Hotel Executive
YOUR VIEW FROM THE TOP

NEW LAWS AFFECTING CALIFORNIA EMPLOYERS IN THE HOTEL INDUSTRY

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In 2019, the California Legislature passed a number of important new laws that are anticipated to affect many California employers. Several of the new laws impose on employers significant and stringent requirements on a variety of topics, ranging from claims for workplace discrimination and harassment, to issues regarding worker classification, to commonly used provisions in employment and separation agreements.

Regardless of the size of their operations or past practices, employers should take time to educate themselves regarding the new laws. The following is a sampling of notable California laws passed this year that are likely to affect employers in the hotel industry.

Worker Classification: Employee vs. Independent Contractor

AB 5: Assembly Bill 5 is one of the most important changes in California's legal landscape. It codifies the California Supreme Court's decision last year in Dynamex Operations West, Inc. v. Superior Court, 4 Cal. 5th 903 (2018). In Dynamex, the California Supreme Court established a new three-factor "ABC test" for determining whether a worker qualified as an employee or an independent contractor. Initially, Dynamex only applied this new test for purposes of California Industrial Welfare Commission (IWC) wage orders, which govern many day-to-day employer obligations such as payment of overtime and provision of meal and rest periods.

Under AB 5, which is effective January 1, 2020, the ABC test now governs the determination of a worker's status as an employee or independent contractor for most purposes, including qualifying for unemployment insurance coverage, workers' compensation benefits and employee rights under the California Labor Code.

The ABC test presumes that workers are covered employees unless an employer can establish that a worker is an independent contractor by satisfying all of the following ABC factors: (A) the worker 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 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.

AB 5 includes a long list of exempt professions who are not subject to the ABC test, including licensed professions such as lawyers, architects, engineers, private investigators, and accountants; physicians; direct sales salespersons; and real estate licensees. AB 5 also contains a broad exemption for business-to-business contracting relationships. In such cases, a more flexible standard (the "Borello" standard, taken from prior case law) may apply.

Given that it expands Dynamex's reach to statutory schemes besides the IWC wage orders, AB 5 may result in increased liability for employers for misclassifying workers. To ensure workers are properly classified, employers in the hotel industry should review carefully their independent contractor and third-party worker relationships in light of the three ABC factors, or confirm that workers fall within one of the specified exemptions.

Mandatory Arbitration Under Attack

AB 51: Assembly Bill 51 is another significant new law with a potentially broad reach. It prohibits employers from requiring as a condition of employment, continued employment, or the receipt of any employment-related benefit, that an employee or applicant for employment waive any right, forum, or procedure for a violation of the California Fair Employment and Housing Act (FEHA) or the Labor Code. Thus, the law on its face appears to prohibit mandatory arbitration agreements. The law also prohibits employers from threatening, retaliating against, or terminating any employee or job applicant based on a refusal to consent to any such waiver. AB 51 applies to contracts for employment entered into, modified, or extended on or after January 1, 2020.

This law may be subject to challenge in the courts because of its apparent conflict with the Federal Arbitration Act (FAA), which broadly favors the use of arbitration as a means of dispute resolution. However, the Legislature included within AB 51 a "savings clause." The law states that it does not intend to invalidate written arbitration agreements that are otherwise enforceable under the FAA and that if any provision of the law is held invalid, the other portions should not be affected. It is not clear whether this savings clause will allow the law to withstand the likely judicial challenges asserting that AB 51 is preempted by federal law. In the meantime, employers will need to evaluate their arbitration practices in light of AB 51 and its uncertain future.

New Anti-Discrimination Laws in the Wake of #MeToo

AB 9: The #MeToo movement continues to fuel legislative changes designed to protect employees against unlawful discrimination and harassment and afford them additional opportunities to remedy wrongful conduct. In AB 9, the Legislature substantially increased the time in which an employee can bring a claim under the FEHA. Previously, a person claiming

violation of the FEHA, including claims for workplace discrimination or harassment, was required to file a complaint with the Department of Fair Employment and Housing (DFEH) within one year of the date upon which the unlawful practice occurred.

Proponents of AB 9 asserted that victims of discrimination and harassment often need more time to appreciate how they may have been subjected to unlawful treatment or to be comfortable coming forward. AB 9 therefore extends the period of time that a person can file such a complaint, from one year to three years. Although AB 9 states that it should not be read to revive already lapsed claims, employers should expect an increase in such claims, particularly by former employees, and will need to be prepared to respond to older claims, where evidence and witness memories may be less clear.

