KRONICK

REFERENCE GUIDE
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2020 LEGISLATIVE UPDATES

An Employer's Guide to New Laws Impacting the Workplace in 2019 and Beyond

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Employee Classifications p.1
Discrimination p.3
Employment Agreements p.6
Wage and Hour p.7
Employee Leaves p.8
Workers Compensation and Safety p.9
Whistleblower Protections p.10

I. Employee Classifications.

1. AB 5 (GONZALEZ) WORKER STATUS AND INDEPENDENT CONTRACTORS.

AB 5 codifies the California Supreme Court's decision last year in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903 ("*Dynamex*"). In *Dynamex*, the Court adopted the "ABC" test for determining whether a worker is an employee for purposes of applying California's wage orders. Under the ABC test, a person providing labor or services is properly classified as an employee, unless the employer can establish all of the following elements:

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; and

C. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

It is only when all of these elements are present that a worker can properly be classified as an independent contractor.

AB 5 enacts new Labor Code section 2750.3, which expands the holding in *Dynamex* by applying the ABC test not only to the determination of who is an employee under California's wage orders, but also to that same determination under all provisions of California's Labor and Unemployment Insurance Codes. In other words, every time the words "employee," "employer," "employ," and "employment" are used in those codes, the applicability of those terms to an individual, or to the relationship between a person and a hiring entity, will be determined through application of the ABC test.

During the legislative process, AB 5 was the subject of intense lobbying by numerous industry and professional groups that sought to exempt various occupations from application of the ABC test. As a result, new Labor Code section 2750.3 lists dozens of occupations in which the determination of employee or independent contractor status is not governed by the ABC test, but rather by the older multi-factor test established by the California Supreme Court in *S. G. Borello & Sons v. Department of Industrial Relations* (1989) 48 Cal.3d 341 ("*Borello*"). In *Borello*, the Court held that while the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the desired result, additional factors must also be considered such as (a) the right to discharge at will, without cause; (b) whether the one performing service is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the services are to be performed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the principal; and (i) whether or not the parties believe they are creating the relationship of employer-employee (the "*Borello* test").

Included among the diverse occupations and professions listed in new Labor Code section 2750.3, in which the determination of an employer/employee relationship is governed by the *Borello* test, are doctors; lawyers; veterinarians; architects; engineers; accountants; securities brokers; commercial fisherman; individuals providing a variety of services under professional services contracts such as marketing, human resources administration, graphic arts, and several occupations; journalists; photographers; cosmetologists; barbers; and real estate agents or brokers.

In addition, new Labor Code section 2750.3 exempts from the ABC test bona fide business-to-business relationships, i.e., where one business (known as the "contracting business") hires another business (known as the "business service provider") to provide it with services. This exemption, however, is subject to a number

of statutorily enumerated conditions. Similarly, contractor-subcontractor relationships in the construction industry and independent construction truckers are exempted from the ABC test, but once again subject to a number of statutory conditions. Finally, individuals providing services through a "referral agency" (a business that connects clients with service providers) and who provide a diverse range of services from home repairs to dog walking to tutoring, and several others are exempted, but again there are a number of conditions that apply.

2. AB 170 (GONZALEZ) NEWSPAPER DISTRIBUTORS AND CARRIERS.

This bill, which was a companion bill to AB 5, exempts newspaper distributors working under contract with a newspaper publisher and newspaper carriers working under contract with either a newspaper publisher or distributor from application of the ABC test for purposes of classifying workers as either employees or independent contractors. This provision becomes inoperative as of January 1, 2021, unless extended by the Legislature.

II. Discrimination.

1. AB 9 (REYES) EMPLOYMENT DISCRIMINATION: LIMITATION OF ACTIONS.

This bill amends sections 12960 and 12965 of the Government Code. It increases the statute of limitations for filing discrimination and harassment claims with the Department of Fair Employment and Housing ("DFEH") to three years from the alleged unlawful employment action. Because employees must file a claim with DFEH prior to filing a lawsuit, allowing more time at this stage will increase the time employees have to file lawsuits against employers. In an attempt to clarify the process, the bill establishes the effective date of filing as the date an intake form is filled out with the DFEH.

The bill also specifies that it will not revive lapsed claims. Therefore, if the time for filing a claim lapsed prior to January 1, 2020, that will not be extended by this legislation. The implication for claims regarding incidents that occurred under the old law, but which have not expired by January 1, 2020, is not expressly addressed by the bill. According to past precedent of the California Supreme Court, however, such claims will likely fall under the new timing rules. The Court has held in previous instances that as long as the former limitations period has not expired, the newly increased limitations period ordinarily applies, and applies prospectively to govern cases that are pending when, or instituted after, the enactment took effect. This is true even though the underlying conduct that is the subject of the litigation occurred prior to the new enactment. (*Quarry v. Doe I (Quarry)* (2012) 53 Cal.4th 945, 955-957.)

