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NEW CALIFORNIA LAWS AFFECT CRE EMPLOYERS

Last year was a busy year for the state legislature in terms of employment-related statutes that are of particular interest to commercial real estate companies. Attorneys Dwayne P. McKenzie and Cathy T. Moses explain three of these measures and how they will impact the industry.

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March 11, 2019

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California has long been at the national forefront of enacting progressive laws relating to employment and the workplace, including laws meant to protect and expand the rights of employees and unions. Expectations are that this will continue to be the case in 2019 given that Gavin Newsom has assumed the Governor's seat from Jerry Brown and is expected to pursue a similar, if not more ambitious, agenda in office. While it is difficult to predict the Legislature's focus in the coming year, it appears likely that Governor Newsom will use his platform to urge the passage of laws that are in line with issues on which he campaigned, including women's rights, equal pay and workforce development. Some proposals may benefit commercial real estate employers. As a business owner himself, Governor Newsom has championed small business opportunities. And with rising labor costs and tight labor markets in construction,

workforce development initiatives that create additional construction labor training and employment opportunities could benefit the industry with an expanded and better trained workforce.

Another area that may garner significant attention this year is the continuing fallout from the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court*. In that decision, the high court held that in the context of the state's wage orders, individuals are presumed to be employees, and not independent contractors, unless proven otherwise by an employer using the "ABC" test that the Court set forth. That test in turn considers whether a worker is free from the hiring business's control and direction, whether the worker performs work outside the usual course of the hiring entity's business, and whether the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed. Only if a business satisfies all three of these factors is a worker considered an independent contractor, and not an employee. Legislation either enacting or eroding *Dynamex* may be the subject of debate. Further clarification from the courts and legislative and regulatory guidance concerning the application of *Dynamex* is likely and could fuel further debate.

In looking back, 2018 was a busy year for the Legislature and witnessed the passage of numerous employment-related laws. The following are three laws that may be of particular interest to commercial real estate employers given their subject matter and scope.

Skilled and Trained Workforce (AB 3018). Existing statutes imposed skilled and trained workforce requirements on various types of construction projects by public agencies, requiring that a certain percentage of the skilled journeypersons employed to perform work on the contract or project by every contractor and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation. Since the majority of apprenticeship programs are union affiliated, the purpose of the requirement was to incentivize the use of union labor and signatory contractors and subcontractors. The percentage in 2019 will be 50 percent and will rise to 60 percent in 2020. AB 3018 imposes new penalties on contractors and subcontractors that fail to meet skilled and trained workforce requirements. For initial violations, penalties up to $5,000 per month may be imposed, with a second or subsequent violation within a three-year period resulting in penalties up to $10,000 per month. A contractor or subcontractor found by the Labor Commissioner to be in violation of this chapter with intent to defraud is also subject to disbarment from public works for a period of one

to three years. In the event monthly reports of skilled and trained workforce compliance are not provided as required, AB 3018 also provides that public agencies shall withhold an amount equal to 150 percent of the value of the monthly billing for the entity that failed to comply. Owners, contractors and subcontractors with projects subject to skilled and trained workforce requirements should consider planning in advance of construction to meet the requirements since sufficiently qualified labor may be limited.

Construction Contractor Liability for Wage and Benefit Payments to Subcontractor Employees (AB 1565). In 2016, AB 1701 imposed on prime contractors on private works of construction liability for employee wage, fringe and other benefit payments owed to a wage claimant that is incurred by a subcontractor of any tier acting under, by, or for the contractor. Although similar liability has long existed on public works projects, the imposition of this joint liability on direct contractors was new for private works construction. In response, many contractors and owners revised their subcontract forms to address this significant new liability, including imposing broad disclosure obligations on subcontractors. For contracts entered into on or after January 1, 2019, AB 1565 requires that a contract with a subcontractor identify the specific documents or information that the subcontractor will be required to produce before disputed amounts can be withheld from the lower-tiered subcontractor. Owners and contractors should review their subcontract forms to ensure that subcontractor disclosure obligations are sufficiently specific to comply with AB 1565.

Sexual Harassment Training (SB 1343). Prior law required that employers with 50 or more employees provide sexual harassment prevention training to all supervisors in California. SB 1343 expanded this training requirement, requiring employers with five or more employees, including seasonal and temporary employees, to provide at least two hours of sexual harassment training to all supervisory employees and at least one hour of sexual harassment training to all non-supervisory employees by January 1, 2020, and once every two years thereafter. The Department of Fair Employment and Housing is to develop or obtain online training courses that it will make available on its website. Although not specific to the commercial real estate industry, since many employers with less than 50 employees were not required previously to conduct training, the expanded application to small employers and the new training mandate for non-supervisory employees will subject most employers in the industry to training obligations. Employers should ensure that their human resources staff is prepared to implement training necessary to meet the expanded requirements.

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