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SUMMARY OF CALIFORNIA'S NEW EMPLOYMENT LAWS FOR 2020

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By Tom Geidt

Again this year, the California Legislature has passed a flurry of new worker-friendly employment laws. Some of them will profoundly affect California employers. We summarize the key enactments below. Each will take effect on January 1, 2020 unless we state otherwise.

Mandatory Arbitration of Most Claims is Outlawed for New Hires. (A.B. 51)

After years of failed attempts, the Legislature passed – and Governor Newson signed – a bill designed to effectively end the practice of requiring job applicants or employees to execute arbitration agreements that waive court or agency claims. Under A.B. 51, no employer or person may require any applicant or employee – as a "condition of employment, continued employment, or the receipt of any employment-related benefit" – to waive any "right, forum, or procedure" pertaining to an alleged violation of any provision of the Labor Code or the Fair Employment & Housing Act. This includes waiver of the right to file and pursue a civil action or complaint with any State agency or law enforcement body, or to notify any court, agency, or other governmental entity of an alleged violation.

Employers may not threaten, retaliate, discriminate against, or terminate an employee or applicant for refusing to consent to any such waiver. A.B. 51 also prohibits so-called "opt-out" agreements, where employees or applicants are deemed to consent to a waiver if they do not take some affirmative action to opt out or otherwise preserve their rights; an opt-out clause is considered a "condition of employment."

These new provisions, which will be codified in new Labor Code section 432.6, will apply to all contracts for employment entered into, modified, or extended on or after January 1, 2020. The law does not apply to post-dispute settlement agreements or negotiated severance agreements.

Attempting to avoid federal preemption, the bill's authors inserted a clause stating, somewhat confusingly, that the bill is not intended to invalidate "a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act." This means, at a minimum, that existing arbitration agreements entered into prior to January 1, 2020, if otherwise enforceable under federal law, will not be invalidated by this new law. However, employers purportedly will

be precluded from entering into new mandatory arbitration agreements that would bar Labor Code or FEHA claims. Such claims, of course, make up the vast majority of claims that complaining employees in California typically seek to pursue in court or before an agency.

Without question, the validity of A.B. 51 will be challenged in court on federal preemption grounds. A titanic legal battle over its validity is likely. A plausible argument exists that the bill is invalid under the Federal Arbitration Act, at least in part. However, the outcome of the inevitable legal challenge is by no means certain.

Meanwhile, all California employers who now require new employees to sign arbitration agreements will need to decide how to proceed after January 1. Their choices include, among other things: (1) making arbitration purely voluntary for new employees in the future, using an opt-in rather than opt-out approach; (2) discontinuing the use of mandatory arbitration altogether for new employees; or (3) maintaining the status quo and taking the risk of liability while A.B. 51 is being fought in the courts. Employers that are faced with these choices should consult competent counsel for guidance.

Employers Must Classify Many Workers as Employees Rather than Independent Contractors Under "ABC" Test. (A.B. 5)

Another momentous law, A.B. 5, sets new statutory rules for determining the status of contingent workers as employees or independent contractors for a variety of purposes. Its net effect will be to render many such workers "employees" who, in the past, were properly classified as independent contractors.

A.B. 5 essentially has codified the California Supreme Court's April 2018 decision in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), which adopted the new "ABC test" for determining employee status in matters arising under IWC wage orders. A.B. 5 establishes that for purposes of all Labor Code matters, the Unemployment Insurance Code, the IWC Wage Orders, and the workers' compensation laws, a person "providing labor or services for remuneration" must be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:

> (A) The person 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 person performs work that is outside the usual course of the hiring entity's business.
>
> (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

A.B. 5 contains an extensive and complicated listing of exemptions granted by the Legislature – the result of heavy lobbying up to the last minute. Briefly summarized, the exemptions cover the following:

- Certain insurance industry personnel, physicians, surgeons, dentists, podiatrists, psychologists, veterinarians, lawyers, architects, engineers, private investigators, accountants, securities broker-dealers, investment advisers, direct sales salespersons, and commercial fishermen;