2. AB 547 (GONZALEZ) JANITORIAL WORKERS: SEXUAL VIOLENCE AND HARASSMENT PREVENTION TRAINING.

This bill amends sections 1420, 1425, 1429, 1429.5, 1431, and 1432 of the Labor Code. The bill directs the Department of Industrial Relations ("DIR") to create content for biennial sexual violence and harassment prevention training programs and requires that employers providing

janitorial service use the content. To enforce this requirement, all janitorial service businesses must register annually with the Labor Commissioner. Effective January 1, 2020, all new applications will require a written attestation that the training was provided.

Additionally, the bill requires that the training be done by a "peer trainer" who has 40 hours of training in the subject matter, at least two years of work experience in the janitorial field, and is fluent in the primary language spoken by the workers he or she is training. Effective January 1, 2022, registration applications will also require an attestation that the training was conducted by a peer trainer, or an explanation of the reason one was not used.

3. SB 530 (GALGIANI) CONSTRUCTION INDUSTRY: DISCRIMINATION AND HARASSMENT PREVENTION.

This bill amends section 12950.1 of the Government Code, section 3073.9 of the Labor Code, and adds Chapter 4.3 (commencing with section 107.5) to the Labor Code. In another industry-specific attempt to increase training for discrimination and harassment prevention in the work place, SB 530 requires the DIR to develop recommendations for a harassment and discrimination prevention policy and training standard for use by employers in the construction industry. According to proponents of the bill, specific curriculum is necessary because there are often very few females present on a construction site, which has the potential to make them targets of discrimination or harassment.

The bill directs the DIR to create an advisory committee composed of representatives from collective bargaining agents that represent construction workers, construction industry employers or employer associations, labor-management groups in the construction industry, nonprofit organizations that represent women in the construction industry, other related subject matter experts, and representatives of the Division of Labor Standards Enforcement, the Division of Occupational Safety and Health, and the Department of Fair Employment and Housing. The advisory committee must convene by March 1, 2020, and must present its recommendations to the Legislature by January 1, 2021.

The bill also provides some concessions to assist the construction industry with compliance. Like employers in other industries, construction employers must ensure that their employees receive harassment training every two years. However, if an employee can provide documentation that he or she received the training from another employer or from a state-approved apprenticeship program, the employer does not have to provide training until a full two years has passed since the employee received the training from another provider. Because it authorizes apprenticeship programs to provide harassment prevention training, it also imposes requirements that the program maintain records of the training it provides. The bill also clarifies that apprenticeship programs do not assume any liability by providing training or maintaining records.

4. SB 142 (WIENER) EMPLOYEES: LACTATION ACCOMMODATION.

This bill makes three changes to the current requirements regarding lactation accommodations for employees who wish to express breastmilk during the work day. The bill amends sections 1030, 1031, and 1033 of the Labor Code to change requirements in lactation spaces and rest break requirements.

First, employers must allow a reasonable break for expressing milk each time the employee has a need to express milk. This may require the employer to provide more break time than was previously required. Any breaks that do not run concurrently with the rest time authorized for the employee by the applicable wage order of the Industrial Welfare Commission are to be unpaid.

Second, the bill adds new requirements for the accommodation space an employer must provide. Under the new law, employers are expressly prohibited from offering a bathroom as a lactation space. The space must be in close proximity to the employee's work area, shielded from view, and free from intrusion while the employee is expressing milk.

There are also new requirements for inside the space. Employers must provide an area that is safe, clean, and free from hazardous materials, contains a surface to place a breast pump and personal items, contains a place to sit, and has access to electricity or other alternatives. The bill also deems the lack of either adequate time or an appropriate location to be a failure to provide adequate rest time under section 226.7 of the Labor Code.

Finally, the bill adds section 1034 to the Labor Code, which imposes a new requirement on employers to develop and implement a lactation policy. The policy must cover employees' rights with respect to lactation breaks, their right to file a complaint if it is violated, the process for requesting accommodation, and the employer's obligations to respond to requests.

5. SB 188 (MITCHELL) DISCRIMINATION: HAIRSTYLES.

This bill expands California's anti-discrimination law to prohibit discrimination against employees or students on the basis of their natural or protective hairstyles, declaring such discrimination to be a proxy for racial discrimination. The bill adds language to California's Fair Employment and Housing Act ("FEHA"), codified as section 12926 of the Government Code, and anti-discrimination provisions in section 212.1 of the Education Code. The new language expands the definition of "race" to specify that the term is "inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles" such as braids, locks, and twists.

