BUSINESS BRIEF: CALIFORNIA QUARTERLY EMPLOYMENT LAW UPDATE

VOLUME 3, NOVEMBER 1ST, 2019

RAINESFELDMAN

THIS EDITION

For additional information on this business brief, please contact:

Phillip Maltin at pmaltin@raineslaw.com **or Ricardo Rozen at** rrozen@raineslaw.com

KEY CONTRIBUTORS

PHILLIP MALTIN
EDITOR-IN-CHIEF

RICARDO ROZEN
ASSOCIATE EDITOR

REPORTING ALSO BY:

DAVID SCHWARTZ
ELAINE CHANG
MATTHEW GARRETT-PATE
ALLISON WALLIN

Franchisors Must Not Control Franchisees' Personnel Decisions to Avoid Liability for Franchisees' Employees' Labor Code Claims

BY: ALLISON WALLIN

SUMMARY: Employees of a McDonald's Bay Area franchisee sued the national franchisor ("McDonald's") and the local franchisee in a wage and hour class action for meal and rest break violations and related claims. The employees argued McDonald's was a joint employer with its franchisees because its computer systems for time-keeping could have prevented the alleged violations. The Ninth Circuit Court of Appeals found McDonald's was not a joint employer and was not liable to the franchisees' employees because McDonald's did not exert the requisite "control" over them.

RULE: Under California law, an affiliated entity like a franchisor is not a "joint employer" and is not liable for wage violation claims unless it "retain[s] or exert[s] direct or indirect control over plaintiffs' hiring, firing, wages, hours, or material working conditions" and allows the employees to work for or under the control of the franchisee.

TAKEAWAYS: To avoid joint employer liability, franchisors should not assume a general right of control over their franchisees' workforces, including hiring, directing, supervising, disciplining, discharging, or controlling day-to-day workplace activities.

Governor Signs Bill Codifying *Dynamex* Independent Contractor Test, Applies Retroactively

BY: MATTHEW GARRETT-PATE & PHILLIP MALTIN

SUMMARY: California Governor Gavin Newsom signed into law Assembly Bill 5 codifying the state Supreme Court's *Dynamex* decision, limiting the circumstances under which a business may consider a worker an independent contractor. The new law clarifies how to apply the "ABC" independent contractor test. Most employers will find it difficult to classify workers as independent contractors under this new test. However, the Legislature gave some professions a reprieve because the statute applies the less stringent *Borello* test to doctors, real estate agents, barbers, insurance agents, accountants, journalists, travel agents, and a handful of other industries whose workers receive state licenses. For employers currently in or under threat of litigation, be aware the law applies retroactively. This means currently pending litigation will use the ABC test regardless of when the misclassification claims arose.

RULE: Under *Dynamex* and the ABC test, California considers a worker an employee unless all of the following apply:

(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.

TAKEAWAYS: If your employees are misclassified as independent contractors, now is the time to reclassify them. The law gives no grace period. Misclassification of workers can result in multimillion-dollar class actions, as the onslaught of litigation after *Dynamex* is demonstrating.

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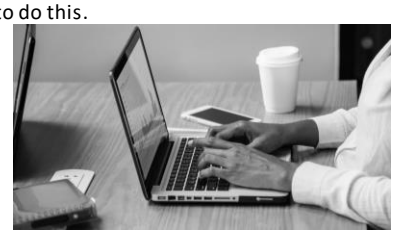
California Triples the Statute of Limitations for Harassment, Retaliation, and Discrimination Lawsuits from One Year to Three

BY: PHILLIP MALTIN

RULE: On October 10, 2019, California Governor Gavin Newsom signed a bill extending the deadline to file a complaint with the Department of Fair Employment and Housing ("DFEH") for unlawful harassment, discrimination, or civil rights-related retaliation under the Fair Employment and Housing Act from one year to three. The state celebrated Governor Newsom's decision by underscoring that the new period "is six-times the length of" federal law "and three-times the length of the current state standard." The employee will also have one year after obtaining a right to sue letter from the DFEH to file a lawsuit in state or federal court.

TAKEAWAYS: Confirm you have policies designed to protect employees from illegal discrimination, harassment, and civil-rights related retaliation. Confirm all employees are current with their anti-harassment training and use training as an opportunity to confirm that human resources processes are effective. Ensure complaints receive swift, good faith investigation, even if the employee who filed a complaint no longer works for the business. Finally, the gap in time between the events and the trial could total five years, or more. Employers should ensure they preserve detailed records, including video, witness statements and other necessary evidence. Contact us about how to do this.



