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New Laws Affecting Commercial Real Estate Employers in California

By Cathy T. Moses, partner at Cox, Castle & Nicholson LLP

In 2019, the California Legislature enacted a number of important new employment laws. Some of the new laws, particularly AB 5, represent dramatic departures from prior law. Employers in the state, including those in commercial real estate, should take note of the following.

AB 5

AB 5 codifies the California Supreme Court's decision in Dynamex Operations West Inc. v. Superior Court, 4 Cal. 5th 903 (2018). In Dynamex, the California Supreme Court established a three-factor "ABC test" for determining whether a worker qualified as an employee or an independent contractor. Under AB 5, which took effect on January 1, the ABC test governs the determination for qualifying for unemployment insurance coverage, workers' compensation benefits and employee rights under the California Labor Code.

The ABC test presumes that a worker is an employee unless an employer can establish all of the following: (A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, (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 that are not subject to the ABC test, including real estate licensees, architects, engineers, lawyers, private investigators and accountants, physicians and direct sales salespersons. AB 5 also contains a broad exemption for business-to-business contracting relationships.

AB 51

Assembly Bill 51 prohibits employers from requiring 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 as a condition of employment, continued employment or the receipt of any employment-related benefit. The law therefore appears to prohibit mandatory arbitration agreements. It 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 has been challenged by the California Chamber of Commerce and other trade associations in the federal court for the Eastern District of California on the grounds that it conflicts with the Federal Arbitration Act (FAA), which broadly favors the use of arbitration as a means of dispute resolution. The challenge could result in AB 51 being invalidated.

AB 9

AB 9 substantially increases 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 the event took place. AB 9 extends the period of time that a person can file such a complaint from one year to three years.

AB 749

AB 749 seeks to address "no-hire" provisions, which are provisions in settlement and separation agreements that limit an employee's ability to be reemployed by the employer. AB 749 states 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 violates this new law and is void and against public policy.

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 training to nonsupervisory employees. The law required that employers provide these trainings by January 1 and once every two years thereafter. SB 778 extends the period of time for employers to comply with these requirements. Under the new law, California employers with five or more employees have 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

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

SB 142 requires employers to provide, among other things, a lactation room or location for employees that includes prescribed features and access to a sink and refrigerator in close proximity to the employee's workspace. 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, exposing employers to liability for premium wages owed to employees who do not receive required breaks.

AB 1768

Existing laws require prevailing wages to be paid to workers on most "public works" projects. AB 1768 expands the definition of public works projects to include work conducted during site assessment or feasibility studies. The law also states that preconstruction work (including design, site assessment, feasibility studies and land surveying) is part of a public work, even if further construction work is not completed.

These recently passed laws likely will affect employers in every sector, including commercial real estate. Employers in the state should evaluate existing protocols and procedures with these changes in mind.