Here Comes Santa Laws: Unwrapping the New Employment Fa-La-La-La-Laws for 2020

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We don't know about you, but we don't feel like it's the holidays until there are fancy tree and menorah displays in every office lobby around town, a plethora of chocolate and cookie assortments multiplying daily in the staff kitchen, and California employers are "gifted" a variety pack of new employment laws (carefully wrapped in layers of ambiguity and impracticality, of course). While the items below may not be found on anyone's list of "Favorite Things," failure to comply with these changes could lead to results that are even less palatable than that brick of fruit cake that sits untouched on the buffet table every year. If we summarized every single obscure new employment law for 2020, we would have the Fa-la-la-longest alert you've ever seen. To avoid such a Nightmare before Christmas, we have carefully curated and summarized those employment laws which we consider to be most relevant and impactful to our clients.

CODIFICATION OF THE "ABC TEST" FOR INDEPENDENT CONTRACTORS

In October of this year, we issued a client alert devoted entirely to the passage of Assembly Bill 5 ("AB 5"), which adds Section 2750.3 to the California Labor Code. This new law, which was highly anticipated and has far reaching implications for California businesses, becomes effective on January 1, 2020. It codifies that portion of the landmark 2018 California Supreme Court decision, *Dynamex Operations West v. Superior Court*, which held that an individual is presumed to be an employee unless the hiring entity can satisfy all three of the following elements, commonly referred to as the "ABC Test":

A. The person must be 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 must perform work that is outside the usual course of the hiring entity's business.

C. The person must be customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

The new law also provides that certain professions and industries may be exempt from the "ABC Test" and may classify independent contractors under California's prior independent contractor test (known as the "*Borello* test") if they satisfy various requirements as enumerated in the statute. For more information about this new law, please click here to read our prior client alert.

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MINIMUM WAGE/EXEMPT SALARY INCREASES

California

With the new year, the California minimum wage will increase again. Effective January 1, 2020, **employers with 25 or fewer employees** must increase the minimum hourly wage **to $12.00** (increased from $11.00 per hour), while employers with **26 or more employees** must pay a minimum wage of $**13.00 per hour** (increased from $12.00 per hour).

The minimum wage is further scheduled to increase on January 1 of 2021-2023 as follows:

Employers with 26 or More Employees	Employers with 25 or Fewer Employees
January 1, 2021: $14.00 per hour	January 1, 2021: $13.00 per hour
January 1, 2022: $15.00 per hour	January 1, 2022: $14.00 per hour
January 1, 2023: $15.00 per hour	January 1, 2023: $15.00 per hour

Until the minimum wage reaches $15 per hour, the Governor has the authority to suspend increases if economic conditions warrant.

Exempt Employee Minimum Salary Increases

Employers should also remember that the state minimum wage affects the minimum salary for many exempt employees under California law. To satisfy the administrative, executive, and professional exemptions, California employers must pay the exempt employee a salary that is at least twice the state minimum wage as summarized below. As of January 1, 2020, employers with **25 or fewer employees** will be required to pay exempt employees **$960 per week/$49,920 annually** (increased from $880 per week/$45,760 annually), while employers with **26 or more employees** will be required to pay exempt employees **$1,040 per week/$54,080 annually** (increased from $960 per week/$49,920 annually)**.**

City of Los Angeles and Unincorporated Areas of Los Angeles County

As of July 1, 2019, the minimum wage schedule for employees working in the City of Los Angeles and the Unincorporated Areas of Los Angeles County for the next three years is as follows:

Employers with 26 or More Employees	Employers with 25 or Fewer Employees
July 1, 2019: $14.25 per hour	July 1, 2019: $13.25 per hour
July 1, 2020: $15.00 per hour	July 1, 2020: $14.25 per hour
July 1, 2021: $15.00 per hour	July 1, 2021: $15.00 per hour

Non-profit employers with 26 or more employees may qualify for the deferral rate schedule for employers with 25 or fewer employees.

Other Cities

A number of other cities will be increasing their minimum wages as of January 1, 2020, including but not limited to Belmont; Cupertino*; Daly City; El Cerrito*; Los Altos*; Mountainview **; Oakland; Palo Alto*; Petaluma; Redwood City **; Richmond**; San Mateo**; San Diego**; San Jose *; Santa Clara*; and Sunnyvale.*[1]

Furthermore, as we shared in a prior client alert here a number of other cities including but not limited to Alameda, Berkeley, Long Beach, Malibu, Pasadena, San Francisco, and Santa Monica had local increases on July 1.

