

2019 Employment Update

Presented By: Treaver Hodson, Esq.

Website: https://www.pkwhlaw.com/

2019 Employment Update

Palmer Kazanjian

I. Hiring Practices

AB 2282 – Clarification of the Salary History Ban Law

Background: AB 168, enacted in 2017, prohibits employers from asking applicants about salary history and relying on applicants' salary history when considering employment applications.

The New Law: AB 2282, enacted in July 2018, provides that:

- The salary history ban only applies to external applicants.
- Applicants can voluntarily disclose salary history and if so employers can rely on that information when considering employment applications.
- Employers may ask applicants about their salary expectations.

SB 1412 – Criminal History Inquiries

Background: Labor Code § 432.7 limits employers' ability to conduct criminal history inquiries. Specifically it precludes both public and private employers from asking an application to disclose, seeking from any source or considering in determining conditions of employment information concerning the application participating in a diversion program or a conviction that was judicially dismissed or sealed. There is an exception, however, for employers who are required by federal or state law to inquire into an applicant's or employee's criminal history.

The New Law: This bill amends Labor Code § 432.7 to narrow the exception for criminal history inquiries required by law to apply only where an employer is required by law to inquire into a "particular conviction" or where an employer cannot by law hire someone with a "particular conviction." "Particular conviction" is defined to mean "a conviction for specific criminal conduct or a category of criminal offenses prescribed by any federal law, federal regulation or state law that contains requirements, exclusions, or both, expressly based on that specific criminal conduct or category of criminal offenses."

Significance: There are now fewer circumstances under which an employer may inquire into or consider applicant's and employee's criminal convictions.

II. Wage and Hour

Dynamex Operations West v. Superior Court

Facts: Delivery drivers in a class action claimed they were misclassified by Dynamex as independent contractors when they should have been classified as employees. The drivers claimed the misclassification violated the state wage orders and Labor Code.

Holding: The court established the "ABC" test, which presumes all workers are employees for the purposes of the wage orders. Independent contractor status requires that the worker:

A. Is free from the control and direction of the employer in connection with the performance of the work, both under contract and in fact;

B. Performs work outside the usual course of employer's business; and

C. Is engaged in an independently established trade, occupation, or business of the same nature as the work performed for the employer. (i.e. has incorporated, gotten licenses, or purchased advertisements)

Significance: It is now more difficult to classify workers as independent contractors. The California Court of Appeal indicated the ABC test does not apply to the joint employer context. Additionally, courts are currently deciding whether the opinion applies retroactively.

Troester v. Starbucks Corporation

Facts: Employee's job at Starbucks required he clock out before completing his "closing" duties, such as setting the alarm and locking up the store. The employee claimed he needed to be paid for the off the clock work. Starbucks claimed the employee did not have to be paid under the *de minimis* exception which says that employees do not have be paid for insubstantial amounts of working time of a few seconds or minutes.
Holding: The Court determined the federal *de minimis* exception was not adopted by the California Labor Code.
Significance: Employers must compensate employees for routinely working off the clock even for small amounts of time. Therefore, employees must be compensated for off the clock duties such as closing up the store.

Tip Pooling

Background: In California, tips belong to employees and not to employers, but employers can mandate tip pools which distribute tips among employees.
A change in federal law now permits tip pooling with back-of-the-house employees who are not directly engaging with customers, a change from previous California law.
Significance: Employers may now include back-of-the-house employees, such as cooks or dishwashers, in tip pools.

III. Arbitration

Epic Systems Corp. v. Lewis

Facts: Employees claimed that the class action and class arbitration waivers in the arbitration agreements the employees signed violated the National Labor Relations Act (NLRA). The employees claimed that class and collective actions were protected by the NLRA.
Holding: The Court determined class action and class arbitration waivers in arbitration agreements are enforceable under the Federal Arbitration Act and do not violate the NLRA.
Significance: Employers can now require that employees waive their rights to class or collective class actions and require that they arbitrate their claims on an individual basis. The decision further demonstrated how arbitration agreements can be a powerful tool for employers to decrease potential liability.
NOTE: *This case did not address representative actions under PAGA.*

IV. Harassment

SB 1300 – Amendments to the Fair Employment and Housing Act

New Law: It is now an unlawful practice for an employer to require an employee to release a FEHA claim in exchange for a bonus, raise, or continued employment. Additionally, Employers are now liable for any kind of unlawful harassment by non-employees (not just for

sexual harassment as under existing law) where the employer knew or should have known of the harassment and failed to take appropriate remedial action. The new law also includes certain statements of legislative intent making it harder for employers to prevail on harassment claims (e.g., a legislative declaration that harassment cases are rarely appropriate for resolution on summary judgment, and a declaration that a single act of harassment may suffice to support a finding of a hostile work environment).
Significance: This law expands the circumstances under which an employer may be liable for harassment of an employee and makes it more difficult for the employer to resolve a harassment suit at summary judgment.

SB 224 – Sexual Harassment
New Law: Expands the types of relationships that can be subject to a claim for sexual harassment to include lobbyists, elected officials, directors, producers, and investors.

SB 820 – Settling Sexual Harassment Claims
New Law: Prohibits including a provision in settlement agreement entered into after January 1, 2019, that prevent disclosure of factual information pertaining to claims of sexual assault, sexual harassment, gender discrimination or related retaliation that have been filed in court or before an administrative agency. (The new law does not prohibit a provision that prevents the parties to the agreement from disclosing the amount of the settlement.) Additionally, at the claimant' request, the settlement agreement may include a provision that limits the disclosure of the claimant's identity or of facts that would lead to the discovery of the claimant's identity.

