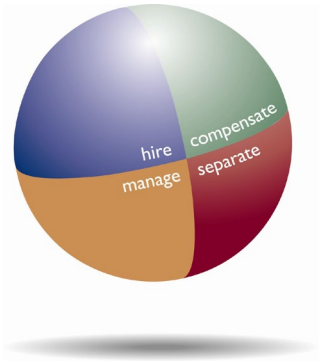

EMPLOYMENT LAW GROUP
Our team of talented employment attorneys will assist you in navigating California's unique business environment as it relates to the hiring, managing, pay, and separation of employees.

We work closely with our clients to identify issues and avoid disputes. Our clients rely on us for advice on day-to-day personnel and benefits issues as well as handling complex and high exposure litigation and other disputes.

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Recap of 2019 Employment Law Update Seminar

HIRE

Criminal Background Checks (SB 1412; Labor Code § 432.7): This statute modifies the law to provide that employers can only ask applicants about **particular convictions (not all criminal history)** if:

A) Employer is **required by law** to obtain the information;

B) The applicant would be **required to possess or use a firearm** in the course of their employment;

C) An individual with that particular conviction is **prohibited by law from holding the position** sought; or

D) Employer is **prohibited by law from hiring** an applicant who has that particular conviction

Salary Inquiries (AB 2282; Labor Code § 432.3): Although an employer may not seek salary history information from an applicant in deciding whether to hire the applicant or determining the salary to offer, the employer can ask about salary expectations. Per the 2018 change, employers were required to provide a pay scale upon reasonable request; the new 2019 changes to the statute defines "pay scale" (a salary or hourly wage range) and "reasonable request" (a request made after an applicant has completed an initial interview with the employer). Finally, the new law clarifies that "applicant" means an individual seeking employment, not current employees.

Wage Differentials for Current Employees (AB 2282; Labor Code § 1197.5): Wage rates can be unequal and an employee's current wage rate may be considered in setting compensation **only** when the wage differential is based on one or more of the following factors: (1) a seniority system; (2) a merit system; (3) a system measuring earning by quantity or quality of production; or (4) a bona fide factor other than sex.

COMPENSATE

California Increases Minimum Wage

- Statewide minimum wage as of January 1, 2019:
  - $12.00 per hour (26 employees or more)
  - $11.00 per hour (25 employees or fewer)
- Scheduled to go up each year until it reaches $15.00 per hour
  - In 2022 for companies with 26 employees or more
  - In 2023 for companies with 25 or fewer employees

Municipal Minimum Wage (partial list; only includes Northern California cities + Los Angeles) – effective January 1, 2019 unless otherwise indicated

- Berkeley: currently $15; will increase based on CPI on July 1, 2019
- Cupertino: $15
- El Cerrito: $15
- Emeryville: currently $15 (55 employees or fewer); $15.69 (56 employees or more); will increase based on CPI on July 1, 2019
- Los Altos: $15
- Los Angeles: $12 (25 employees or fewer); $13.25 (26 employees or more)
- Milpitas: currently $13.50; will increase to $15 effective July 1, 2019
- Mountain View: $15.65
- Oakland: $13.80
- Palo Alto: $15
- Richmond: $15
- San Francisco: currently $15; (will increase based on CPI on July 1, 2019)
- San Leandro: currently $13; will increase to $14 effective July 1, 2019
- San Mateo: $15 citywide (except 501(c)(3) non-profit employers must pay $13.50)
- San Jose: $15
- Santa Clara: $15
- Sunnyvale: $15.65

California Pay Increases

- Partially-exempt inside sales commissioned employees: $16.50 (25 or fewer employees)/$18 (26 or more employees)
- Employees who provide their own tools: $22.00 (25 or fewer employees)/$24.00 (26 or more employees)
- Hourly-paid Licensed Physicians and Surgeons: $82.72 per hour
- Computer Software Professionals: $45.41 per hour/$7,883.62 per month/$94,603.25 per year

California Salary Thresholds for Exempt Employees: $45,760.00 (25 or fewer employees)/$49,920.00 (26 or more employees)

