SARGOY LAW NEWSLETTER #15
CHANGES IN SELECTED CALIFORNIA EMPLOYMENT LAWS FOR 2019

The Legislature has enacted numerous changes to California employment for 2019 that are employee-friendly and restrict the practices of businesses. While employees are sure to view most of the revisions favorably, employer groups have been quoted as calling them "job killers." Several of these laws are summarized below. However, because the purpose of this Newsletter is to provide an overview of the changes, the Newsletter is not intended to, nor does it, comprehensively address all aspects of the laws summarized. Some laws are straightforward; others are anything but. Where there is a question concerning the scope or coverage of a specific law, the reader should consult an attorney knowledgeable in California state and federal employment law.

I. THE NEW LAW RAISES THE STATEWIDE MINIMUM WAGE, THEREBY AFFECTING NON-EXEMPT WORKERS, OVERTIME RATES, INSIDE COMMISSIONED SALESPEOPLE, AND INCREASES THE THRESHOLD WEEKLY OR ANNUAL SALARY REQUIREMENTS FOR EXECUTIVE, ADMINISTRATIVE, AND WHITE COLLAR EMPLOYEES TO REMAIN EXEMPT.

A. Minimum Wage Increases.

Effective **January 1, 2019**, the ***California statewide minimum wage*** will increase to:

- $12.00 per hour for employers with 26 or more employees.
- $11.00 per hour for employers with fewer than 26 employees.

Localities are authorized to require higher minimum wages than statewide levels. In *Southern California*, effective January 1, 2019, the following minimum wage scale will apply:

- **City of San Diego:** $12.00 per hour for employees who perform at least two hours of work in the City of San Diego per workweek.

Effective **July 1, 2019**, the following minimum wage scale will take effect:

- **Los Angeles (City and Unincorporated Areas of County):** $14.25 for employers with 26 or more employees in the City or unincorporated areas of the County and $13.25 per hour for employers with fewer than 26 employees in the City or unincorporated areas of the County.

- **Malibu:** $14.25 for employers with 26 or more employees in the City of Malibu and $13.25 per hour for employers with fewer than 26 employees in the City of Malibu.

- **Santa Monica:** $14.25 for employers with 26 or more employees in the City of

Santa Monica and $13.25 per hour for employers with fewer than 26 employees in the City of Santa Monica.

NOTE: Current minimum wage rates in the City and unincorporated areas of the County and Santa Monica are $13.25 for employers with 26 or more employees and $12.00 for employers with fewer than 26 employees. For Malibu, the hourly rate is $12.00 for all employees. *These minimum hourly wage rates do not change until July 1, 2019.*

B. Exempt White Collar and Inside Salespeople Employees.

(1) White Collar Employees: To remain exempt employees (not entitled to overtime pay), *executive, administrative, and professional employees* must earn a threshold salary of twice the *state* minimum wage for a 40-hour workweek.

Effective January 1, 2019, the threshold for exempt employees will increase to *$960.00 per week* or *$49,920 per year.*

(2) Inside Salespeople: Inside salespeople who are exempt when they earn more than one and one-half times (1 ½) the minimum wage during a pay period must earn *more than $18.00 per hour* as of January 1, 2019 to maintain exempt status.

II. DISCRIMINATION, HARASSMENT, AND RETALIATION PROTECTIONS

A. Confidentiality Provisions Are Prohibited in Settlement Agreements for Claims of Sexual Assault, Sexual Harassment, and Workplace Harassment, Discrimination and/or Retaliation on the Basis of Sex.

Newly added Cal. Code of Civil Procedure section 1001 (SB 820), effective January 1, 2019, prohibits confidentiality clauses in settlement agreements of claims or complaints filed in a civil or administrative action from preventing disclosure of facts concerning the sexual assault; sexual harassment; workplace harassment; and discrimination or retaliation for reporting harassment or discrimination on the basis of sex underlying the action. The legislation is the result of the "Me Too" movement's activism that has criticized companies for shielding harassers and permitting a "culture of harassment."

The new law includes certain EXCEPTIONS:

- The identity of the claimant is NOT subject to disclosure at the request of the claimant, unless a government agency or public official is a party to the agreement.
- The law renders VOID any provision in violation of the above entered into after January 1, 2019.

The law does NOT prohibit disclosure of the amount paid in settlement of a claim or action.

B. It Is an Unlawful Employment Practice to Require Employees to Sign a Release of Claim or Right or a Non-Disparagement Agreement as a Condition of Employment or Continued Employment.

Newly amended Cal. Labor Code section 12964.5 (SB 1300) of the California Fair Employment and Housing Act (FEHA), takes effect January 1, 2019. It is an unlawful employment practice for employers – *in exchange for a raise or bonus, or as a condition of employment or continued employment* – to require an employee to sign (i) a release of a claim or right or (ii) a non-disparagement agreement preventing the employee from disclosing information about unlawful acts in the workplace, including, but not limited to, sexual harassment. The law prohibits the practice of some employers from requiring those provisions as a condition of employment.

