LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, MARCH 6, 2020

PERSPECTIVE

Key California employment law compliance challenges in 2020

By Ann Marie Zaletel

California has long been a national trend-setter in employment law. While some federal agencies of late have generally been more business friendly, California has gone in the opposite direction, as legal developments for 2020 demonstrate anew.

Ban On Mandatory Arbitration Agreements

California traditionally has been hostile toward mandatory arbitration agreements, even though the Federal Arbitration Act declares that states must enforce arbitration contracts to the same extent that they enforce contracts generally. The U.S. Supreme Court has repeatedly struck down California statutes or judicial decisions as discriminating against arbitration agreements in violation of the FAA. Yet California continues to resist.

The latest revolt came in the form of Assembly Bill 51, effective Jan. 1 2020. AB 51 (codified in Lab. Code Section 432.6) prohibits employers from imposing arbitration agreements as a condition of employment. AB 51 was quickly challenged as being FAA-preempted. A federal lawsuit by employer groups sought to enjoin California government agencies from enforcing AB 51 as to arbitration agreements subject to the FAA. Granting a preliminary injunction, the court ruled that AB 51 "is preempted by the FAA because it discriminates against arbitration" and "interferes with the FAA's objectives," not only as to the enforceability of arbitration agreements but also to their "creation." Although this order does not govern private parties, its reasoning will guide courts addressing similar issues.

Employers should continue to follow judicial developments and to evaluate their own arbitration programs in light of each employer's appetite for legal risk and desire to have an effective arbitration program. The most confident employers will stay the course in the belief that AB 51 is FAA-preempted. More cautious employers will suspend mandatory arbitration programs until they're sure that the coast once again is clear.

More Stringent Test for Independent Contracting

AB 5 — called both a boon for workers and a job killer — was the Legislature's ante-up response to the California Supreme Court's 2018 decision in *Dynamex v. Superior Court*, 4 Cal. 5th 903 (2018). AB 5 (codified in large part in Lab. Code Section 2750.3) adopts the strict "ABC" test *Dynamex* mandated for Wage Order claims, and also extends the "ABC" test to all Labor Code and Unemployment Insurance Code claims. As a result, the ABC test must now be used to determine whether a worker is an independent contractor or employee for purposes of claims to which it previously did not apply, even post-*Dyanmex*, such as claims for employee expense reimbursement and failure to provide accurate wage statements.

Reflecting vigorous lobbying, AB 5 exempts from its ABC test about 50 industry-specific categories. Unless one of these exemptions applies, *Dynamex* and AB 5 upend the 30-year-old test of *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989).

Employers should carefully review their independent contractor relationships to determine if each California worker who is classified as an independent contractor qualifies for this status under the ABC test unless an exemption applies, in which case employers may want to re-evaluate the independent contractor relationship under the *Borello* test. Employers also should monitor the various legal challenges to AB 5.

No More "No-Rehire" Provisions

Settlement agreements resolving employment-related claims traditionally have included a promise that the settling individual will not seek employment with the employer or its affiliates. That promise would give the employer an independent basis to reject a job application. As of Jan. 1 2020, AB 749 (codified in Code of Civ. Proc. Section 1002.5) ends that practice. No longer may employers require current or former employees with whom the employer is resolving employment-related legal claims to agree to not seek employment in the future with the employer. AB 749's supporters argued that no-rehire provisions discourage reports of workplace discrimination and harassment. AB 749 recognizes three exceptions: (1) Employers and current employees can enter into severance agreements to end current employment relationships. (2) No-rehire provisions are still permissible in settlement agreements where the employer has found in good faith that the person signing the agreement engaged in sexual harassment or sexual assault. (3) AB 749 does not require employment or rehire of a person if the employer has a legitimate non-discriminatory or non-retaliatory reason to deny employment.

Employers should review and, as necessary, revise their form settlement agreements to comply with this new law. Many employers will opt to create a California-specific template to address this change, so that they can continue using no-rehire provisions in other jurisdictions.

Expanded Lactation Accommodation Obligations

Since 2002, California has required employers to provide a reasonable break time and location for employees to express breast milk. As of Jan. 1, 2020, the lactation accommodation obligations are much broader. SB 142 (codified in Lab. Code Sections 1030-1034) requires employers to provide lactation locations that meet specific requirements: (1) not a bathroom, (2) in close proximity to the employee's work area, (3) shielded from view and free from intrusion during lactation, (4) safe, clean, and free of hazardous materials, (5) containing a surface to place a breast pump and personal items, (6) containing a place to sit, and (7) having access to needed electricity or alternative devices (e.g., extension cords, charging stations). Employers also must provide access to a sink with running water and a refrigerator suitable for storing milk. If a multipurpose room is used, lactation

takes precedence over other uses. SB 142 also requires employer adopt a lactation accommodation policy, with specific content, and to distribute the policy to all new California employees upon hire and to any employee who asks about parental leave.