California Aims to Tame the Wild West of Data Privacy with the CCPA

BY: DAVID SCHWARTZ

SUMMARY: The California Consumer Privacy Act ("CCPA"), will be the most expansive consumer data protection law in the United States when it takes effect on January 1, 2020. The CCPA provides California residents with expansive rights to control how their data is collected, accessed, utilized, shared, and stored. Companies that violate the CCPA are subject to severe financial penalties for each violation.

RULE: The CCPA will apply to for-profit entities that (i) do business in California, (ii) collect the personal information of California consumers, (iii) control the collection of California consumer personal information, (iv) engage in commercial conduct in California, and (v) meet at least one of the following criteria:

- Generate gross annual revenues exceeding $25 million;
- Possess (annually buy, receive for commercial purposes, sell or share for commercial purposes) the personal information of 50,000 or more consumers, households, or devices; or
- Derive 50 percent or more of their annual revenue from selling consumer information.

The CCPA will apply to any entity that (i) controls or is controlled by a business that meets any of the above thresholds, and (ii) shares common branding with that business. Companies subject to the CCPA must ensure that any service providers they engage also comply.

The definition of personal information under the CCPA is broad and impacts how employers collect and use personal data. A recent amendment, however, delays for one year the rules regarding personal information collected about job applicants, employees, business owners, directors, officers, medical staff and contractors, and prospective employees.

Under the new law, California consumers will enjoy the right to disclosure ([i] to be informed the business is collecting personal information before or at the time personal information is collected, [ii] to be informed of the type of information being collected, and [iii] to be informed of why the business is collecting the information), the right to deletion (to request that businesses delete all of the information previously collected, subject to certain exceptions), the right to reporting (to request, up to twice annually, that businesses provide a detailed report of how the business used personal information), the right to opt-out (to refuse to share their data), and the right to non-discrimination (to not be discriminated against by being denied goods or services for refusing to provide their data).

Businesses fail to comply at their peril. The California Attorney General's office can assess fines up to $2,500 for each violation and up to $7,500 for each intentional violation if not cured in 30 days (note: the 30-day cure period may be revised in the coming months). Data breach incidents involving "non-encrypted" or "non-redacted" California resident information are subject to additional civil penalties. A consumer may bring a legal action for damages ranging from $100-$750 per incident, or actual damages, whichever is greater. California residents have the right to enforce the CCPA via private action.

TAKEAWAYS: Compliance with the new law is time-consuming. It involves revising and updating websites, establishing technology protocols, responding to consumer requests, and implementing programs and procedures. Business leaders should audit how the organization collects, accesses, utilizes, shares, and stores personal data. They should then develop policies for protecting the information and disclosing its use by drawing ideas from experts, including key employees, and lawyers. Contact David Schwartz to learn more.

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Businesses Must Provide Lactation Accommodations

BY: RICARDO ROZEN & PHILLIP MALTIN

RULE: California's governor signed a bill expanding accommodations and protections for working mothers who wish to express breast milk for their children. The new law requires employers to provide a private lactation space, not a bathroom, that: (i) is safe, clean, and free from hazardous materials; (ii) contains a surface to place a breast pump; (iii) contains a place to sit; and (iv) has access to electricity. Employers must also give access to a sink with running water and a refrigerator for milk storage in proximity to the employee's workstation. Employers must allow a reasonable amount of break time to accommodate "each time the employee has need to express milk." If possible, employees should take breaks at designated times. Additional break time, if necessary, is unpaid. Employers must also develop and follow a written policy regarding lactation accommodation, include it in the employee handbook, and distribute it to new employees upon hiring and when an employee requests parental leave.

Denying an employee reasonable break time or adequate space to express milk violates the rest break regulations of Labor Code Section 226.7, requiring an of hour of pay for each employee affected each day the employer violates the statute. The new law also carries a $100 per day penalty.

TAKEWAYS: Employers should revisit their lactation accommodation policies and inspect the space used for lactation to ensure both comply with the new requirements.

Employers Requiring Their Employees to Arbitrate Disputes Could Violate the Law

BY: PHILLIP MALTIN

SUMMARY: Beginning on January 1, 2020, in California, under Assembly Bill 51, a business may not require applicants for employment or any of its employees to waive any right, forum, or procedure for prosecuting a claim alleging violations of the Fair Employment and Housing Act (the "FEHA") and the Labor Code. In other words, a business may not require employees, as a condition of employment, continued employment, or the receipt of any employment-related benefit, to pursue claims of harassment, retaliation, or discrimination in arbitration rather than in court.

