — as long as the employee reasonably believes the information discloses a violation of the law.

AB 333 adds a section to the Welfare and Institutions Code that grants whistleblower employment protections specifically to a county's "patients' rights advocates" who provide patient services at county mental health centers.

Current law prohibits discriminating or retaliating against a patient or employee because that person presented a grievance or complaint, or participated in an investigation or administrative proceeding related to a health facility's care, services or condition. SB 322 expands those protections, providing an employee with the right to discuss possible regulatory violations or patient safety concerns with the California Department of Public Health (CDPH) inspector privately during a CDPH investigation.

Leaves of Absence and Benefits

California passed several bills expanding access to various leave of absence protections and other benefits.

Expanding Leave Protections

AB 1748 expands access to the California Family Rights Act (CFRA) for airline employees by creating special eligibility requirements for airline flight deck or cabin crew employees in a way that mirrors the federal Family and Medical Leave Act. These employees will be eligible for CFRA leave if they've worked for 12 or more months for the employer, worked at least 504 hours and have been paid at least 60 percent of the monthly guarantee, which means they worked at least 60 percent of the minimum number of hours scheduled in a given month.

California also expanded protected leave for organ donation. Under current law, employers are required to permit an employee donating an organ to take up to 30 days of paid leave of absence within a one-year period. AB 1223 requires employers to provide an additional unpaid leave of absence, up to 30 days per year, to an employee donating an organ.

Domestic Partnership

SB 30 changes how California law defines "domestic partnership." Under current law, a domestic partnership could be entered into only by either two adults of the same sex, or two adults of the opposite sex who were over the age of 62. SB 30 removes those requirements, allowing any two adults over the age of 18 to enter into a domestic partnership.

Beginning July 1, 2020, the duration of Paid Family Leave benefits for qualifying employees will be extended from six to eight weeks.

Paid Family Leave

Beginning July 1, 2020, the maximum duration of Paid Family Leave (PFL) benefits individuals may receive from California's State Disability Insurance (SDI) program will be extended from six to eight weeks, per SB 83. The PFL program provides partial wage replacement benefits to employees who are absent from work to care for a seriously ill family member or to bond with a minor child within one year of birth or placement of the child via foster care or adoption.

Current law requires state agencies to provide written materials in non-English languages under certain conditions, or to provide other assistance (e.g., translation guides) in completing English forms and questionnaires. AB 406 requires that, beginning January 1, 2025, the Employment Development Department distribute its application for paid family leave in English and in all non-English languages spoken by a substantial number of non-English-speaking applicants, as defined.

Flexible Spending Accounts

Current law requires an employer to notify employees of certain employment and benefit information. AB 1554 requires an employer to notify employees who participate in flexible spending accounts of any deadline to withdraw funds before the plan year's end in two different ways, which may include email, telephone, text message, postal mail and in-person notification.

Unemployment Insurance

California provides unemployment compensation to individuals who meet certain eligibility requirements, and SB 271 makes it easier for motion picture production workers to access such benefits. The bill allows temporary or transitory employment performed outside the state to count toward unemployment eligibility requirements as long as the motion picture worker is a California resident, is hired and dispatched from the state, and intends to return to the state to seek re-employment when the out-of-state work is finished.

Assembly Bill 1805 changes the definitions of “serious injury or illness” and “serious exposure” to align with federal health and safety standards.

Workplace Health and Safety

The Governor signed several new bills related to workplace health and safety this year.

Valley Fever

First, AB 203 requires construction employers working in counties where a fungal infection called Valley Fever is highly prevalent to provide employee training on Valley Fever annually and before an employee begins work that's “reasonably anticipated” to expose them to the fungus. The bill requires the training to cover certain topics and gives employers the option to include the training in their Injury and Illness Prevention Program, or as a standalone program. Training isn't required during the county's first year being listed as highly prevalent for Valley Fever, but training is required in subsequent years.

Definition Changes

AB 1805 changes the definitions of “serious injury or illness” and “serious exposure” to align with the federal Occupational Safety and Health Administration (OSHA) standards. Under current law, employers must report to the California Division of Occupational Safety and Health (known as Cal/OSHA) a “serious injury or illness,” which is defined as requiring inpatient hospitalization for more than 24 hours for reasons other than medical observation or tests. AB 1805 removes the 24-hour minimum hospitalization requirement. This means employers will have to report all inpatient hospitalizations, regardless of the length of stay. The bill also updates the definition of “serious exposure” to mean exposure to a hazardous substance that has a “realistic possibility” of death or serious physical harm (versus current law requiring “substantial probability” of death/serious harm).

Employers should consult with legal counsel regarding the implications of these changes, which may both increase reported injuries and lead to more Cal/OSHA investigations and/or citations.

As for reporting, current law requires employers to report serious workplace injury, illness or death to Cal/OSHA by telephone or email. AB 1804 requires such reporting through an online platform, but employers may continue making these reports by telephone or email until the platform is available.

Restraining Orders

Currently, immediate family members and law enforcement officers can petition courts to issue a “gun violence restraining order” prohibiting individuals from having in their custody or control, owning, purchasing, possessing or receiving, or attempting to purchase or receive, a firearm or ammunition upon showing of a substantial likelihood of significant danger or harm to self or others.