6. SB 229 (HERTZBERG) DISCRIMINATION: COMPLAINTS: ADMINISTRATIVE REVIEW.

This bill amends section 98.74 of the Labor Code. It represents the latest in a series of legislation attempting to make the process of filing a complaint more efficient and timely. Under existing law, employees are protected from retaliation for engaging in certain protected activities, such as reporting discrimination. However, the process

for resolving retaliation complaints can be lengthy. Prior to 2018, the Labor Commissioner did not have the authority to issue citations directly. Instead, the Labor Commissioner or the employee had to bring an action in court. During this process, retaliatory acts could continue, creating a long-term negative impact on the employee and her career.

In 2017, the Legislature passed Senate Bill 306 (Hertzberg), which allowed the Labor Commissioner to seek temporary injunctive relief against the employer to stop any retaliatory conduct during the course of the investigation. The bill also gave the Labor Commissioner the authority to issue citations independently. A person issued a citation has 30 days to contest the citation and request a hearing. If they do not contest it, the citation becomes final.

The current bill addresses procedural gaps discovered through the implementation of SB 306. Specifically, it requires the Labor Commission to file a certified copy of the citation with the clerk of court in a superior court in the county where the person cited has a business. The clerk must then file an immediate judgment against the person cited for the amount shown on the citation.

After the issuance of a judgment, the bill provides procedures for payment and resolution of the judgment if it is not contested. The person against whom the judgment was made can contest by filing a writ of mandate within 45 days of the entry of judgment, but must post a bond equal to the total amount of any penalties, lost wages and interest thereon, liquidated damages, and any other monetary relief due.

7. AB 778 (COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT AND RETIREMENT) EMPLOYERS: SEXUAL HARASSMENT TRAINING REQUIREMENTS.

This bill amends section 4945 of the Business and Professions Code. It extends the deadline for covered employers to provide sexual harassment prevention training and education to January 1, 2021, rather than the current deadline of January 1, 2020. If an employer offered training in 2019, it has until two years after the training to provide a refresher. The employer is excused from the requirement to provide a refresher before the January 1, 2021 deadline if doing so would require it to provide training twice within a two-year window. In general, employers with five or more employees are required to provide two hours of sexual harassment prevention training to supervisors, and one hour of training to non-supervisory employees.

III. Employment Agreements.

1. AB 749 (STONE) SETTLEMENT AGREEMENTS: RESTRAINTS IN TRADE.

This bill, codified as section 1002.5 of the Code of Civil Procedure, prohibits parties from including provisions in a settlement agreement which would prevent or restrict the aggrieved party from ever obtaining future employment from the employer against which the employee filed a claim. Such "no re-hire clauses" can be expansive, often including the employer's parent company, subsidiary, division, affiliate, and/or contractors of the employer. Any such agreement entered into after January 1, 2020 is void as a matter of law and against public policy. The

bill includes an exception if the employer has made a good faith determination that the employee with whom the employer is settling claims, engaged in sexual harassment or sexual assault. It further clarifies that an employer may decline to rehire a formerly aggrieved employee for nondiscriminatory, good faith reasons.

2. SB 707 (WIECKOWSKI) ARBITRATION AGREEMENTS: ENFORCEMENT.

This bill amends sections 1280 and 1281.96 of, and adds sections 1281.97, 1281.98, and 1281.99 to, the Code of Civil Procedure. The goal of SB 707 is to address a situation that has arisen in recent high-profile employment lawsuits. According to the bill's author, some large companies have required their employees to agree to use arbitration to settle disputes, then have failed to pay arbitration fees to begin the process. This bill provides that if the fees or costs to initiate an arbitration proceeding are not paid within 30 days after the due date, the drafting party is in material breach of the arbitration agreement and waives its right to compel arbitration. If the drafting party stops paying fees during the course of the arbitration, the employee can choose to withdraw the claim from arbitration and proceed in court, or to compel arbitration in which the drafting party is required to pay reasonable attorney's fees and costs related to the arbitration.

Arbitration agreements have been a topic of much debate in California. Many previous bills have failed because of concerns that any issues related to arbitration are preempted by the Federal Arbitration Act, and would be subject to litigation. To deflect potential claims on this front, the legislative findings rely on decisions from the United States Court of Appeals for the Ninth Circuit in *Brown v. Dillard's, Inc.* (2005) 430 F.3d 1004. That case held that under federal law, an employer's refusal to participate in arbitration pursuant to a mandatory arbitration provision constituted a breach of the arbitration agreement. In an earlier case, *Sink v. Aden Enterprises, Inc.* (2003) 352 F.3d 1197, the Ninth Circuit held that under federal law, an employer's failure to pay arbitration fees as required by an arbitration agreement constitutes a material breach of that agreement and results in a default in the arbitration.