The new law does NOT apply to a negotiated settlement agreement to resolve a FEHA claim already filed in a court, administrative agency, through an alternative dispute resolution forum, or an employer's internal complaint process, so long as the agreement is voluntary and provides valuable consideration.

C. Contracts or Settlement Agreements that Waive an Employee's Right to Testify Are Prohibited. Violation Renders the provision VOID and UNENFORCEABLE.

Newly enacted Cal. Civil Code section 1670.11 (AB 3109), effective January 1, 2019, is straightforward. It prohibits any provision in a contract or settlement agreement entered into on or after January 1, 2019 that waives a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or alleged sexual harassment on the part of the other party to the contract or settlement agreement, or on the part of the agents or employees of the other party. Violation renders the contract or settlement agreement VOID and UNENFORCEABLE.

D. Governor Brown Has Signed Plaintiff-Friendly FEHA Harassment and Discrimination Standards of Proof.

Governor Brown has signed legislation (SB 1300), enacted as Cal. Government Code section 12923, which takes effect January 1, 2019. The new law strengthens by its codification several substantive FEHA harassment/discrimination provisions.

(1) The Standard of Proof Has Been Lowered for Adverse Actions Affecting "Terms or Conditions" of Employment.

The concurrence set forth by Justice Ruth Bader Ginsburg in her concurrence in *Harris v. Forklift Systems* (1993) 510 U.S. 17 has been expressly written into the law: In a workplace harassment suit "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 . . . that the harassment so altered working conditions as to make it more difficult to do the job."

(2) A Single Incident of Harassing Conduct Is Sufficient to Create a Triable Issue of Material Fact of the Existence of a Hostile Work Environment.

Section 12923 expressly rejected the Ninth Circuit Court of Appeals' opinion in *Brooks v. San Mateo*, 229 F.3d 917 (9th Cir. 2000). Under Government Code section 12923, a single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment.

(3) The "Totality of the Circumstances" Test Applies to Proof of a Hostile Work Environment. Cal. Government Code Section 12923 Expressly Rejects the "Stray Remarks Doctrine."

Cal. Government Code section 12923 declares that the existence of a hostile work environment depends upon the *totality of the circumstances.* A discriminatory remark, even if not made directly in the context of an employment decision or uttered by a non-decisionmaker, may be relevant, circumstantial evidence of discrimination. The code section affirms the California Supreme Court decision in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, which rejected the "stray remarks doctrine."

(4) The Legal Standard for Determining Sexual Harassment Does Not Vary by Type of Workplace.

It is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually-related commentary or conduct in the past. In determining whether or not a hostile environment exists, courts should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary that is integral to the performance of the job duties. The decision in *Kelley v. Conco Companies* (2011) 196 Cal.App.4th 191 is expressly disapproved.

(5) Summary Judgment Is Rarely Appropriate for Harassment Cases.

The new section codifies the reasoning of *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 that hostile working environment cases involve issues "not determinable on paper." Section 12923 provides that harassment cases are rarely appropriate for disposition on summary judgment.

E. Employer Liability for Acts of Non-Employees Has Been Expanded to Include All Types of Prohibited FEHA Harassment, Not Just Sexually Harassing Misconduct.

Effective January 1, 2019, Cal. Government Code section 12940 (SB 1300) has been expanded to include potential employer liability for ALL TYPES of proscribed FEHA harassment of employees, applicants, unpaid interns or volunteers, or non-employees providing services pursuant to a contract in the workplace. Previous law applied to potential employer liability only for SEXUALLY HARASSING conduct.

NOTE: The standard of proof has NOT changed. Liability exists if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action, with consideration being given to the extent of control and other employer legal responsibility for the conduct of non-employees.

F. Employers May Provide Bystander Intervention Training.

Newly added Cal. Government Code section 12950.2 (SB 1300) authorizes, but does not require, employers to provide bystander intervention training that includes information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors.

G. Prevailing Defendants in FEHA Actions Are *Not* Entitled to Attorneys' Fees Unless the Court Finds that the Action is Frivolous, Unreasonable, or Groundless When Brought, or the Plaintiff Continued to Litigate After It Clearly Became So.

Existing law authorizes a court, in its discretion, in a civil FEHA case, to award, with certain limitations, the prevailing party reasonable attorney's fees and costs, including expert witness fees.

Effective January 1, 2019, Cal. Labor Code section 1265 (SB 1300) has been amended to prohibit a prevailing defendant from being awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.

H. Lactation Accommodation Is Required in Locations "Other than a Bathroom."

Existing law requires employers to provide a location *other than a toilet stall* to accommodate an employee to express breast milk for the employee's infant child.

Effective January 1, 2019, Cal. Labor Code section 1031 (AB 1976) is amended to require employers to provide a location *other than a bathroom* unless the requirement would impose an undue hardship.

