SMITH DOLLAR
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Employment Law Notes

From the desk of Diane, Justin, and Glenn
Smith Dollar PC

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Dear Colleagues and Clients: Two federal judges just issued temporary restraining orders in the last few days of 2019 prohibiting enforcement of AB 5 concerning independent contractors in the trucking industry and AB 51 regarding mandatory arbitration agreements. If your company uses independent truckers or arbitration agreements, this is great news. For all other companies, there are plenty of other new laws outlined below to keep you busy.

Please contact either Diane or Justin with any questions and concerns you may have regarding the new employment laws and how to keep your business in compliance.

AB 5 IS NOT APPLICABLE TO TRUCK DRIVERS (AT LEAST THROUGH JANUARY 13, 2020)

As we all know from our prior employment law updates, AB 5 codified the "ABC" test adopted by the California Supreme Court in April 2018, in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* for classification of workers as employees or independent contractors under the California Wage Orders. Under the ABC test, a worker may only be classified as an independent contractor if the hiring entity can show that the worker meets all of the following criteria:

A. The worker is free from the control and direction of the hiring entity, both under the contract for the performance of work and in fact;
B. The worker performs work that is outside of the usual course of the hiring entity's business, and
C. The worker is engaged in independently established trade, occupation, or business that is of the same nature as the work performed for the hiring entity.

The law has many exemptions; however, independent truckers were NOT exempt. Most owner-operators contract their work with trucking companies whose primary business is trucking. That means the contracted drivers are arguably performing work "in the usual course" of that trucking company, and as of January 1, 2020, were required to become employees.

On Tuesday, December 31, 2019, a federal judge in Los Angeles issued a temporary restraining order preventing this law from being enforced against truck drivers. The judge stated that AB 5 is unconstitutional and violates the interstate commerce clause of the Constitution.

A hearing is set for January 13, 2020 to determine whether this restraining order will stay in place until the litigation is concluded.

Action Plan: Business as usual until at least January 13, 2020. We will update you once the court has ruled.

MANDATORY ARBITRATION AGREEMENTS ARE STILL OK (AT LEAST THROUGH JANUARY 10, 2020)

Many employers require their employees to submit any disputes to a private arbitrator rather than going to court. Arbitration is faster and more efficient, and agreements typically include a waiver of an employee's right to bring a class action lawsuit. That waiver alone is worth having a mandatory arbitration agreement as a condition of employment—in conflicts over wages, discrimination, disability, harassment and other issues, arbitration saves employers and employees the needless expense of class-action lawsuits.

Governor Newsom signed AB 51 which keeps in place existing arbitration agreement, but on January 1, 2020 would have prevented employers from requiring new employees from signing arbitration agreements as a condition of employment, and from retaliating against them if they refused.

On Monday, December 30, 2019, a federal judge in Sacramento issued a temporary restraining order halting enforcement of this law and set a hearing for January 10, 2020.

Action Plan: Continue to use your old arbitration agreement with new employees until at least January 10, 2020. We will update you once the court has ruled.

MINIMUM WAGE INCREASES

California's statewide minimum wage has now increased. For employers with 26 or more employees, minimum wage is now $13 an hour; for those with 25 or less, it is $12 an hour. For those employers in Sonoma, minimum wage will be $13.50, and $12.50, respectively. And, looking forward, for those employers who are in the city of Santa Rosa, if you have 26 or more employees, minimum wage will be $15 an hour on July 1, 2020 and for 25 and less, it will be $14.

These increases also mean that the salary threshold in order to qualify as an exempt employee has also increased as follows: $54,080 per year (or $1,040 per week) for employers of 26 or more employees; $49,920 per year (or $960 per week) for employers of 25 or fewer employees.

Action Plan: Employers need to update wages and review the salaries of their exempt employees to ensure they are properly classified.

EXTENDING DEADLINE TO COMPLETE SEXUAL HARRASSMENT PREVENTION TRAINING

The deadline for employers with five or more employees to provide two hours of sexual harassment prevention training to supervisors and one hour of sexual harassment prevention training to employees was extended from January 1, 2020, to January 1, 2021. Current law

already requires employers of 50 or more employees to provide two hours of training to supervisors. That requirement is not extended and remains unchanged under the new law.

Action Plan: Employers should ensure that all employees are trained by the applicable deadlines. Employers should consult with legal counsel to ensure that existing and planned training includes all of the required elements. Smith Dollar attorneys provide this training through the North Coast Builders Exchange, the Northern California Engineering Contractors Association, and at individual employer sites.

PROHIBITING DISCRIMINATION BASED ON PROTECTED HAIRSTYLES

Effective on January 1, 2020, the definition of race under the FEHA (Fair Employment and Housing Act) has expanded to prohibit racial discrimination and harassment based upon a person's natural hairstyle. The legislature found that workplace dress codes and grooming policies that prohibit natural hair, including afros, braids, twists, and locks, have a disparate impact on Black individuals, as such policies are more likely to deter Black applicants and burden or punish Black employees than any other group. All such policies will be unlawful.