IV. Wage and Hour.

1. AB 673 (CARRILLO) FAILURE TO PAY WAGES: PENALTIES.

This bill amends section 210 of the Labor Code. It permits employees to recover statutory penalties for failure to pay wages properly or in a timely fashion or alternatively, for the Labor Commissioner to recover such penalties through the issuance of a citation pursuant to Labor Code section 98.3. The bill imposes an election of remedies requirement on employees to choose either the recovery of the statutory penalty provided by Labor Code section 210 (i.e., $100 for each initial violation of a statutory requirement regarding the timing of wage payments and $200 for each subsequent violation or for any willful violation, plus 25 percent of the amount unlawfully withheld from the employee) or the enforcement of a civil penalty under Labor Code section 2699 (the Private Attorneys General Act), but not both.

2. SB 688 (MONNING) FAILURE TO PAY WAGES: PENALTIES.

This bill amends section 1197.1 of the Labor Code. Existing law authorizes the Labor Commissioner to cite an employer, or persons acting individually or in concert with an employer, for paying a wage less than the state minimum wage and to impose a civil penalty, restitution of wages, and liquidated damages for such a failure to pay the minimum wage. This bill authorizes the Labor Commissioner to issue a similar citation, and to impose the same penalties and damages on employers, or individuals acting in concert with them, for paying a wage less than an amount set by contract, even if that amount is in excess of the minimum wage.

Existing law requires an employer that wishes to challenge such a citation to seek a writ of mandate in the superior court and, as a condition for bringing such an action, to post an undertaking with the Labor Commissioner in an amount equal to the total amount of wages, liquidated damages, and overtime compensation owed. (The bond amount does not have to include amounts imposed as penalties.) This bill provides that if the employer is unsuccessful in the writ of mandate action, and fails to pay the amount of wages, liquidated damages, and overtime compensation imposed by the judgment of the superior court, then the undertaking is forfeited to the Labor Commissioner for "appropriate distribution."

3. SB 698 (LEYVA) PAYMENT OF WAGES.

This bill amends section 204 of the Labor Code. The bill includes a series of legislative findings and declarations regarding errors experienced by the University of California with respect to its new Payroll, Academic Personnel, Timekeeping, and Human Resources system known as "UCPath." Accordingly, this bill removes any exemption regarding the timing of wage payments the UC Regents might previously have enjoyed pursuant to Labor Code section 220 and requires that all UC employees must be paid on their regular payday.

V. Employee Leaves.

1. AB 1223 (ARAMBULA) LIVING ORGAN DONATION.

This bill amends sections 89519.5 and 92611.5 of the Education Code, section 19991.11 of the Government Code, adds sections 10110.8 and 10233.8 of the Insurance Code, and amends section 1510 of the Labor Code.

Existing law, the Michelle Maykin Memorial Donation Protection Act, requires private employers to permit an employee to take a paid leave of absence, not exceeding 30 business days in a one-year period, for the purpose of being an organ donor and up to five business days for being a bone marrow donor. Public employers are required to provide similar paid leaves of absence for organ and bone marrow donations to employees who have exhausted all available sick leave. This bill would require both public and private employers to provide an additional, *but unpaid*, 30-business day leave within a one-year period for the purpose of organ donation. For public employees, the leave would only be unpaid if the employee has exhausted all available paid sick leave benefits.

In addition, this bill would prohibit a life, disability, or long-term care insurance policy, other than health insurance, from refusing to insure, limiting coverage, charging a different premium, or otherwise discriminating against an individual or being a living organ donor.

2. AB 1554 (GONZALEZ) DEPENDENT CARE ASSISTANCE PROGRAM.

This bill adds section 2810.7 to the Labor Code. It requires employers to notify employees who participate in a flexible spending account of any deadline to withdraw funds before the end of the plan year. Notice must be provided in two forms, one of which may be electronic. Acceptable forms of notice include email, telephone, text, mail, or in-person.