New Federal Overtime Exemption Requirements

The DOL recently increased the minimum salary to be paid exempt employees from the currently enforced level of $455 per week to $684 per week (equivalent to $35,568 per year for a full-year worker). The exempt duties requirements must also still be met.

The DOL also increased the total annual compensation threshold for "highly compensated employees" from $100,000 to $107,432. In order to be exempt under this category, these employees are subjected to a less stringent duties test due to their high compensation levels.

The final rule will also allow employers to count annual (or more frequent) nondiscretionary bonuses, incentive payments, and commissions to satisfy up to 10% of the salary threshold.

Important note: These exemptions and rules **do not** apply to California employees.

[1] *Increase tied to the Regional Consumer Price Index, not to exceed five percent. ** Increase tied to the Regional Consumer Price Index

EXTENSION OF STATUTE OF LIMITATIONS FOR SEXUAL HARASSMENT CLAIMS

Beginning on January 1, 2020, victims of sexual harassment, discrimination, or other civil-rights related retaliations will have three years, rather than one, to file complaints.

NO LONGER PERMISSIBLE TO REQUIRE AGREEMENTS TO ARBITRATE DISCRIMINATION/HARASSMENT CLAIMS AS A CONDITION OF EMPLOYMENT

Arbitration Agreements Cannot be Mandatory

Beginning on January 1, 2020, employers will no longer be permitted to require employees or applicants to waive their rights under the Labor Code or the California Fair Employment and Housing Act as a condition of employment. Although the bill does not expressly mention arbitration, it effectively prohibits mandatory arbitration of claims in employment. Furthermore, while the bill does not invalidate employment arbitration agreements already in effect prior to January 1, 2020, it will apply to contracts for employment that are not just entered into but also modified or extended on or after that date.

While people have interpreted the bill as providing a savings clause that still permits mandatory arbitration agreements that are "otherwise enforceable under the Federal Arbitration Act," this is far from clear and will likely generate substantial litigation before employers get the clarity they need. For now, employers must decide what to do before the new law goes into effect and what to do with offer letters and arbitration agreements once the law goes into effect.

Arbitration Agreements Already in Effect Will Have a Use-it-or-Lose-it Effect

For those employers who already have valid arbitration agreements with employees, AB 707 will require that all arbitration fees be timely paid by the employer in accordance with the arbitration provider's policies. Those employers who fail to do so, either at the commencement of an arbitration case or during the arbitration process itself, will face forfeiture of their right to proceed or continue to proceed in arbitration, at the employee's election, as well as having to reimburse the affected employee for her/his attorney fees and costs incurred in the arbitration prior to transfer to court.

"CROWN" ACT

Senate Bill 188 ("SB 188") - Creating a Respectful and Open World for Natural Hair

The California legislature concluded in SB 188: "Workplace dress code and grooming policies that prohibit natural hair, including afros, braids, twists, and locks, have a disparate impact on Black individuals as these policies are more likely to deter Black applicants and burden or punish Black employees than any other group."

Based on this conclusion, the CROWN Act prohibits employers and public schools from discriminating on the basis of "traits historically associated with one's race, such as hair texture and protective hairstyles." This includes braids, cornrows, dreadlocks, and twists.

Employers should review hiring, dress, and grooming policies and provide training to those responsible for hiring and recruiting.

There may still be health and safety limitations—for example, if a hairstyle cannot be pulled back or placed in a net and the employee is in a food service or medical industry.

EXTENSION OF PAID FAMILY LEAVE BENEFITS

California Paid Family Leave ("PFL") provides partial pay to employees who need to take time off from work to care for a seriously ill family member (child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered domestic partner) or to bond with a new child entering the family through birth, adoption, or foster care placement. Beginning on July 1, 2020, California will extend the maximum duration of PFL from six weeks to eight weeks. PFL is funded entirely through withholdings from employees' paychecks.

The PFL program is not a leave right and does not provide job protection, but other state and federal laws such as the federal Family and Medical Leave Act (FMLA), the California Family Rights Act (CFRA) and the New Parent Leave Act can provide such protection for eligible employees.

LACTATION ACCOMMODATION EXPANSION

Effective January 1, 2020, Senate Bill 142 ("SB 142") expands current law (Cal. Labor Code 1030 et seq.), under which employers are required to make reasonable efforts to provide a private location, other than a bathroom, in close proximity to the employee's work area, for employees to express milk in private and to provide reasonable break time to express milk.