RULE: The statute does not apply to employees who sign arbitration agreements before January 1, 2020. It also does not invalidate arbitration under the Federal Arbitration Act ("FAA"). "Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable" under the FAA. The term "otherwise enforceable" is unclear. It likely means arbitration under the FAA may occur if the parties entered the agreement before January 1, 2020, or if the employer offered it rather than required it. However, it could mean that if the FAA applies, and the arbitration agreement is valid under California law, an employer may require the employee to sign it as a condition of employment. Finally, the statute does not apply to settlement agreements and some severance agreements.

TAKEAWAYS: This new law will prohibit some employers from requiring arbitration, but unresolved is whether a business may insist its employees sign an arbitration agreement as a condition of employment if the FAA applies. Litigation challenging this law is likely, particularly because the United States Supreme Court determined in *Epic Systems v. Lewis* that an agreement requiring a business and its employee to resolve disputes through arbitration is enforceable under the FAA. Meanwhile, arbitration agreements, if made a condition of employment in the new year, may be invalid, and could lead to lawsuits. Employers should revise their handbooks, change their policies, and talk to their lawyers.

U.S. Department of Labor Increases Base Salary Required for Employees to Qualify as Exempt from Overtime under Federal Law, but Does Not Change California's Minimum Wage

BY: PHILLIP MALTIN

SUMMARY: On September 24, 2019, the US Department of Labor announced that beginning January 1, 2020, the earnings threshold for employees to qualify as exempt from overtime under the Fair Labor Standards Act ("FLSA") will rise. This will not affect many California employers because California's minimum wage laws are more generous to employees than the FLSA. California law, not the FLSA, usually applies to California workers.

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RULE: Under the new FLSA rules, the "base salary" required for a worker to qualify as exempt from overtime payments is $684 per week, up from $455 per week, equivalent to $35,568 per year. The FLSA permits employers to use nondiscretionary bonuses and incentive payments (including commissions) paid at least annually to satisfy up to 10% of the standard salary level. California does not permit this. The increases do not change the tests for establishing whether an employee is exempt from overtime under the executive, administrative, or professional tests.

Under California employment law, the base salary for exemption is twice the state minimum hourly wage, based on a 40-hour workweek. California employers with 26 or more employees must pay an employee at least $960 a week to qualify. California employers with 25 or fewer employees must pay exempt employees at least $880 a week.

Federal law also permits businesses to exempt from overtime payments some "highly-compensated employees" if they receive $107,432 a year, up from $100,000 a year. California has no equivalent exemption.

TAKEAWAYS: Misclassifying employees as exempt from overtime can lead to significant liability. The tests for determining whether an exemption applies to an employee are nuanced. Businesses should "audit" the work of employees paid a salary (versus hourly) to confirm whether employees are exempt from overtime payments. California has multiple categories of exemptions from overtime, each with different criteria. In addition, the interplay between the FLSA and California law is complex. Contact a lawyer to ensure your business has properly classified employees as exempt from overtime, and that it is paying them the correct amount. Please note that some exemptions from overtime require the business to ensure the worker receives meal and rest periods.

California Supreme Court Muddies the Arbitration Waters

BY: RICARDO ROZEN & PHILLIP MALTIN

SUMMARY: In a split opinion, the California Supreme Court ruled a car dealership's arbitration agreement with a former employee was unenforceable. The case involved a car dealership's attempt to compel to arbitration a former service technician's wage claims filed with the California Labor Commissioner. The Supreme Court found the arbitration agreement procedurally unconscionable (unfair in how the business offered it to the employee) because (i) the company presented it to a Chinese-speaking employee using a "porter" who could not answer the employee's questions about it, (ii) the employee did not have time or an opportunity to read and understand it, (iii) the company required the employee to sign the agreement to keep his job, and (iv) the agreement was lengthy and full of legalese. The Court also found the agreement substantively unconscionable (unfair in its terms) because the arbitration process was "inaccessible and unaffordable" when compared with the speedy and informal hearing procedures used by the California Labor Commissioner.

