

## Resources

### New California Employment Laws to Take Effect in January 2019 and Beyond

December 4, 2018

As in previous years, the California legislature kept busy in 2018. As a result, a number of new and noteworthy employment laws will go into effect on January 1, 2019, and beyond. Much of the legislation stems from the #MeToo movement by strengthening harassment and discrimination protection, imposing broader anti-harassment training obligations, updating lactation accommodations and mandating female presence on boards of public companies. Other significant new laws concern employee compensation, related personnel issues and important clarifications due to ambiguities in laws that were passed last year, including the bans on asking about an applicant's salary history and criminal history.

#### Wages, Hiring, Salary, Payroll

**Minimum Wage:** Remember that the state minimum wage will increase on January 1, to \$11 per hour for employers with 25 or fewer employees and to \$12 per hour for employers with 26 or more employees. This is not a new law—SB 3 was signed in 2016, and this is the next mandatory increase. (And do not forget to determine if any local minimum wage ordinances apply to your business -- City of Los Angeles: July 1, 2019: \$13.25 for employers with 25 or fewer employees and \$14.25 for employers with 26 or more employees.)

**Copies of Payroll Records:** Existing law already requires that employees have a right to inspect or copy their payroll records and that they must be allowed to do so within 21 days of such a request. SB 1252 merely makes clarifying changes designed to ensure that employers make and provide the copies rather than requiring that employees find ways to make the copies themselves.

**Salary History:** Last year's law banning inquiries about salary history and requiring employers to provide pay scales to applicants upon request contained some ambiguities that were addressed in this year's AB 2282.

The Labor Code will be amended to clarify that:

- Employers can ask about an applicant's salary expectations for the position being applied for;
- Only external applicants (not current employees) are entitled to a pay scale upon request, and only after completing an initial interview; and
- The pay scale provided only needs to include salary or hourly wage ranges.

In addition, compensation decisions based on a current employee's existing salary, such as for giving raises or bonuses, will be permissible if justified by factors such as a seniority or merit system.

**Criminal Background Checks:** Current law generally prohibits consideration of an applicant's judicially sealed or expunged convictions. SB 1412 will narrow an employer's ability to consider sealed or expunged convictions to only those circumstances where a particular conviction would legally prohibit someone from holding that job.

#### Harassment and Discrimination

**Sexual Harassment Omnibus Bill: SB 1300** adds a section to the Government Code that declares the purpose of harassment laws is to provide all Californians with equal opportunity to succeed in the workplace. The bill expressly affirms Justice Ruth Bader Ginsburg's concurrence that in the landmark Supreme Court workplace harassment decision in *Harris v. Forklift Systems*, providing:

"...the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job."

SB 1300 also prohibits an employer from requiring an employee, in exchange for a raise or bonus, or as a condition of employment or continued employment to:

- Agree not to sue or bring a claim against the employer under FEHA; or
- Sign a non-disparagement agreement preventing the employee from disclosing information about unlawful acts in the workplace, including but not limited to sexual harassment.

These prohibitions won't apply to negotiated settlement agreements or severance agreements. SB 1300 also will expand employer liability for unlawful harassment by nonemployees and prohibit a prevailing defendant from being awarded attorney's fees and costs unless specific factors are proven.

**Confidentiality Clauses in Settlement Agreements:** SB 820 will prohibit any settlement agreement entered into on or after January 1, 2019, in a case where sexual harassment, assault or discrimination has been alleged, from including a confidentiality provision that prohibits disclosure of factual information regarding the claim. SB 820 expressly authorizes provisions that (1) preclude the disclosure of the amount paid in settlement and (2) protect the claimant's identity and any fact that could reveal the identity, so long as the claimant has requested anonymity.

**Waivers of Right to Testify:** Under AB 3109, any provision in a contract or settlement agreement will be deemed unenforceable if it prohibits testimony about criminal conduct or sexual harassment in an administrative, legislative or judicial proceeding. AB 3109 covers only testimony that is required, such as by subpoena or court order, or in response to a written request in an administrative or legislative hearing.

**Sexual Assault; Statute of Limitations:** This new law, AB 1619, greatly enlarges the statute of limitations for filing a civil action for damages for sexual assault to 10 years after the alleged assault or three years after the plaintiff discovered or reasonably discovered injury as a result of the assault, whichever is later.

**Gender Representation on Boards of Directors:** This unique law requires any publicly held corporation with principal executive offices in California to place at least one female director on its board by December 31, 2019. Depending on the board's size, up to three female members may be required by the end of 2021. Significant financial penalties apply if a company fails to achieve the required number of female directors.

**Defamation:** Under existing law an employer may inform a prospective employer whether or not the employer would rehire the employee. Such a communication is deemed privileged and protected from a lawsuit for defamation under Civil Code Section 47. AB 2770 adds the following communications as privileged and protected: (a) complaints of sexual harassment by an employee made to an employer without malice and based on credible evidence; (b) communications between an employer and an interested person, without malice, regarding a complaint of sexual harassment; and (c) communications by the employer, made without malice, as to whether the employer's decision to not rehire the employee is based on the employer's determination the former employee engaged in sexual harassment.

**Sexual Harassment Training:** Current law requires employers with 50 or more employees to provide supervisors with two hours of sexual harassment training. Under SB 1343, **by January 1, 2020**, all employers with five or more employees will be required to provide two hours of sexual harassment training to supervisors and one hour to non-supervisory employees within six months of hire or promotion, and every two years after that.

**Lactation Accommodation:** California employers currently must provide a private location in close proximity to the employee's work area, other than a toilet stall, for an employee to express breast milk. AB 1976 brings California law into conformity with federal law by requiring that the employer provide a location other than a "bathroom," rather than a toilet stall. The new law will provide an undue hardship exemption under limited circumstances.

**Paid Family Leave Uses:** California has a paid family leave program that provides partial wage replacement to employees who take leaves of absence for specified purposes. This new law, SB 1123 expands the program to provide paid family leave benefits **beginning January 1, 2021**, to employees who take time off for reasons associated with being called to active duty or a spouse, domestic partner, parent, or child being called to active duty.

## What Should Employers Do Now?

Employers are strongly urged to:

- Review and update their policies and procedures in anticipation of the aforementioned new laws;
- Focus on ensuring that they are in compliance with all of the new legislation that requires immediate action, such as increases in minimum wage; changes to paid family leave policies; compliance with salary history inquiries and sexual harassment and discrimination protection laws (there may be significant repercussions for failing to comply with these new regulations, such as fines, penalties, or even exposure to civil liability); and
- Consult with legal counsel to ensure that their policies are compliant and up to date, based on local, state, and federal laws.

For more information about these laws, please contact Laura Worsinger (213-457-1744 or [lworsinger@dykema.com](mailto:lworsinger@dykema.com)) or your Dykema relationship attorney.

## Attorneys

Laura P. Worsinger

## Practice Areas

Labor & Employment

Wage & Hour

As part of our service to you, we regularly compile short reports on new and interesting developments and the issues the developments raise. Please recognize that these reports do not constitute legal advice and that we do not attempt to cover all such developments. Rules of certain state supreme courts may consider this advertising and require us to advise you of such designation. Your comments are always welcome. © 2020 Dykema Gossett PLLC.