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EMPLOYER ADVOCATES GROUP

ANNUAL CALIFORNIA LEGISLATIVE RECAP

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Another year has passed in the California Legislature, with new laws and amendments affecting California employers. Among the more significant changes, bills prompted by the #MeToo movement, including the new requirement that corporate boards of directors include women, have been passed. Other changes include amendments to the Fair Pay Act regarding potential employees' salary history and amendments potentially increasing the number of international commercial disputes brought in California. On the federal side, we are seeing regulatory changes as Trump appointees reverse Obama-era policies and regulations. This Commentary helps companies navigate these changes, all of which are effective January 1, 2019, unless otherwise noted.

California State Laws and Amendments

SB 826 – Corporations: Women on Boards of Directors

With the signing of SB 826, California becomes the first state to require that corporate boards include women. This bill adds Sections 301.1 and 2115.5 to the Corporations Code, mandating that a publicly held domestic or foreign corporation whose principal executive offices are located in California have a minimum of one female director on its board. Corporations can increase the number of directors on a board to comply with this rule. In a letter addressing his decision to sign SB 826, Governor Brown acknowledged the "potential flaws that indeed may prove fatal to [the bill's] ultimate implementation," but noted that "it's high time corporate boards include the people who constitute more than half of the 'persons' in America."

SB 1300 – Unlawful Employment Practices: Discrimination and Harassment

SB 1300 is part of the package known as the "#TakeTheLead" bills, a group of what some have called the "boldest" anti-sexual harassment bills in the country. The bill amends the California Fair Employment and Housing ACT (FEHA) to make it unlawful for an employer—in exchange for a raise or bonus, or as a condition of employment or continued employment—to require the signing of a nondisclosure agreement or

waiver of the right to file claims. SB 1300 also expands the scope of FEHA to include nonemployees with respect to any type of harassment prohibited under FEHA—not just sexual harassment. The bill also prohibits awarding fees and costs to a prevailing defendant unless the court finds the action was frivolous, unreasonable, or groundless.

AB2334 – Worker Safety Mandates

In 2016, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) adopted the "Improve Tracking of Workplace Injuries and Illnesses" rule. This rule sought to improve workplace safety through expanded access to injury-and illness-related information. In 2017, OSHA announced its intent to relax the workplace injury and illness reporting requirements.

Seemingly in response to this announcement, California passed AB 2334, which requires Cal/OSHA to monitor rulemaking and implementation of the rule. If Cal/OSHA determines that OSHA has "eliminated" or "substantially diminished" the requirements for employers to submit injury and illness data, Cal/OSHA is required to convene a committee to evaluate how to implement the changes necessary to protect the goals of the rule. Effectively immediately, AB 2334 also changes the statute of limitations for citations or violations regarding recordkeeping requirements from six months after the occurrence of the violation to either the date the violation is corrected or the date the division discovers the violation.

AB2587 – Disability Compensation: Paid Family Leave

Under California's paid family leave law, an employer may require an employee to take up to two weeks of earned but unused vacation before, and as a condition of, the employee's receipt of disability benefits. Prior to AB 2587, the law required one week of this vacation leave to be applied to the seven-day waiting period before the receipt of benefits. Because the waiting period was previously eliminated, AB 2587 amends section 3303.1 to make the statutes consistent.

AB 2455 – Home Care Services

Following strong opposition, and a veto of similar legislation in October 2017, Governor Brown signed AB 2455 amending the Home Care Services Consumer Protection Act, which requires licensure and regulation of home care organizations. The bill notes that "[h]ome care aids who are organized [by labor organizations] are more likely to have higher wages, greater access to training, and lower turnover rates." To achieve that goal, the new provisions require the State Department of Social Services to provide personal information of the home care organizations to labor organizations for the purpose of organizing and representing home care aids. The new provisions apply only to newly registered home care aides and prohibit a labor organization from using this information for any purpose other than employee organizing, representation, or assistance activities.

AB2770 – Privilege: Sexual Harassment

AB 2770—a sexual harassment bill that passed the Legislature with unanimous bipartisan support--protects employers and sexual harassment victims from potential defamation suits. Under existing law, employers' responses to reference checks from prospective employers regarding a former or current employee's job performance or qualifications were protected from libel or slander claims as privileged, as long as the communications were made without malice. AB2770 extends the privilege to complaints of sexual harassment by an employee, without malice, to an employer. AB 2770 also allows employers to inform potential employers about the sexual harassment investigation and findings. AB 2770 protects employers from defamation claims by allowing employers to inform prospective employers during reference checks of an employee's past harassing conduct, including providing information about sexual harassment investigation and findings.

AB 3109 – Contracts: Waiver

Stemming from the #MeToo movement, AB 3109 adds a new section to the Civil Code making waivers in contracts or settlement agreements void and unenforceable to the extent they waive a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment if the party has been required or requested to attend the proceeding pursuant to a court order, subpoena, or written request from an administrative agency or the legislature.

SB 820 – Settlement Agreements: Confidentiality

Another result of the #MeToo movement, SB 820 prohibits provisions in settlement agreements that prevent the disclosure of factual information relating to certain claims of sexual assault, sexual harassment, or harassment or discrimination based on sex, that are filed in a civil or administrative action. The bill also makes such a provision void as a matter of law and against public policy. The bill creates an exception for a provision that shields the identity of the claimant and all facts that could lead to the discovery of his or her identity, if the provision is included at the request of the claimant.

AB 1976 – Lactation Accommodations

Before AB 1976, employers were required to make reasonable efforts to provide an employee with the use of a room or other location, other than a toilet stall, for lactation purposes. AB 1976 now requires employers to make reasonable efforts to provide an employee with a room or other location, other than a bathroom, for these purposes. Employers may seek an exemption if they can demonstrate that making a space available outside of a bathroom would pose an undue hardship.