IRS Reimbursement Rate: 58 cents per mile

New Test for Determining Independent Contractor Status *(Dynamex v. Superior Court (2018) 4 Cal.5th 903)*: California courts will now apply the "ABC test" when determining whether an individual is an employee or an independent contractor for all claims brought under an IWC Wage Order. The "ABC test" provides that an individual is an independent contractor **only if**:

(A) the worker is **free from the control and direction** of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
(B) the worker performs work that is **outside the usual course** of the hiring entity's business; **and**
(C) the worker is **customarily engaged in an independently established trade, occupation, or business** of the same nature as the work performed for the hiring entity

For example, as the court explained, a plumber hired by a retail store to fix a restroom leak is certainly an independent contract under the "ABC test." The plumber is not controlled by the store, is performing duties that the store ordinarily would not perform, and the plumber customarily engages in an independent business. However, a work-from-home seamstress hired by a clothing company to make a dress from fabric provided by the company (and then sold to the company) is not an independent contractor under the "ABC test."

Court Establishes that Employers Must Generally Pay for All Hours Worked, No Matter How De Minimus *(Troester v. Starbucks Corp. (2018) 5 Cal.5th 829):* In this case, a former employee sued Starbucks alleging that he was forced to perform small tasks after clocking out each day to complete his duties. Starbucks argued that the "de minimus doctrine" should apply, which excuses nonpayment for time that is administratively difficult to record. However, this California court rejected the "de minimus doctrine" and required that Starbucks compensate the former employee for **all** time worked. Takeaway: pay hourly employees for all time worked. Create a policy wherein employees are not permitted to perform any work duties after clocking out at the end of their shift.

Optional Use of Company Vehicle for Commute Was Not Compensable *(Hernandez v. Pacific Bell Telephone Company (2018) 29 Cal.App.5th 131):* The court held that an employees' time spent commuting to and from work using a company vehicle – where use of the company vehicle was optional – was **not compensable** time. The court held that the employer did not have sufficient "control" over the employee during commute times and therefore was not required to compensate the employee while commuting to and from work.

MANAGE

Expansion of Who Must Train and Be Trained (SB 1343; Government Code §§ 12950, 12950.1): This law expands the sexual harassment prevention training requirement to **employers with 5 or more employees**. Supervisory employees are to receive at least two hours of training, and non-supervisory employees are to receive at least one hour of training. This training must be provided in 2019, and training is to be provided at least once every two years thereafter. New hires and newly promoted supervisors must be trained within six months (and then at least every two years thereafter).

For seasonal and temporary employees, including any employee who is hired to work for less than six months, the employer shall provide sexual harassment prevention training **within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first.**

If an employee is employed by a **staffing agency**, the staffing agency shall provide the training, not the client.

Human Trafficking Training for Specified Industries:

- **AB 2034; Civil Code § 52.6**: Employers must provide at least 20 minutes of training in identifying, recognizing, responding to, and reporting human trafficking **to employees of intercity passenger rails, light rails, and bus stations** who might interact or come into contact with a victim of human trafficking or are likely to receive a report from another employee about suspected human trafficking. Training must be complete by January 1, 2021. Failure to comply results in a $500.00 penalty for the first offense and a $1,000.00 penalty for each subsequent offense.
- **SB 970; Government Code § 12950.3:** Employers must provide at least 20 minutes of training in identifying, recognizing, responding to, and reporting human trafficking to certain **hotel and motel employees** who are likely to interact or come into contact with victims of human trafficking **(including those in reception, housekeeping, or those who help customers move their possessions or drive customers)**. Training must be complete by January 1, 2020. Failure to comply can result in the Department of Fair Employment and Housing seeking an order requiring compliance.

Harassment: Everything But the Kitchen Sink (SB 1300; Government Code §§ 12923, 12940, 12950.2, 12964.5, 12965): The California state legislature broadened protections for victims of harassment to make it easier for them to assert claims.