I. Allegations of Sexual Harassment Are Protected Against Defamation Actions.

Cal. Civil Code section 47 (AB 2770) has been amended to expand the statutory definition of privileged communications to victims of sexual harassment and employers. Effective January 1, 2019, privileged communications include (i) complaints of sexual harassment made by an employee, without malice, to an employer based upon credible evidence and communications between employers and interested persons (such as victims and witnesses) regarding a complaint of sexual harassment, and (ii) employers are permitted to provide in a job reference the employee is eligible for rehire based upon the employer's determination that the employee engaged in sexual harassment.

J. Workplace Sexual Harassment Training Has Been Expanded.

Current law requires employers with 50 or more employees to provide at least two (2) hours of sexual harassment, abusive conduct, and gender harassment training to all supervisory employees within six (6) months of their hire or promotion to a supervisory position and once every two years thereafter.

Effective **January 1, 2020**, the FEHA, at Cal. Government Code section 12950.1 (SB 1343), is amended to require employers of **five (5) or more** employees to provide at least two (2) hours of sexual harassment training to all supervisory employees and at least **one hour** of sexual harassment training to **nonsupervisory employees**, within six (6) months of hiring or promotion, and every two (2) years thereafter. Employers who provide such training during 2019 are not required to repeat the training in 2020. The training includes temporary and seasonal employees, with the requirement that training must be provided within 30 calendar days of hiring or 100 hours of work, whichever occurs first.

K. Female Representation Is Now Required on Boards of Directors of Publicly Traded Corporations.

Sections 301.3 and 2115.5 (SB 826) have been added to the Cal. Corporations Code, and require that by **December 31, 2019** publicly held corporations with principal executive offices in California must have at least one female on the board of directors. By **December 31, 2021**, two (2) female directors are required if the corporation has five (5) directors and three (3) female directors if the corporation has six (6) or more directors.

L. Sexual Harassment in a Non-Employment Business Relationship Has Been Expanded Under Cal. Civil Code Section 51.9.

Existing law under Cal. Civil Code section 51.9 establishes liability for sexual harassment when there is a business, service, or professional relationship between the plaintiff and defendant and the plaintiff cannot easily terminate the relationship. The relationships include, but are not limited to, those involving a physician, psychotherapist, dentist, attorney, social worker, teacher, and substantially similar relationships.

Effective January 1, 2019, Cal. Civil Code section 51.9 (SB 224) includes liability for a defendant holding him/herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party and includes an investor, elected official, lobbyist, director, and producer among those listed persons who may be liable to a plaintiff for sexual harassment. The statute further eliminates the necessity that the plaintiff be unable to easily terminate the relationship.

III. HIRING PRACTICES

A. Salary History Information and Rules Regulating Disparities in Pay Have Been Updated.

(1) Existing law generally prohibits employers from relying on an applicant's salary history as a factor in determining whether to offer employment or what salary to offer, with limited exceptions. Existing law further requires employers, upon "reasonable request," to provide the "pay scale" to an applicant for a position.

Cal. Labor Code section 432.3 (AB 2282), effective 1/1/19, has been amended to clarify ambiguities:

- Employers are permitted to ask about an applicant's salary expectations for the position being sought.
- "Pay scale" is defined as *salary or hourly wage range* only, and "reasonable request" means a request made after an applicant has completed an initial interview for the position.
- The term "applicant" refers to *external* applicants and not current employees.

(2) Existing law generally prohibits disparities in wage rates based on sex, race or ethnicity for substantially similar work under comparable working conditions, with certain exceptions, including, but not limited to, seniority or merit-based systems.

Effective January 1, 2019, Cal. Labor Code section 1197.5 (AB 2282) authorizes compensation decisions such as raises, bonuses, and similar remuneration based on seniority systems, merit-based systems, systems measuring earnings by quantity or quality, or bona fide factors other than sex, race or ethnicity, such as education, training, or experience, if the employer demonstrates the factor is not based on or derived from sex, race or ethnicity-based differential in pay.

B. Criminal Background Checks Relating to Expunged, Dismissed, or Sealed Convictions Are Restricted to Crimes Prohibiting an Individual from *Holding the Particular Job Sought.*

Existing law, Cal. Lab. Code, § 432.7, generally prohibits public and private employers from obtaining information about judicially expunged, dismissed, or sealed convictions. However, the law does not apply when under state or federal law (i) the employer is required to obtain information about an applicant's conviction, (ii) the applicant would be required to possess a firearm in the course of employment, (iii) an individual convicted of a crime is prohibited by law from *holding the position sought*, regardless of whether the conviction has been expunged, dismissed or sealed, or (iv) the employer is prohibited by law from hiring an applicant convicted of a crime.

Effective January 1, 2019, Cal. Labor Code section 432.7 (SB 1412) has been amended to restrict employers from considering expunged, dismissed, or sealed convictions unless the underlying conviction prohibits the applicant from *holding that particular job.*