RULE: In the past, the Court has upheld arbitration agreements with procedural safeguards like those found in this case. Here, however, the Court ruled that the arbitration agreement was so unfair and one-sided that it would not enforce it. The Court then appeared to soften the impact of its decision by noting, "we have not said no arbitration could provide an appropriate forum for resolution of [plaintiff's] wage claim, but only that this particular process, forced upon [plaintiff] under especially oppressive circumstances and erecting new barriers to the vindication of his rights, is unconscionable."

TAKEAWAYS : The impact of this decision is unclear. It perhaps announces a new era of increased scrutiny of arbitration agreements by the California Supreme Court. With that in mind, California employers should allow their employees to read, understand, and ask questions about the arbitration agreements they ask, or require, their workers to sign. They may also wish to exclude wage claims filed with the Labor Commissioner from arbitration, or to create an expedited arbitration process to handle them. Our Raines Feldman 2020 handbook update will include revisions to the arbitration agreement that account for this ruling and the new Assembly Bill 51 discussed above.

Take Advantage of Tax Incentives for Disability-Related Access Expenditures

BY: ELAINE CHANG & PHILLIP MALTIN

ISSUE: Accessibility lawsuits related to compliance with the Americans with Disabilities Act ("ADA") and the California Unruh Civil Rights Act are on the rise. While physical access barriers were always subject to ADA compliance lawsuits, the number of website accessibility lawsuits has skyrocketed since 2017. In December 2017, the U.S. Department of Justice withdrew its notice of intent to issue website accessibility regulations and guidelines, meaning no website accessibility regulations or specific technical standards currently exist and none are forthcoming. In October 2019, the U.S. Supreme Court declined to hear Domino's Pizza's appeal on a website accessibility case. Continued uncertainty and lack of specific guidelines fuel website accessibility litigation. We therefore encourage all companies to inspect their physical properties and websites for ADA compliance and take all necessary steps to address potential ADA compliance issues. The good news is that companies can take advantage of tax breaks to do so.

TAX INCENTIVES: Businesses may qualify for federal and state tax incentives for expenditures related to removing accessibility barriers or other ADA compliance efforts.

The IRS allows a deduction of up to $15,000 per year for "qualified architectural and transportation barrier removal expenses" to make a facility or public transportation vehicle more accessible to individuals who are handicapped or elderly.

The IRS also provides a Disabled Access Credit to small businesses with either $1 million or less in gross receipts for the preceding tax year or 30 or fewer full-time employees during the preceding tax year. Eligible small businesses may receive a credit for 50 percent of "eligible access expenditures" that exceed $250 but do not exceed $10,250 for a taxable year.

California gives small businesses a limited credit of 50% of eligible access expenditures up to $250. It caps the credit at $125 per year, but allows the business to carryover the credit until it is exhausted.

TAKEAWAYS: Businesses can reduce their exposure to ADA lawsuits when they remove accessibility barriers to their facilities or websites. If you recently paid to improve, or plan to pay to improve, accessibility to your facility or website, consult your accountant about whether your business is eligible for tax incentives. Please contact us if you have questions about ADA compliance for your facility or website.

California Employers Must Permit Natural Hairstyles for Employees Beginning in 2020

BY: MATTHEW GARRETT-PATE & PHILLIP MALTIN

SUMMARY: California Governor Gavin Newsom signed Senate Bill 188, the "Create a Respectful and Open Workplace for Natural Hair" Act ("Crown Act"), into law in 2019, banning employer policies against natural hairstyles in the workplace. The bill, championed by civil rights activists, is meant as a remedial measure to rectify societal exclusion of hairstyles associated with people of color from cultural understandings of "professionalism." The Crown Act amends the Fair Employment and Housing Act and the Education Code to prohibit discrimination based on "protective hairstyle and hair texture." Specifically, "protective hairstyles" include, but are not limited to, afros, twists, dreadlocks, and braids. The new protections take effect in January 2020.

RULE: Dress codes and other policies or conduct that discriminate against such hairstyles are prohibited and can trigger employment discrimination claims. The Fair Employment and Housing Act will include natural hairstyles and textures as part of the definition of race beginning in 2020.

TAKEAWAYS: Employers must update their policies and dress codes to remove any reference to bans on protected hairstyles like dreadlocks, afros, twists, and braids. Employers should also ensure that their policies do not implicitly ban such hairstyles by, for example, requiring short haircuts or straightened hair. If necessary, employers should update their handbook or prepare a memo regarding this change in policy and distribute it to employees in the new year.

Please note: The changes to California employment laws in 2020 are numerous and significant. Please closely review the articles above and contact us with any questions or concerns.

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