SB 142 amends Cal. Labor Code section 1031 to require that the lactation space:

- be close to the employee's work area;
- be shielded from view and free from intrusion;
- be safe, clean and free of hazardous materials;
- contain a surface to place a breast pump and personal items;
- contain a place to sit; and
- have access to electricity or alternative devices (e.g., extension cords or charging stations) needed to operate a breast pump.

The law also requires that there be access to a sink with running water and a refrigerator suitable for storing breast milk close to the employee's workspace.

Employers with fewer than 50 employees may be exempt from these additional requirements. To be exempt, the employer must demonstrate that it would impose an undue hardship when considered in relation to the size, financial resources, nature, or structure of the business.

Employees may report violations directly to the Cal. Labor Commissioner, who may levy a civil penalty of up to $100 per day for each day on which an employee is denied reasonable break time or adequate space to express milk (the prior law permitted a $100 penalty per violation).

Denial of reasonable break time or adequate space to express breast milk is deemed a failure to comply with Cal. Labor Code section 226.7, which mandates rest and recovery periods. The penalty is one

additional hour of pay at the regular rate of compensation for each workday a rest or recovery period is not provided.

SB 142 also prohibits discrimination or retaliation against an employee for exercising or attempting to exercise any right within Cal. Labor Code 1030, et seq.

Lastly, employers are required to distribute a written policy regarding lactation accommodation requirements to new employees upon hire or a request for parental leave. The policy must, among other things, state that the employer will respond in writing if it is unable to comply with an employee's request for accommodation. The policy must also advise employees of their right to report violations to the California Labor Commissioner.

EXPANSION OF ORGAN DONATION LEAVE

Under the current law, employers with 15 or more employees already have to provide up to 30 business days of paid leave for organ donation and up to 5 business days of paid leave for bone marrow donation in a one-year period.

Effective January 1, 2020, section 1500 of the Labor Code is amended to require employers to give eligible employees an additional 30 business days of unpaid leave in a one-year period to an employee who requires leave to donate an organ to another person.

Consistent with the current law, an employee may still be required to provide written verification that he or she is an organ donor and there is a medical necessity for the organ donation.

Time spent by employees on leave under this statute does not constitute a break in service, and employers are required to maintain and pay for health insurance coverage on the same terms as the employee had prior to the leave.

The law also has strict anti-retaliation provisions.

Employers should keep in mind that employees who need to take time off to donate an organ may also be protected under state and federal laws against disability discrimination and association with a disabled person.

"NO-REHIRE" PROVISIONS NO LONGER PERMITTED IN SETTLEMENT AGREEMENTS

Beginning on January 1, 2020, it is prohibited in California for an agreement that settles an employment dispute to have a provision that prohibits an employee from working for the employer again.

The prohibition applies to settlements at any stage of dispute or in any venue, including an employer's internal grievance process, mediation, arbitration, court lawsuits, and government agencies.

It applies not only to the employer, but also the employer's parent company, subsidiary, division, affiliate, or contractor.

The prohibition applies to any no re-hire provision included in a settlement agreement on or after January 1, 2020. If such a prohibited provision is included, that provision is rendered void.

However, the law is not intended to infringe on certain rights of employers, including:

(1) the employer's right to end a current employment relationship;
(2) the employer's right to restrict a settling employee from being rehired, if the employer makes a good faith determination that the settling employee engaged in sexual harassment or assault; or
(3) the employer's right to not continue to employ, or not to rehire an employee if there is a legitimate nondiscriminatory or non-retaliatory reason for terminating the employee or refusing to rehire the person.

EXTENSION OF SEXUAL HARASSMENT TRAINING DEADLINES

In 2018, California passed a law amending Government Code section 12950.1 to require that employers with **five or more employees** provide, by no later than January 1, 2020 (and every two years thereafter), at least two hours of sexual harassment training to all employees in a supervisory position and at least one hour of sexual harassment training to all nonsupervisory employees. Before 2018, the law required that companies with 50 or more employees provide sexual harassment training to employees in supervisory positions every two years.

The 2018 law required that new employees (regardless of position) receive sexual harassment training within six months of being hired. Also, seasonal and temporary employees, or any employee hired to work less than six months, need to receive the training within 30 calendar days after the hire date, or within 100 hours worked, whichever occurs first.