AB 1309 – Disclosure of Sexual Harassment
New Law: Makes void and unenforceable any provision in a contract or settlement agreement that prevents a party to the contract from testifying about criminal conduct or sexual harassment in an administrative, legislative, or judicial proceeding.

SB 1343 – Sexual Harassment Training
Existing Law: Existing law requires employers with 50 or more employees to provide supervisors with sexual harassment training.
New Law: This new law expands the training requirement to employers with five or more employees, and it requires said employers provide at least 2 hours of training to supervisory employees and at least one hour of training to non-supervisory employees, by January 1, 2020,and once every two years thereafter. It also requires the DFEH to develop and post training materials for employers to use for these purposes.

V. Protected Categories and Discrimination

Regulations on National Origin
The FEHC adopted new regulations for California effective July 2018.
"National Origin," for the purposes of discrimination, now includes, among other qualities, an individual's or ancestor's actual or perceived:

- Physical, cultural, or linguistic characteristics associated with a national origin group
- Tribal affiliation
- Attendance or participation in schools, churches, temples, mosques, or other religious institutions generally used by persons of national origin group

Significance: Employees now have more grounds to bring a discrimination claim. Therefore, employers must be more careful about taking any action that could be seen as based on national origin.

Regulations on English-Only Policies

The new FEHC regulations also prohibit employers from adopting an English language only policy unless:

- (A) The language restriction is justified by business necessity;
- (B) The language restriction is narrowly tailored; and
- (C) The employer has notified its employees of the circumstances in which the language restriction is observed and the consequence for violations.

Significance: It is now harder for employers to adopt a valid English-only policy. Employers must be fully aware of and follow all requirements when adopting these policies. With the new regulations, employers with these policies may face increased liability because employees now have more grounds to contest the policy.

VI. Immigration

United States v. California

Background: On October 5, 2017, Gov. Jerry Brown signed into law AB 450, called the "Immigrant Worker Protection Act," intended to discourage employers' compliance with US Immigration and Customs Enforcement (i.e. "ICE"). AB 450 imposes certain constraints on employers' cooperation with ICE. It added new Cal Govt. Code § 7285.1, which states that "[e]xceept as otherwise required by federal law, an employer, or a person acting on behalf of the employer, shall not provide voluntary consent to an immigration enforcement agent to enter any nonpublic areas of a place of labor."

Facts: In this case, the United States brought action against the State of California, Gov. Jerry Brown and the California Attorney General in United States District Court, for the Eastern District of California, alleging the Immigrant Worker Protection Act is preempted by federal immigration law.

Holding: District Judge John A. Mendez issued an order enjoining California from enforcing parts of the Immigration Workers Protection Act. The Court found several provisions of the law discriminate against private employers who cooperate with the federal government. The Court concluded that "a law which imposes a monetary penalty on an employer solely because the employer voluntarily consents to federal immigration enforcement's entry into nonpublic areas of their place of business or access to their employment records impermissibly discriminates against those who chose to deal with the federal government." The Court also struck down a provision of the law that limits an employer's ability to re-verify an employee's employment eligibility unless otherwise required by federal law.

Significance: This decision means private sector employers may no longer be prosecuted for 1) consenting to federal immigration enforcement agents' request to enter nonpublic areas in the workplace, 2) granting federal immigration enforcement agents access to employee records, and 3) re-verifying an employee's eligibility to work in the United States.

VII. Labor Unions

NLRB Handbook Guidance

The NLRB General Counsel provided guidance on workplace rules:

- A rule's burden on employees' NLRA rights is balanced with the employer's right to maintain discipline and productivity when dealing with facially neutral rules.
- Rules are no longer unlawful because they *could*, rather than *would*, cover protected activities.
- Ambiguities in rules are no longer construed against the drafter.

Significance: Workplace rules are now less likely to be found in violation of the NLRA.

- *Category 1 Rules – Generally Lawful*

Rules that:

- Do not prohibit or interfere with NLRA rights or;
- Any burden on NLRA rights is outweighed by business justifications.

Category 1 rules include:

1. Civility rules;
2. No photography or no recording rules;
3. Rules against insubordination and non-cooperation;
4. Disruptive behavior rules;
5. Rules protecting confidential or proprietary information.

Significance: These types of rules are generally immune from employee claims based on the NLRA.

- *Category 2 Rules – Not Obviously Lawful or Unlawful*

Rules requiring case-by-case determinations.

- Any determination requires analysis of whether the rule would interfere with NLRA rights.
- If so - is that interference outweighed by legitimate justifications?

Category 2 rules include:

1. Regulating use of the employer's name.
2. Generally restricting speaking to the media.
3. Prohibiting making false or inaccurate statements.

Significance: Employers adopting these types of rules must take into account employees' NRLA rights and not adopt rules limiting those rights.

- *Category 3 Rules – Generally Unlawful*

Rules that prohibit or limit NLRA rights and the adverse impact on rights outweighs any justifications.

Category 3 rules include:

1. Confidentiality rules specifically regarding wages, benefits, or working conditions; and
2. Rules against joining outside organizations or voting on matters concerning the employer.

Significance: These types of rules generally increase employer liability. The NLRB will typically issue complaints over these rules.