Action Plan: In our almost 20 years of counseling and advising employers in Sonoma County, we have never seen a dress code policy prohibiting this. However, in the event that a policy like this exists, Employers should make changes, if required.

EXPANDING PAID FAMILY LEAVE

Effective on July 1, 2020, the maximum duration of Paid Family Leave (PFL) benefits an individual can receive from California's State Disability Insurance program will be increased from six to eight weeks. There is no change in the law with regard to the amount of time that an individual may take for Family and Medical Leave Act leave, California Family Rights Act leave, or California Pregnancy Disability Leave.

Action Plan: Obtain the new brochures from EDD to provide in your new hire packet.

REPORTING OCCUPATIONAL INJURIES AND ILLNESSES

Effective on January 1, 2020, employers are now required to report serious workplace injuries, illnesses, or death immediately by telephone or through an online platform to be developed by the California Division of Occupational Safety and Health. Until the online platform is available, employers are permitted to make these reports by telephone or email. Noncompliance carries a $5,000 civil penalty.

Action Plan: Prior law provided that an employer had up to 8 hours to report, so be aware of this change.

EXPANDING LACTATION ACCOMMODATION REQUESTS

Employers are now required to provide more lactation accommodations than previously required in California. Specifically, a lactation room or location must:

1. Be close to the employee's work area;

2. Be shielded from view and free from intrusion; and
3. Have certain features, including electricity and resources necessary to operate a breast pump.
4. The employer also must provide access to a sink with running water and a refrigerator nearby. As before, the room may not be a bathroom.

Employers must create and implement a lactation accommodation policy and make it available to employees. The policy must include the following:

1. A statement about an employee's right to request lactation accommodation;
2. The process by which the employee makes the 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.

Employers must include the policy in the employee handbook and they must distribute the policy to new employees upon hiring and whenever an employee makes an inquiry about or requests parental leave. If an employer cannot provide break time or a location that complies with the new law, the employer must provide a written response to the employee.

Failure to provide an adequate room or location and/or failure to provide reasonable time for lactation will be deemed a violation of California's rest period laws, requiring the employer to pay a premium of one hour of pay per day for each day on which a violation occurs.

Small employers of less than 50 employees may request an exemption if they can demonstrate that certain requirements of the new law would impose an undue hardship by causing "significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." If an exemption is granted, the employee will still be required to make reasonable efforts to provide the employee with use of a room or other location, other than a toilet stall, in close proximity to the employee's work area, for the employee to express milk in private.

ACTION PLAN: Draft either a stand-alone lactation accommodation policy or include one in your employee handbook.

EXTENDING STATUTE OF LIMITATIONS FOR FEHA CLAIMS

Effective on January 1, 2020, the deadline for a person alleging unlawful discrimination, harassment, or retaliation in violation of the California Fair Employment and Housing Act (FEHA) to file a verified complaint with the California Department of Fair Employment and Housing (DFEH) will be extended from one year to three years from the date of the occurrence. The change will not revive claims that have already expired under the current statute.

ORGAN DONOR LEAVE

Assembly Bill (AB) 1223 amends California Labor Code Section 1510 to require that employers grant an employee an additional leave of absence, not exceeding 30 business days in a one-year period, for the purpose of organ donation. Currently, employers are required to provide 30 days of paid leave for organ donation. This amendment adds 30 days of unpaid time off for a

total of 60 days of protected leave for organ donation. Employers are not required to maintain the employee's health insurance coverage during the additional 30-day leave period.

Action Plan: Employers may want to review and update their organ donor policies and leave of absence request forms.

CALIFORNIA'S NEW CONSUMER PRIVACY ACT EFFECTIVE JANUARY 1, 2020

California enacted the Consumer Privacy Act in June of 2018, which became effective January 1, 2020. It is applicable only to those businesses with annual gross revenues in excess of $25,000,000, and protects the personal data of employees and customers. "Personal Data" includes name, address, phone number, social security and driver's license number, email address, educational and employment related information, financial and bank account information, and medical information that is not protected by HIPAA.

Businesses must inform the employee and/or applicant in writing, before the information is collected what information is being collected and the purposes for collection. The individual also has the right to receive a written disclosure setting forth the information the business has actually collected, where the information came from, and any third parties the business shares the information with. The business must also post their privacy policy on their website. Employees also have the right to request that the employer delete any personal information; however, in the employment context the employer may refuse if it maintains the information to comply with legal obligations or for internal purposes.

Action Plan: If your business has annual gross revenues in excess of $25,000,000, identify the categories of employment-related information that fall within the Act and how the information is collected and processed; identify any third-party vendors that maintain personal information of employees or applicants; determine the associated business reasons for the collection and processing of this information; identify the policies, procedures and technology that must be implemented to come into compliance with this Act (i.e., updated privacy policies, revised employee handbooks, disclosures, website updates); consider purchasing cyber security insurance.

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