3. AB 1748 (BONTA) CFRA FLIGHT CREW.

This bill amends section 12945.2 of the Government Code, also known as the California Family Rights Act ("CFRA"), by revising the eligibility requirements for flight crews employed by airlines in a manner consistent with the federal Family and Medical Leave Act ("FMLA"). Such employees are eligible for benefits under the FMLA and CFRA if they have been employed by their employer for 12 months, the employee has worked or been paid for 60% of the applicable monthly guarantee, or the equivalent annualized over the preceding 12-month period, and has worked or been paid a minimum of 504 hours during the preceding 12-month period. The "applicable monthly guarantee" is both the minimum number of hours for which an employer has agreed to schedule such employees for any given month and, for reserve employees, the number of hours for which an employer has agreed to pay such employee for being on reserve status.

VI. Workers' Compensation and Safety.

1. AB 203 (SALAS) OSHA: VALLEY FEVER.

This bill adds section 6709 to the Labor Code. It contains a legislative find and declaration that Valley Fever effects construction employees in Fresno, Kern, Kings, Madera, Merced, Monterey, San Joaquin, San Luis Obispo, Santa Barbara, Tulare, and Ventura Counties. It requires that such employees receive awareness training by May 1, 2020, and annually thereafter, and before new employees begin working. The training must include information regarding how Valley Fever is contracted, high risk areas and types of work, personal risk factors, methods to prevent exposure, the importance of early detection, recognition of common signs and symptoms, the importance of reporting symptoms, and common treatment and prognosis.

2. AB 1804 (COMMITTEE ON LABOR AND EMPLOYMENT) OCCUPATIONAL INJURIES AND ILLNESSES: REPORTING.

This bill amends section 6409.1 of the Labor Code. Employers are now permitted to report instances of serious injury or illness, or death, through an online mechanism once established by OSHA. Until then, telephone reporting is permitted.

3. AB 1805 (COMMITTEE ON LABOR AND EMPLOYMENT) OCCUPATIONAL SAFETY AND HEALTH.

This bill amends section 6302 of the Labor Code in two respects. First, it amends the definition of "serious injury or illness" to include any injury or illness requiring hospitalization for other than medical observation or diagnostic testing (eliminating the requirement for hospitalization in excess of 24 hours) or any injury or illness involving amputation, the loss of an eye, or any serious degree of permanent disfigurement. The latter portion of the definition does not apply to an injury or illness caused by an accident on a public street or highway, unless the accident occurred in a construction zone. Second, the definition of "serious exposure" to hazardous substance is revised from one requiring a "substantial probability" of death or serious physical harm to one creating a "*realistic possibility*" of such.

4. SB 542 (STERN) WORKER'S COMPENSATION.

The bill adds section 3212.15 to the Labor Code. The bill includes a number of legislative findings and declarations relating to the extreme stress experienced by firefighters and law enforcement personnel. The legislative findings and declarations recognize the cumulative impact of exposure to horrific events that make firefighters and law enforcement personnel susceptible to emotional and behavioral impacts of job-related stressors. Accordingly, the bill expands the definition of "injury" as used in the worker's compensation statutes to include PTSD. The bill further provides that compensation for a PTSD-related injury shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits. The bill further provides that for firefighters and law enforcement personnel as defined in the statute, a diagnosis of PTSD will be presumed to arise out of and in the course of employment. The presumption created by the statute is "disputable" and may be controverted by other evidence. The section applies to injuries occurring on or after January 1, 2020. The bill sunsets as of January 1, 2025.

VII. Whistleblower Protections.

1. AB 333 (EGGMAN) WHISTLEBLOWER PROTECTION: COUNTY PATIENTS' RIGHTS ADVOCATES.

This bill adds section 5525 to the Welfare and Institutions Code and amends section 5550. This bill expands current employee whistleblower protections to county patients' rights advocates. It provides that employers, or local agencies contracting patients' rights advocates, are expressly prohibited from retaliating against a patients' rights advocate for providing information to a public body or law enforcement agency if the advocate had reasonable cause to believe that a violation of state, federal or local statute or regulation had occurred. It further prohibits any person from knowingly obstructing the county patients' rights advocate in the performance of his or her duties.

The bill also establishes a private right of action for county patients' rights activists to enforce the protections it creates.

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Kronick is a full-service law firm serving clients throughout California that provides the full spectrum of employment law services. The firm works closely with its labor relations and employment law clients to implement comprehensive policies and practices that help them avert potential employee relations problems along with the distractions and discontent that these problems often cause. We have developed highly effective tools for our clients such as employee handbooks, employee training sessions, and troubleshooting efforts that raise awareness, deter improprieties, and evidence employer preparedness. Should a specific issue arise, we defend our clients vigorously before public oversight agencies and, when necessary, in the courts. While we are highly proficient and cost-effective litigators, we know that it is in helping our clients avoid litigation in the first place that we render them the greatest service.

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