AB 61 expands the law, allowing employers, co-workers (with employer approval) who regularly interact with the person, or an employee or teacher of a secondary or postsecondary school (with school administration approval), to file a petition for a gun violence restraining order. Employers should consult with legal counsel on this law’s implications related to the employers’ workplace violence prevention policies and strategies.

Assembly Bill 51 bans mandatory arbitration agreements between employers and employees, and prohibits retaliation and discrimination against those who refuse to enter such agreements.

Agreements

The governor signed several bills affecting agreements between employers and employees, particularly arbitration agreements.

First, AB 51 effectively bans mandatory arbitration agreements entered into between employers and employees. The bill specifically prohibits an employer from requiring an applicant or employee to waive any right, forum or procedure for any employer violations of the FEHA and the Labor Code. The Legislature was clear this was intended to target arbitration agreements, in which employers and employees generally agree to resolve employment disputes outside of court. The bill also prohibits retaliation and discrimination against an applicant or employee who refuses to enter such agreements.

Last year, Governor Brown vetoed a virtually identical bill because it “plainly violates federal law,” he said, referring to the Federal Arbitration Act, under which the U.S. Supreme Court has struck down state laws that unduly restrict arbitration.

The bill would not apply to any arbitration agreements entered into prior to January 1, 2020, but employers may wish to seek legal counsel on how to proceed with amending such agreements in the new year.

Another bill targeting arbitration, SB 707, provides consumers or employees remedies if the drafting party (the business or employer) breaches an arbitration agreement. The bill states that if the employer doesn’t pay the costs associated with beginning or continuing arbitration within 30 days after they are due, then the employer is in material breach of agreement, in default of arbitration and waives its right to compel arbitration.

In that case, the employee may withdraw the arbitration claim and proceed in court or compel arbitration in which the employer is required to pay reasonable attorney's fees and costs. The bill also requires the court or arbitrator to impose monetary sanctions on an employer who breaches an arbitration agreement and authorizes additional sanctions beyond that.

Turning to settlement agreements, AB 749 provides that employers, as part of a settlement agreement, cannot prohibit or restrict an "aggrieved employee" (employee who has filed a claim against employer) from working for the employer. In other words, settlement agreements between employers and employees can no longer contain "no rehire" clauses. When the employer has made a good faith determination that the employee has engaged in sexual assault or sexual harassment, however, this doesn't apply.

Employers should consult with legal counsel on the implications of these new laws.

Assembly Bill 25 exempts employee data from the California Consumer Privacy Act for one year.

Privacy

The 2018 California Consumer Privacy Act (CCPA) changed the consumer data collection rules, allowing consumers to know about and request deletion of data that businesses collect about them, among other things. The CCPA's broad language, however, arguably encompasses employees and job applicants, which means employees, upon request, could potentially have information from their personnel files deleted under the CCPA.

Enter AB 25, which exempts from the CCPA employee data, i.e., information collected and used within the context of a person's employment or application for employment. This exemption is good for only one year.

Importantly, employers subject to the CCPA must still comply with the act's requirement to disclose, at or before the time of collection, the categories of personal information collected about an applicant or employee and the purposes for which the information will be used. Employers should consult with legal counsel on how to amend employee privacy notices or otherwise comply with their obligations under the act.

Wage and Hour

The Legislature passed several bills addressing the payment of wages and penalties for failure to pay wages, some of which were limited to specific industries.

Payment of Wages

SB 286 will allow professional baseball teams in California to pay park employees on the next regular payday after the season's end. This bill seemingly arose from recent litigation over whether park employees were automatically discharged at the end of baseball season, thereby triggering the obligation to pay their final wages immediately.

Under the new law, ballpark employees are considered continuously employed until the employee quits or is discharged, and the season's conclusion does not, by itself, constitute a discharge.

Another industry-specific bill, SB 671, allows employers of “print shoot employees” — individuals hired for a limited time to render services for a still image shoot, including film or digital photography, for use in print, digital or internet media — to pay wages owed upon termination on the next regular payday rather than immediately.

Penalties for Non-Payment of Wages

Current law imposes, independent from other penalties, a civil penalty on employers who fail to pay wages as provided in certain sections of the Labor Code. The Labor Commissioner may recover these penalties, which amount to \$100 for the initial violation and \$200 plus 25 percent of the amount unlawfully withheld for subsequent violations. Now, AB 673 gives employees the ability to bring a private action to either:

- Recover statutory penalties against the employer in a hearing before the Labor Commissioner; or
- Seek to enforce civil penalties under the Private Attorneys General Act.

They may not do both.

Lastly, SB 688 expands the Labor Commissioner's authority regarding citations for wage violations. Current law allows the Labor Commissioner to issue a citation and recover penalties, restitution of wages and liquidated damages from employers who pay employees less than the minimum wage. SB 688 expands that authority, authorizing the Labor Commissioner to issue citations and recover amounts owed by an employer who has paid less than the wages set by contract, even if it was more than minimum wage.

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