SB 1402 – Joint Liability for Motor Carrier Service

Beginning in 2019, motor carrier service providers in California may be jointly and severally liable for unpaid wages, unreimbursed expenses, damages and penalties, and interest, for workers supplied by labor contractors. Supported by the

California Trucking Association, the bill amends the Labor Code to add provisions requiring that a customer that engages or uses a port drayage motor carrier will share joint and several liability with the motor carrier.

SB 1412 – Criminal Background Checks

In the past, employers were generally prohibited from seeking particular conviction history information of an applicant, with some exceptions, such as when an employer is required by law to obtain information regarding a criminal conviction of an applicant or when an individual who has been convicted is prohibited by law from holding the position sought by the applicant. To avoid conflicts with federal law, SB 1412 clarifies how employers can use conviction history to screen job applicants. For example, the new law allows employers to consider a "particular conviction" relevant to the job when screening applicants. The new changes leave the exceptions in place but include additional clarifications. For instance, an employer may also obtain information regarding a particular conviction, *regardless* of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed.

AB 1565 – Liability for Subcontractors

Under section 218.7 of the Labor Code, a direct contractor is liable for subcontractors for unpaid wage liabilities. Effective immediately, AB 1565 repeals the previous provisions of section 218.7 that relieved direct contractors for liability for anything other than unpaid wages and fringe or other benefit payments or contributions including interest owed.

AB 1654 – Exceptions to PAGA

Some employers in the construction industry may find reprieve following passage of AB 1654. Under the Labor Code Private Attorneys General Act of 2004 (PAGA), aggrieved employees are entitled to file private lawsuits to recover civil penalties for alleged violations of the Labor Code. AB 1654 will prohibit employees in the construction industry from recovering civil penalties under PAGA if the employees are subject to collective bargaining agreements in effect any time before January 1, 2025 that contain a grievance and binding arbitration procedure to redress violations.

SB 766 – Representation in International Commercial Arbitration

Since the 1998 California Supreme Court case *Birbower v. Superior Court of Santa Clara County*, 949 P2d 1(Cal. 1998), California has been a disfavored jurisdiction for international arbitration. Under previous law, foreign lawyers were not permitted to appear in international arbitrations in California without engaging local co-counsel. Under the new law, however, lawyers who are not members of the California bar may now appear in California and represent their clients without engaging local counsel. These individuals must be admitted to practice law in a state or territory of the U.S. or D.C. or be a member of a recognized legal profession in a foreign jurisdiction. The individuals must also be in good standing in every jurisdiction in which he or she is admitted or otherwise authorized to practice. These individuals will be subject to disciplinary jurisdiction of the State Bar. This

development is likely to result in an increase in international arbitration in California.

AB 2282 – Amendments to the Fair Pay Act

Just last year, Labor Code § 432.3 was enacted, prohibiting employers from relying on salary history as a factor for determining whether to offer employment or make pay decisions. To continue addressing disparities in pay equity, AB 2282 amends Labor Code §§ 432.3 and 1197.5 to:

- Define previously undefined terms, including "applicant," "pay scale," and "reasonable request";
- Clarify that, while an employer cannot ask for salary *history*, an employer *may* ask for salary expectations;
- Prohibit using prior history to justify any disparity in compensation; and
- Permit compensation decisions based on a current employee's existing salary, as long as the wage differential is justified based one or more of the following factors: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; and (4) a bona fide factor other than race or ethnicity, such as education, training, or experience.

AB 2610 – New Exception to Meal Period Requirements

AB 2610 creates an exception to current law that prohibits an employer from employing an employee for a work period of more than five hours without providing the employee with a meal period of not less than 30 minutes. Now, a commercial driver employed by a motor carrier transporting nutrients and byproducts from a commercial feed manufacturer to a customer located in a remote rural area may commence a meal period after six hours of work, if the regular pay of the driver is no less than one and one-half times the state minimum wage and the driver receives overtime compensation.

SB 1500 – Expanded Protections to Service Members

SB 1500 amends Section 394 of the Military and Veterans Code to prohibit businesses from barring U.S. Armed Forces members because the member is wearing his or her military uniform.

Federal

With Congress gridlocked, the most significant changes are occurring in regulatory agencies as Trump appointees have supplanted Obama appointees. For instance, as we wrote about in our September issue, we have already begun to see changes in National Labor Relations Board decisions and rulemaking following President Trump's appointment of a new General Counsel as well as new members to replace Obama-appointed members whose terms expired. For instance, to address the Obama Board's decision in *Browning-Ferris*, 362 NLRB No. 186 (2015), which loosened the standard for determining whether two separate employers should be considered "joint employers" and thus share each other's labor law liability and bargaining obligations to a union, the Trump Board has proposed a rule that will reverse this decision and return the law on joint employer to its traditional form.

The Department of Labor's Wage and Hour Division also plans to make changes to the overtime rule under the Fair Labor Standards Act (FLSA). On August 27, 2018, the Department announced that it would hold public "listening sessions" for those

members of the public who are interested in changes to the overtime rule. By way of background, the Obama Administration had previously issued a rule to be effective in late 2016 that raised the threshold in the salary basis test to $47,476, which essentially doubled the prior threshold required to qualify for the executive, administrative, or professional exemptions. A Texas federal judge enjoined the rule which has never taken effect. The Trump Department of Labor, while rejecting the Obama rule, has stated that it plans to update the overtime rule, including raising the threshold but not anywhere near to where the Obama Administration intended to set it. Other potential changes include indexing the level, lower regional levels for low-cost areas, and lower levels for non-profits.

We are likely to see more regulatory changes as Trump appointees continue to reverse Obama-era policies and regulations.