In 2019, California amended the 2018 law to change the deadline by which employers must comply with the new training requirements. The 2019 amendment extended the deadline from January 1, 2020 to January 1, 2021. The main reason for this amendment was so that employers who provided training to their supervisors in 2018 did not need to retrain them the next year, in 2019, rather than in two years (as the law has always required for supervisors).

Key takeaways:

- All employers now have until **January 1, 2021,** to implement one hour of training for nonsupervisory employees and two hours of training for supervisory employees (if the employer was not previously training supervisors).
- If an employer provided training in 2018, they should do so again in 2020.
- If an employer provided training in 2019, they can wait to do so again until 2021.
- Employers should provide the training within six months of employees being hired.

For more, see our client alert here.

MANDATORY IMPLICIT BIAS TRAINING AND TESTING FOR CERTAIN INDUSTRIES

As a possible indicator of which way the wind is blowing on additional mandatory trainings, several bills passed in 2019 which require implicit bias training and testing.

SB 464 and AB 241 require implicit bias training every two years for perinatal healthcare providers and licensed medical professionals, including doctors, surgeons, physician assistants and nurses.

SB 242 requires implicit bias training every two years for attorneys and court personnel.

EMPLOYING MINORS IN THE ENTERTAINMENT INDUSTRY

Current law regulates the employment of minors in the entertainment industry. It requires the written consent of the Labor Commissioner for a minor under 16 years of age to take part in certain types of employment and requires specified certification from a physician and surgeon in order for an infant under the age of one month to be employed on any motion picture set or location.

Effective on January 1, 2020, 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, commercial, documentary, or television program), by any medium (theater, television, photography, recording, modeling, publicity, musical performances, advertising, and "any other performances where a minor performs to entertain the public").

CHANGE IN DOMESTIC PARTNERSHIP ELIGIBILITY DEFINITION

A new law effective on January 1, 2020, SB 30, changes how California law defines "domestic partnership." Under current law, a domestic partnership could only be entered into 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.

AIR QUALITY PROTECTION FOR EMPLOYEES

Effective on July 29, 2019, the Occupational Safety and Health Standards Board issued an emergency regulation intended to protect employees from wildfire smoke. While this emergency regulation is set to expire on January 18, 2020, it is subject to two possible 90-day extensions and a permanent rule is anticipated in 2020. Here is the full text of the regulation.

General Requirements

Employers need to monitor the Air Quality Index (AQI) at their worksites for fine particulate matter (PM 2.5). If the AQI for PM 2.5 is greater than 150 and the employer "reasonably anticipates" that employees will be exposed to wildfire smoke, then employers must reduce exposure to the smoke.

Depending on the worksite and conditions, employers may reduce exposure to workers by:

- Relocating them to enclosed buildings with filtered air (the engineering control method);
- Relocating them to another outdoor location where the AQI for PM 2.5 is 150 or lower (the administrative control method); or
- If neither of the above methods are possible, then employers must give employees the option to use air respirators.
- If the AQI >500, then respirator use is mandatory. Employers must also comply with Section a5144 of the regulations, including fit testing and medical evaluation requirements.

Finally, employers must establish a system to communicate to employees about AQI levels, including:

- Relaying information about available protective measures;
- Encouraging employees to inform them of worsening air quality and any adverse symptoms resulting from smoke exposure; and
- Providing training on the new regulation, including information about:
    - the effects of wildfire smoke;
    - how to obtain medical treatment;
    - how to obtain AQI information;
    - methods to protect employees from wildfire smoke; and
    - how to safely use respirators.

Affected and Exempt Workplaces

Outdoor occupations and industries, including agriculture, construction, maintenance, and landscaping, are primarily affected.

Certain workplaces are exempt:

- Enclosed buildings;
- Vehicles that have air filter systems;
- Firefighters engaged in firefighting; and
- Employees with only short-term exposure to the smoke (less than one hour).

All employers with a worker who could spend a cumulative hour or more outside during a shift (including intermittent exposure) must comply with the regulations. This could affect:

- Certain warehouse jobs where employees might move in and out of doors or delivery jobs; and
- High traffic indoor worksites such as restaurants or banks where doors are consistently opened and allow in outside air.

Next Steps for Employers

Employers should determine whether the smoke protection requirements apply to their business and, if so, they should familiarize themselves with how to monitor AQI information; develop the appropriate training and information for their employees; and potentially have respirators on hand.

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We encourage you to reach out to a member of our Employment Law Group with any questions or concerns.