- Persons who enter into certain contracts for "professional services" if various statutory criteria are met, but only for marketers, human resource administrators, travel agents, graphic designers, grant writers, fine artists, persons licensed to practice before the IRS, payment processing agents, certain still photographers and photojournalists; certain freelance writers, editors, and newspaper cartoonists; and certain licensed estheticians, electrologists, manicurists, barbers, and cosmetologists;

- Real estate licensees and repossession agencies;

- "Bona fide business-to-business contracting relationships," but only if they satisfy all 12 prongs of a multi-factor test laid out in the statute;

- Relationships between contractors and subcontractors in the construction industry;

- "Referral agencies" that connect clients with service providers who provide graphic design, photography, tutoring, event planning, minor home repair, moving, home cleaning, errands, furniture assembly, animal services, dog walking, dog grooming, web design, picture hanging, pool cleaning, or yard cleanup work; and

- Certain workers performing services relating to "motor clubs."

Also, in a later enactment, newspaper carriers and distributors were granted a temporary exemption from A.B. 5's coverage until January 1, 2021.

Whenever one of these exemptions applies, this does *not* mean that the worker can automatically be classified as an independent contractor. Rather, it means that the status of the worker as an employee or independent contractor is to be determined by another test – the so-called "*Borello*" test – rather than the ABC test. The *Borello* test focuses primarily on the hiring entity's right-to-control (essentially the "A" part of the ABC test), considered together with several secondary factors.

This is only a nutshell summary of A.B. 5's lengthy and complex provisions. Moreover, the statute is fraught with ambiguities. Before the dust settles, A.B. 5 will spawn much litigation. At least one legal challenge to the law already has been filed. Changes to the statute may also be forthcoming through future legislative action or ballot initiatives.

Meanwhile, all California employers that use contingent workers should familiarize themselves with A.B. 5 and obtain competent legal advice on what they must do to comply with it.

No-Rehire Clauses in Settlement Agreements are Banned. (A.B. 749)

Settlement agreements between employers and complaining employees often include a waiver of reemployment, under which the settling employee agrees not to seek or obtain reemployment with the employer or any of its affiliated entities in the future. These clauses are being outlawed. As of January 1, a settlement agreement may no longer contain a clause that prohibits or otherwise restricts a settling party who is an "aggrieved person" (someone who has asserted a claim against his or her employer) from obtaining future employment with the employer, or any parent company, subsidiary, division, affiliate, or contractor of the employer.

A.B. 749 does not prohibit employers and employees from agreeing to "end a current employment relationship." Also, it carves out a narrow exception for sexual harassers; if an employer determines in good faith that the settling employee engaged in sexual harassment or sexual assault, it may include a clause barring the employee from future employment. Additionally, the statute clarifies that employers retain the right to exclude someone from rehire based on legitimate non-discriminatory or non-retaliatory reasons.

More Protection for Lactation. (S.B. 142)

Another new bill, patterned after San Francisco's lactation accommodation ordinance, will make wholesale changes to the existing State-law requirements on lactation accommodation. As before, employers must provide a reasonable amount of break time whenever an employee needs to express milk for an infant child, and a suitable private place other than a bathroom in which to do so. As of January 1, employers must also provide a lactation room or location in close proximity to the employee's work location, shielded from view and free from intrusion, that (1) is safe, clean, and free of hazardous materials; (2) contains a surface to place a breast pump and personal items; (3) contains a place to sit; (4) has access to electricity or alternative devices, including extension cords or charging stations; and (5) is in close proximity to a sink with running water and a refrigerator or other cooling device suitable for storing milk.

Employers may designate a *temporary* lactation location if operational, financial, or space limitations make a permanent location infeasible, if the location otherwise complies with the above requirements. Employers with fewer than 50 employees may seek an exemption from these requirements if they can show that full compliance would impose an undue hardship. Even then, the small employer must make reasonable efforts to provide a lactation location in close proximity to the employee's work area, other than a toilet stall.