- An employer can be held liable for the acts of non-employees with respect to harassment based on all protected categories (not just sexual harassment). We will need to wait for guidance on just how far employer liability can extend.
- Prevailing defendants (i.e., employers) in a harassment lawsuit must prove that the lawsuit was frivolous, unreasonable, and/or without merit or that the plaintiff continued to litigate the matter after becoming aware that the case had no merit before it can collect post-offer attorneys' fees and costs on a successful Code of Civil Procedure section 998 offer (a statute that encourages settlement in litigation by offering a party the opportunity to collect fees and costs if the other

party rejects a settlement offer made pursuant to CCP section 998 and then fails to obtain a more favorable judgment).

- Employers may not require the following in exchange for a raise or a bonus or as a condition of employment or continued employment:

    - Requiring an employee to sign a release of claims stating the employee does not possess any claim or injury against the employer or covered entity, or
    - Requiring an employee to sign a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace including, but not limited to, sexual harassment.

It is still ok to require a release and/or a non-disparagement agreement in the context of a negotiated settlement of a dispute so long as the settlement agreement is otherwise compliant with all other laws that are in effect.

- The legislature expressly affirmed and rejected several judicial decisions:
    - *Harris v. Forklift Systems* – The legislature formally adopted Justice Ginsburg's concurrence that a sexual harassment plaintiff need not prove that their productivity has declined as a result of the harassment. It is sufficient that a reasonable person subjected to the discriminatory conduct would find that the harassment so altered the working conditions as to make it more difficult to do the job.
    - *Brooks v. City of San Mateo* – The legislature rejected the *Brooks* decision and prohibited use of the case in determining what conduct may be sufficiently severe or pervasive to constitute a violation of FEHA. Contrary to the holding in *Brooks*, a single incident of harassment **is** sufficient to create a triable issue 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. In essence, summary judgment is not available in harassment cases where there is evidence of at least one incident of harassment.
    - *Reid v. Google, Inc.* – The legislature affirmed *Reid*, which found that isolated remarks, if viewed in light of other circumstances, can be evidence of severe and pervasive harassing conduct. Thus, the legislature rejected the stray remarks doctrine (which states that comments made by non-decision-making supervisors or coworkers that are unrelated to the challenged employment decision are irrelevant to the question of discriminatory motive or animus).
    - *Kelley v. Conco Companies* – The legislature disapproved the use of the decision in *Kelley* to support different standards of hostile work environment harassment for different workplaces.
    - *Nazir v. United Airlines, Inc.* – The legislature affirmed the *Nazir* court's observation that hostile work environment cases involve issues not determinable on paper in a motion for summary judgment or motion for summary adjudication.

- Finally, employers may (but are not required to…yet) provide employees with bystander intervention training on how to recognize potentially problematic behaviors and motivate bystanders to take action when they observe such behaviors.

Expansion of Who May Be Liable for Sexual Harassment (SB 224; Civil Code § 51.9; Government Code §§ 12930, 12948): A defendant will be liable for sexual harassment when the plaintiff proves specified elements, including, among other things, that the defendant holds himself or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party. Among other enumerated relationships, an investor, elected official, lobbyist, director, and producer may be liable to a plaintiff for sexual harassment.

Sexual Harassment – Entertainment Industry (AB 2338; Labor Code §§ 1700.50 et seq.): Talent agencies must provide educational materials on sexual harassment prevention, retaliation, and reporting resources and nutrition and eating disorders to its artists. Further, prior to the issuance of a minor's work permit in the entertainment industry, minors and their parents/guardians must receive training in sexual harassment prevention, retaliation, and reporting resources. The Labor Commissioner may assess civil penalties of $100 for each violation.

Protection from Defamation Claims (AB 2770; Civil Code § 47): Communications regarding or evidencing complaints of sexual harassment by an employee, based on credible evidence and without malice, are now "privileged communications" that cannot give rise to a defamation claim. Further, employers may disclose in reference checks whether an employee is ineligible for rehire based upon a determination that the employee engaged in sexual harassment. The complainant, witnesses, and the employer are all protected against claims of defamation.

