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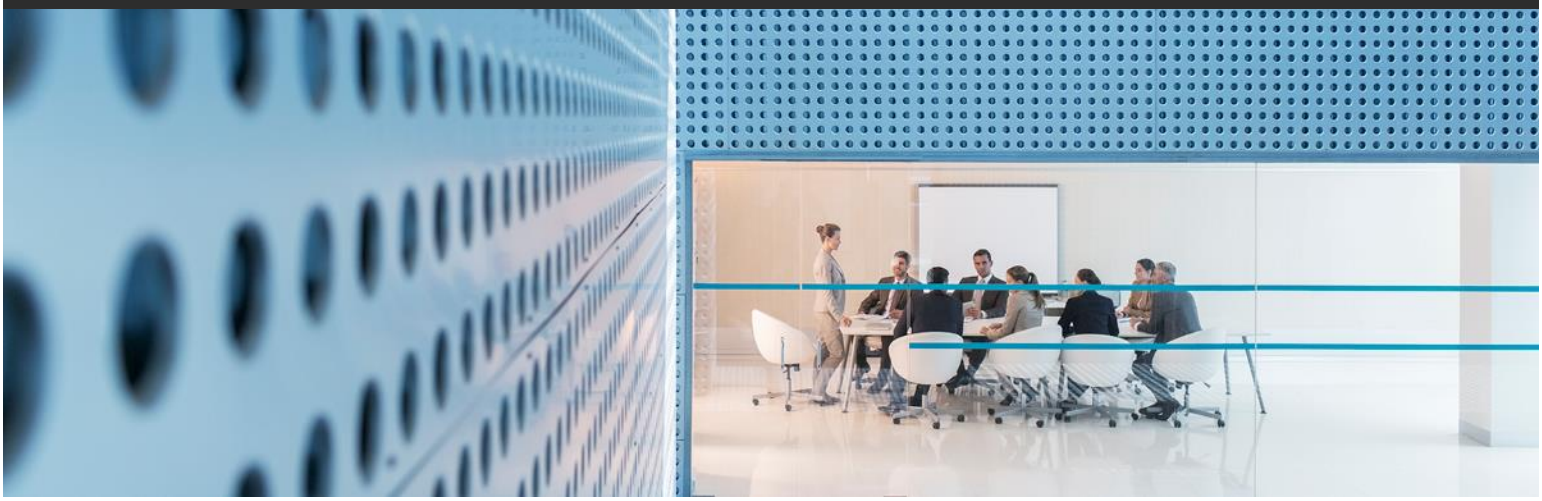

January 2019

2018 Year in Review: California L&E

There are myriad special rules for employers operating in California, and even more were signed into law last term. 2018 was Jerry Brown's last year of his second "two-term" round as governor. Both legislatively and judicially, 2018 was a busy year, with the legislature sending more than 1,000 bills to the governor. This GT Alert discusses the bills signed into law that will affect California employers and pertinent case-based developments in California labor and employment.

Case-Based Developments

Dynamex Operations West v. Superior Court. This April 2018 California Supreme Court decision was discussed both in a GT Alert and on the GT L&E Blog. The opinion created a new "ABC" test for employee versus independent-contractor status when the alleged violation arises under California Industrial Welfare Commission wage orders. Among the key features is a presumption of employee status if the worker is performing a service that is the general business of the entity claiming independent-contractor status. Conspicuously absent from the new test is any concern for the wishes of the worker as to whether he or she prefers to be treated like an employee or an independent contractor. This impacts those participants in the so-called gig economy as well as businesses with long histories of operating under an independent-contractor model, which can include hair stylists, barbers, tattoo artists, delivery drivers, yard maintenance workers, and many others. Businesses wanted some certainty on the employee-status issue, and they got it. But it may be a year or two before any unintended consequences and the impact of the re-classification warrant legislative action. In the interim, legislation is in progress to spread the new ABC test across the entire labor spectrum. Additional caution is warranted, as existing law imposes significant penalties for willful misclassification.