S.B. 142 also significantly increases the penalties and remedies for a violation. Violations can now be treated as rest break violations, entitling employees to a rest break premium equivalent to one hour's pay, as under the current Labor Code provisions governing meal and rest break premiums. Also, the Labor Commissioner can award civil penalties equal to $100 per day for each day that an employer is out of compliance with the new requirements. Employers may not discriminate or retaliate against an employee for exercising her rights under the statute.

Finally, *all employers must develop and implement a written policy on lactation accommodation.* The policy must include, at a minimum: (1) a statement about an employee's right to request lactation accommodation; (2) the process by which the employee makes such a request; (3) the employer's obligation to respond to the request; and (4) a statement about an employee's right to file a complaint with the Labor Commissioner for any violation of a right under these statutory provisions. The policy must be included in an employee handbook or set of policies that the employer makes available to employees. This policy must be distributed to all new employees upon hire and whenever an employee makes an inquiry about or requests parental leave.

Employers Cannot Discriminate Based on "Protective Hairstyles." (S.B. 188)

Another new law forbids California employers from discriminating against employees because they wear their hair in a manner that is associated with race. "Race" in the Fair Employment & Housing Act will now be defined to include "traits historically associated with race, including but not limited to hair texture and protective hairstyles." "Protective hairstyles" includes such hairstyles as braids, locks, and twists. The Legislature enacted this provision based on its determination that hair remains a rampant source of racial discrimination, and that societal perceptions of professionalism too often are linked to "European features and mannerisms."

Employers Will Have Another Year to Train Their Employees on Sexual Harassment. (S.B. 778)

We reported last year on a new bill that requires all California employers with five or more employees to train not only their supervisors, but also their *nonsupervisory employees*, on sexual harassment and other related topics. Last year's bill set a deadline of January 1, 2020 to complete this training.

Heeding the pleas of the business community, the Governor signed a bill that will extend this deadline by a year, to January 1, 2021. The employee training must consist of at least one hour of classroom or other effective interactive training and education regarding sexual harassment. As in the past, employers must continue to provide at least two hours of training on sexual harassment to their California-based *supervisors* every two years. New supervisors must be trained within six months of assuming a supervisory role.

Deadline for Employees to File Discrimination Complaints Extended to Three Years. (A.B. 9)

Until now, California employees who wished to pursue a court or administrative complaint of discrimination or retaliation under the Fair Employment & Housing Act have generally been required to file an administrative complaint with the Department of Fair Employment & Housing within <u>one year</u> after the alleged wrongful act occurred. Under A.B. 9, this deadline has been extended to <u>three years</u>. The filing date will be deemed to be the date on which the employee's "intake form" is filed with the DFEH, even if the employee's "verified complaint" is filed later.

Employees still will have one year after the issuance of a DFEH right-to-sue letter in which to file their own discrimination, harassment, or retaliation complaint in court. Consequently, employers can now expect to face discrimination lawsuits arising from events that happened up to four or more years prior to the filing of the suit.

Penalties Will Dramatically Stiffen for Delayed or Underpaid Wages. (A.B. 673 and S.B. 688)

Two new laws will significantly increase the penalties and remedies that current employees can recover when they are shorted or delayed in receiving their agreed-upon wages. A.B. 673 will allow employees, for the first time, to seek "statutory" penalties not only for delayed payment of their *final* pay, but also for any alleged delay or underpayment of their regular wages during their employment.

Currently, Section 210 of the Labor Code allows the Labor Commissioner to recover "civil" penalties whenever employees did not timely receive their full wages by the end of each pay period. The penalties can range from $100 to $200 for each failure to pay each employee, plus 25% of the amount unlawfully withheld. Current law allows the Labor Commissioner to issue a citation against employers to recover these penalties, in which case the penalties are paid to the State. The Labor Commissioner rarely issues such citations. Under A.B. 673, complaining employees may elect to recover these penalties as "statutory" penalties through the Labor Commissioner's "Berman" hearing process, in which case any recovery will go to the employees rather than the State. Employees still may seek to recover these penalties as "civil" penalties through a Labor Commissioner citation or a PAGA lawsuit, but A.B. 673 clarifies that employees cannot recover both kinds of penalties for the same violation.