Employers should modify their lactation accommodation procedures to comply with the new law. Specifically, employers should develop and implement a lactation accommodation policy that complies with the law's requirements. The law mandates that such policy be included in an employee handbook or a set of policies that the employer makes available to employees. Employers also implement a process for distribution of the policy to new hires and to employees who inquire about parental leave.

Expansion of Paid Family Leave Wage Replacement Benefits

Under SB 83, as of July 2020, California paid family leave wage replacement benefits will be available to eligible employees for up to eight weeks, instead of just six. Employers should update their leave policies accordingly and ensure that they are distributing the most current version of the California Employment Development Department's California Paid Family Leave pamphlet (DE 2511) to new hires and to employees who request leave to care for a seriously ill family member or bond with a new child.

Additional Organ Donation Leave Entitlement

As of Jan. 1, 2020, private employers must provide an employee an additional 30 business days of unpaid organ donation leave in a one-year period, for a total of 60 business days of leave per year — 30 of which are paid. Employers that have a written policy on this topic should ensure that the policy is updated to reflect this important change.

Hairstyle Discrimination

SB 188, the CROWN Act (Create a Respectful and Open Workplace for Natural Hair), amends the Fair Employment and Housing Act definition of race to include traits historically associated with race, such as hair texture and "protective hairstyles," which the bill defines as braids, locks, and twists. SB 188, as of Jan. 1, 2020, aims to chip away at "Eurocentric" professional norms by forbidding workplace dress code and grooming policies that prohibit natural hair, including afros, braids, locks, and twists.

Employers should review any grooming or appearance policies to ensure they are facially neutral and to eliminate any proxies for race, such as any prohibition on natural hairstyles. Employers also should consider whether the application of these policies may have a disparate impact on employees in a protected class. Finally, employers should train managers and supervisors on the CROWN Act to prevent natural hairstyles from impacting personnel decisions.

Extending FEHA Limitations Period to Three Years. As of Jan. 1, 2020, AB 9 (the Stop Harassment and Reporting Extension (SHARE) Act), extends from one year to three years the deadline for filing with the Department of Fair Employment an administrative complaint for unlawful discrimination, harassment, or retaliation. With this extended three-year filing deadline in mind, California employers should re-evaluate their record retention policies to ensure they are retaining employment records needed to defend employment discrimination complaints.

Minimum Wage and Exempt Employee Annual Salary Threshold Increases

As of Jan. 1, 2020, the California minimum wage for employees of large employers (with 26 or more employees) increased from $12 to $13. Correspondingly — because California law requires "white collar" exempt employees to be paid a minimum of two times the California state minimum wage for full-time (i.e., 40 hours per week) employment — the minimum annual salary threshold for exempt executive, administrative, and professional employees increased from $49,920 to $54,080. For employees of smaller employers (25 or fewer employees), the minimum wage increases from $11 to $12, and the corresponding minimum annual salary threshold for executive, administrative, and professional employees increases from $45,760 to $49,920.

Employers should confirm that their California exempt executive, administrative, and professional employees earn at least the new minimum salary threshold. And if an employee does not earn meet this requirement, the employer has two options — increase the employee's salary to satisfy this requirement (assuming the employee satisfies the duties test for the exemption) or reclassify the employee as non-exempt.

Creating still additional snares for the unwary, many California cities have enacted minimum wages in excess of the state minimum wage. As of July 2020, the city of Los Angeles minimum wage increases to $15 for larger employers and $14.25 for smaller employers. And in San Francisco, meanwhile, the minimum wage has been $15.59 per hour since back in July 2019. Other California cities with minimum wage ordinances include, but are not limited to, Berkeley, Emeryville, Oakland, Palo Alto, Pasadena, San Diego and Santa Monica. Employers should ensure that they are in compliance with all applicable ordinances.

Expansion of Sexual Harassment Prevention Training Requirements

Most large California employers (those having greater than 50 employees) had implemented their sexual harassment training to ensure supervisors received the required two-hour training every two years. Now, thanks to SB 1343, large and small employers (with as few as five employees) alike must provide at least two hours of interactive training to all supervisory employees once every two years, and must provide at least one hour of interactive training to all non-supervisory employees once every two years.

Amidst the outcry and confusion SB 1343 created regarding training deadlines, the Legislature provided some relief by acting quickly to pass SB 778, which extended the deadline for non-supervisory employees to Jan. 1, 2021 and clarified that supervisors trained in 2018 need not be retrained until 2020. But the training requirements for new supervisory employees have not been changed: employers still must train new supervisors within six months of their starting their position.

With these mind-numbing legislative developments, California employers will have their hands full with numerous additional employment law compliance challenges in 2020. Indeed, this piece highlights only some of the key changes California employers face. ■

Ann Marie Zaletel *is a Labor & Employment partner in Seyfarth's Los Angeles office. She can be reached at (310) 201-1560 or azaletel@ seyfarth.com.*