Troester v. Starbucks Corp. This July 2018 California Supreme Court decision was also discussed both in a GT Alert and on the GT L&E Blog. Under federal wage and hour law, the courts had adopted a *de minimus* exception to an employer obligation to pay wages for all time worked when the amount of time was very small and hard to measure. A federal court case arose as to whether that concept applied under California wage and hour law. On appeal, the Ninth Circuit asked the California Supreme Court to weigh in on the issue. Unanimously, the California Supreme Court rejected automatic adoption of the *de minimus* doctrine under California law and separately rejected its application to the facts of the case the Ninth Circuit presented. The court stopped short of declaring there could never be a *de minimus* scenario, but plainly such situations will be extremely rare. If the time keeping system can capture a time increment, employers should expect that the captured time will need to be paid if it was time worked. What this means for employers using rounding methods remains to be seen, and was not directly addressed in the opinion.

NuVasive, Inc. v. Patrick Miles. This September 2018 Delaware Chancery Court decision, again discussed in more detail in a GT Alert and on the GT L&E Blog, addresses circumstances under which an employee non-compete covenant might be effective in California. The vehicle is a 2017 amendment to the California Labor Code, which added Section 925. That section generally prohibits inserting non-California choice of law provisions in a California employee's contract. By adding this provision, the legislature created an exception for contracts in which the employee was represented by counsel. That exception conceptually opens the door to selecting a state with an appropriate nexus to the transaction, a state that does permit non-competition covenants in contracts negotiated with the employee's counsel. The unaddressed question until *NuVasive* was whether Labor Code 925 effectively permitted the parties to enter a contract otherwise forbidden by Business and Professions Code Section 16600. The Delaware Chancery Court found the choice of law provision, and the non-competition agreement by extension, enforceable. Whether a California court reviewing the same issue also will agree is an open question.

Legislation

S.B. 1300. This bill arose in the wake of very public sexual harassment allegations. The legislation adds Section 12923 to the Government Code, generally lowering the threshold for employees to establish harassment and discrimination claims. Some of the changes are specific to litigation, but others have more general application:

- Employees now have fewer hurdles to establish and maintain a sexual harassment claim. Removal of the requirement that the employee must prove that the harassment created an actual loss of tangible productivity means that employees now must merely prove the offensive conduct makes it more difficult for the worker to do his or her job. This newly enacted standard appeared in Supreme Court Justice Ruth Bader Ginsburg's concurring opinion test for hostile work environment articulated in *Harris v. Forklift Systems*, rejecting the standard adopted by the majority opinion.
- A single incident of harassment may be enough to establish a hostile work environment, and that question is for the jury to decide. This provision expressly rejects the Ninth Circuit decision in *Brooks v. City of San Mateo*.
- The so-called "stray remarks" defense, under which comments from non-decisionmakers and other less direct communications were not enough to create a hostile work environment, has been eliminated. This provision of the bill was an express affirmation of *Reid v. Google, Inc.*
- The nature of the workplace no longer matters in assessing whether sexual commentary creates an unlawful environment. Past case law suggested that the nature of the workplace and its history could matter. What this means for certain industries (including but not limited to certain entertainment

businesses) will be assessed on a case-by-case basis. On a practical level this means more focus on remote locations and aspects of operations where conduct standards are not as closely monitored as they may be at corporate headquarters. This portion of the bill expressly rejects *Kelley. v. Conco Companies*.

- Harassment cases that are not settled are more likely to go to a jury trial, as opposed to being resolved on a written motion citing to the evidence from deposition transcripts and the like. This portion of the bill affirms *Nazir v. United Airlines*.
- Employers may not secure releases for California Fair Employment and Housing Act claims in exchange for employees' raises, bonuses, employment, or continued employment or signing certain non-disparagement agreements.

Employers should expect these changes to make it more difficult for them to win summary judgment, which could result in costlier litigations and higher settlements.