Another bill, S.B. 688 (amending Labor Code §1197.1), likewise expands the penalties and remedies that the Labor Commissioner can award against an employer for failing to pay not only the applicable *minimum* wage (as under current law) but also any "contract" wages – that is, "wages based upon an agreement, in excess of the applicable minimum wage." These remedies can include civil penalties ranging from $100 to $250 per employee per pay period, liquidated (double) damages, recovery of the underpaid wages as restitution, and any applicable waiting time penalties in the case of terminated employees.

Without a doubt, these two laws, in combination, will lead to even more wage and hour lawsuits, including class and PAGA actions, than those already being filed against California employers. The potential exposure for employers will increase significantly.

Late Payment of Arbitrator's Fees Will be Sanctionable and Allow Employees to Transfer their Claims to Court. (S.B. 707)

Another new law specifies that employers who draft mandatory arbitration agreements and then fail to pay the required arbitration fees within 30 days of their due date will be in material breach of the arbitration agreement. Employees in such cases will now have various recourses, including transferring the matter from arbitration back to court, recovering additional

attorneys' fees and costs, and/or asking the court to impose various monetary and non-monetary sanctions against the employer.

S.B. 707 also requires private arbitration companies to collect and disclose demographic information about their arbitrators, including their ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation.

New Federal Overtime Rules Will Finally Go into Effect.

The U.S. Department of Labor's longstanding salary rules for exempt status under the Fair Labor Standards Act are finally about to change. For many years, employees who have earned salaries as low as $23,660 could be classified as exempt under the FLSA's administrative, executive, and professional ("white-collar") exemptions. The DOL during the Obama Administration sought to increase the salary threshold to approximately $47,476, but this was blocked by the courts. A rule proposed by the current DOL will instead increase the federal salary minimum for exempt status to $35,568 per year ($684 per week), effective January 1, 2020. Anyone making less than this amount can no longer be classified as exempt under the FLSA.

As part of this change, the "highly compensated employee" threshold will increase from $100,000 to $107,432. Persons whose salaries and other annual compensation exceed the new threshold will not automatically qualify as exempt, but employers will be permitted to apply a relaxed "duties" test that will make it easier to classify those employees as exempt.

These federal changes will have little or no effect on employers in California. California's salary threshold for exempt status is much higher (see below), and California does not recognize any highly-compensated-employee standard.

MINIMUM WAGE INCREASES AND OTHER CHANGES

- ***California minimum wage.*** California's minimum wage will increase from $12 to $13 on January 1, 2020 for employers with 26 or more employees. The minimum wage for smaller employers will increase from $11 to $12. The minimum wage already exceeds $13 in many cities and counties across the State – for example, it is $15.59 in San Francisco and is due to increase again on July 1, 2020. Employers should check the websites of the cities where they have employees to stay up on the local requirements.

- ***Minimum salary for exempt status.*** Because of the State's higher minimum wage, the minimum salary threshold for exempt status under California's administrative, executive, and professional exemptions will increase on January 1 from $49,920 to $54,080 ($4,506.67 per month) for large employers (26 or more employees).

- ***Computer professionals.*** The minimum salary threshold for the California computer professional exemption will increase from $94,603.25 to $96,968.33 ($8,080.71 per

month). For hourly-paid computer professionals, the minimum rate will increase from $45.41 to $46.55 per hour worked.

- ***Minimum pay to qualify for CBA exemption.*** Several Labor Code provisions, including the overtime and paid sick leave laws, exempt employers whose collective bargaining agreements meet certain criteria, one of which is that the covered employees be paid at least 30% above the California minimum wage. As of January 1, 2020, this pay threshold for large employers (26 or more employees) will increase from $15.60 to $16.90 per hour.

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All California employers should familiarize themselves with these new laws and take the necessary steps to comply with them.

If you have questions about any of these developments, please feel free to contact me or any other GBG attorney.

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