AB 749: Settlement and separation agreements between employers and employees often contain a provision that limits an employee's ability to be reemployed by the employer, otherwise known as a "no hire" provision. AB 749 takes aim at these provisions, stating that an agreement to settle an employment dispute must not contain a provision that would prohibit the aggrieved person from obtaining future employment with the employer. An aggrieved person is defined as one who has filed a claim against one's employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process.

AB 749 specifically states that a provision in any agreement that is entered into on or after January 1, 2020, that violates this new law is void and against public policy. However, the law does not prevent the settling parties from agreeing to end their current employment agreement, and it does not prohibit the employer from refusing to later employ the employee so long as the employer has made a "good faith determination" that the person engaged in sexual harassment or sexual assault. The law also does not require any employer to continue to employ a person if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship.

SB 778: In 2018, the Legislature passed Senate Bill 1343, which required California employers with five or more employees to provide at least two hours of sexual harassment training to all supervisory employees, and one hour of sexual harassment training to nonsupervisory employees. SB 1343, which was another law passed in the wake of the #MeToo movement,

required that employers provide these trainings by January 1, 2020, and once every two years thereafter.

This year, SB 778 provides employers some relief from these deadlines by extending the period of time for employers to comply with SB 1343's training requirements. SB 778 gives California employers with five or more employees an additional year, until January 1, 2021, to provide employees with the required sexual harassment training. SB 778 also requires that new nonsupervisory employees be provided training within six months of their hire and that new supervisory employees must receive training within six months of assuming their supervisory positions.

SB 188: Earlier this year, the Legislature passed the Creating a Respectful and Open Workplace for Natural Hair (CROWN) Act, which is intended to combat discrimination against persons based on natural hairstyles. Under the FEHA, employers are prohibited from engaging in discriminatory practices based on certain protected characteristics, including based on race. SB 188 amends both the FEHA and the Education Code to expand the definition of race to include traits that are historically associated with race, including hair texture and protective hairstyles such as braids, locks, and twists. In explaining the basis for the bill, its sponsors stated, "[D]iversity and inclusion are key in American classrooms and across all industries and sectors, and this legislation will help to drive justice, fairness, education equity, and business success."

SB 142: The Legislature continued refinement of employer obligations to provide lactation accommodations. SB 142 requires employers to provide, among other things, a lactation room or location for employees that includes prescribed features and to provide access to a sink and refrigerator in close proximity to the employee's workspace. Also, if an employer does not provide an employee with reasonable break time or adequate space to express milk, that is considered a failure to provide a rest period, thereby exposing employers to additional liability for premium wages owed to employees who do not receive required breaks.

Although lactation accommodation requirements have existed previously, SB 142 now requires employers to institute a written policy and to make it available to employees, including in an employee handbook. Employers with fewer than 50 employees can seek an exemption from these requirements but only if they are able to demonstrate undue hardship.

Penalties for Employers Who Fail to Pay Wages

AB 673: To further encourage the timely payment of wages by employers, the Legislature enacted AB 673, which allows an employee to maintain a private right of action against an employer to recover penalties for the late payment of wages. Previously, only the Labor Commissioner was authorized to collect penalties. For initial violations, the penalty is one hundred dollars for each failure to pay wages to each affected employee. For subsequent violations, or any willful or intentional violation, an employee can seek two hundred dollars for each failure to pay, plus 25 percent of the amount unlawfully withheld.

As the above sampling shows, the Legislature continued in 2019 to enact laws that significantly affect California employers, their business practices and employment relationships. Given the wide range of subjects addressed, employers should take time now to evaluate current practices, procedures, and forms to determine whether they are in compliance. In particular, California employers should examine how they classify their existing and anticipated workforce under the lens of the three-factor ABC test.

Employment or separation agreements and handbooks should be reviewed to ensure they do not contain problematic "no hire" provisions and that lactation accommodation policies are included. And employers should ensure that employees are being paid in a timely manner and that sexual harassment training obligations are met in the upcoming year. Employers who have questions regarding these laws may need to consult with knowledgeable employment counsel to assist in navigating these new developments


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