S.B. 820. The California Legislature added Section 1001 to the Code of Civil Procedure, which prohibits the inclusion of a confidentiality clause in agreements in which parties are settling certain sexual assault, sexual harassment, or claims in which the plaintiff asserts harassment or discrimination claims based on sex. Any such agreement that prohibits parties from disclosing facts relating to these types of claims, entered after Jan. 1, 2019, are void as a matter of law as against public policy. The amendment has broad application to both private and public employers in California (including the California Legislature) and owners of housing accommodations, among others. However, this restriction only applies to settlement agreements entered after a civil or administrative action has been initiated. Thus, the passage of this bill may encourage potential defendants to settle disputes early, prior to initiation of a lawsuit or administrative charge, even before the potential defendant has the opportunity to fully assess liability.

Despite the general prohibition against shielding facts from disclosure, parties may maintain the secrecy of the amount paid in consideration for a release. In addition, the claimant may request a provision preventing the parties from disclosing the claimant's identity. This carve out does not apply where one of the parties to the settlement agreement is a government agency or public official, nor is this option available to the accused.

The bill was authored by Sen. Connie M. Leyva (D-Chino) and co-sponsored by the Consumer Attorneys of California and the California Women's Law Center. It will be known as the Stand Together Against Non-Disclosures Act (STAND).

Training, Training, Training

California's penchant for adding more training requirements continued in 2018, in spite of a very public 2016 report from an EEOC Task Force concluding that there is no empirical evidence that harassment training has any positive effect on reducing harassment events, and some indications that the training may have a negative impact. Undeterred, the California Legislature added the following requirements:

- Under **SB 970** all hotel and motel employers must provide 20 minutes of human-trafficking awareness training to all employees who may come into contact with human-trafficking victims. The obligation becomes operative Jan. 1, 2020, and must be repeated every two years.
- **AB 2388** requires all talent agencies to provide adult artists, parents, and guardians of minor artists over the age of 14 years with sexual harassment, prevention, and retaliation training within 90 days of the agency being retained. Adult models must also receive training on eating disorders.

- Under **SB 1343**, effective Jan. 1, 2020, the mandatory supervisor harassment training applies to all employers with five or more employees and must be conducted within six months of hire or promotion and every two years thereafter. All other employees must receive an hour of harassment training every two years.

Other New Requirements

SB 1431. Employers who regularly utilize releases will need to modify and update their forms because of this legislation. The issue is California's nearly unique rule for releasing unknown claims. By statute such unknown claims are not released unless the release itself waives protection of the statute. Under the prior version of the statute quoted in nearly all such releases, the language was the following:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

As revised by SB 1431, the new language quoted should read:

> A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.

AB 1976. Lactation facilities. Under prior state law the employer was required to provide a location that was not a toilet stall for purposes of expressing milk. The new law expands the prohibition on the lactation facility to also prohibit it from being in a bathroom.

SB 1412. This expands "Ban the Box" protections enacted previously and by several localities. Under amended Labor Code 432.7 the employer must match specific convictions relevant to the job if using a criminal background check as part of the process. How this will develop remains to be seen. It seems plain that a child care facility could screen out sex offenders, though it would need to identify the offenses. It is less clear whether something like a felony DUI could be challenged as being not relevant to a non-driving position.

AB 3250/SB 847. While not technically a revision to employment law, the changes made to Code of Civil Procedure 384 relating to class actions are of interest. Although reversionary class settlements (ones where unclaimed funds were returned to the defendant) were tough to get approved in California before, what little wiggle room there was may have been legislated out of existence. Under the new process, before judgment is entered, the court must determine the total amount to be paid to the class as a whole, and the parties then must generate a report by a date certain of the total amount that actually was paid to the class members. After the report is received, the court must amend the judgment and "direct the defendant to pay the sum of the unpaid residue or unclaimed or abandoned class member funds, plus any interest that has accrued thereon, to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent."

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