Representation on Corporate Boards (SB 826; Corporations Code §§ 301.3, 2115.5): Publicly held corporations whose principal executive offices are located in California must have a minimum of 1 female on its Board of Directors by the end of 2019. "Female" is defined as one who self-identifies as a woman without regard to the individual's designated sex at birth. By the end of 2021: (1) If a corporation has 5 directors, it must increase the minimum number to 2 female directors; and (2) If a corporation has 6 or more directors, it must increase the minimum number to 3 female directors.

Lactation Accommodations (AB 1976; Labor Code § 1031): This modification to the law requires employers to make reasonable efforts to provide an employee with use of a room or other location, **other than a bathroom** (prior law said other than a toilet stall), to express breast milk. Temporary lactation locations are sufficient so long as they are only used for lactation purposes while an employee expresses milk. If this law imposes an undue hardship on an employer, the employer is still required to make reasonable efforts to provide a room or location for expressing breast milk that is not a toilet stall (consistent with prior law).

National Origin Discrimination:

- CCR 2 CCR § 11027.1.1: Protection against national origin discrimination extends to an individual's **actual or perceived** national origin and this statute generally defines national origin expansively to include:
    - Physical/cultural/linguistic characteristics associated with a national origin group;
    - Marriage to or association with persons of a national origin group;
    - Tribal affiliation;
    - Membership in or association with an organization identified with or seeking to promote the interests of a national origin group;
    - Attendance or participation in schools, churches, temples, mosques or other religious institutions generally used by persons of a national origin group;
    - Name that is associated with a national origin group.

National origin groups include any ethnic groups, geographic places of origin, and countries that are not presently in existence.

- 2 CCR § 11028: It is unlawful to have English only policies or prohibit the use of any language in the workplace **unless** the language restriction is justified by business necessity, the restriction is narrowly tailored, and the employer has effectively notified its employees of the circumstances and time when the language restriction is required to be observed and of the consequence for violating the language restriction.

  Pleasing customers is not a business necessity. A **business necessity** means the language restriction is necessary to the safe and efficient operation of the business; language restriction effectively fulfills the business purpose it is supposed to serve; and there is no alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact.

  Language restrictions are **never** permitted during an employee's non-work time.

  An employer may request an applicants' information regarding their ability to speak/read/write/understand any language **if** justified by business necessity.

  Height and weight requirements may be discriminatory if they can create a disparate impact on members of certain national origins – if adverse impact is established, requirements are unlawful **unless** job related and justified by business necessity. Even so, the requirements may still be unlawful if plaintiff can show alternative means to accomplish business necessity.

Prohibited Discrimination Against Service Members (SB 1500; Military and Veterans Code § 394):

Discrimination laws are now expanded to the federal reserve components of the Armed Forces of the United States and members of the State Military Reserve. Further, employers may not refuse entrance into specified places (public entertainment or places of amusement or any places covered by Civil Code sections 51 and 52) to any member of the Armed Forces because that member is wearing a uniform.

Expansion of Paid Family Leave Benefits (SB 1123: Unemployment Insurance Code §§ 3301, 3302.1, 3302.2, 3303, 3303.1, 3307): On or after January 1, 2021, California's Paid Family Leave benefits may be used to pay for time off for an employee to participate in a qualifying exigency related to the covered active duty status of their spouse, registered domestic partner, child, or parent who is a member of the US Armed Forces. A "qualifying exigency" includes but is not limited to: official military ceremonies, briefings, changes to child care/financial/legal arrangements as a result of military service; counseling; spending time with the covered service member during rest and recuperation leave.

Requiring Vacation Usage Before Paid Family Leave: Despite there no longer being a 7-day waiting period for employees to receive Paid Family Leave benefits, employers may still require employees to use of two weeks of vacation prior to the employee's initial receipt of Paid Family Leave benefits.

Employer is not Liable for an Employee's Car Accident (Under Very Narrow Facts) *(Newland v. County of Los Angeles (2018) 24 Cal.App.5th 676):* The County of Los Angeles was not vicariously liable for an employee's car accident that occurred during his commute home after work because the employee had no need for his car that day, his employer did not expect him to drive his car, and the employer obtained no benefit from the employee driving his car.

SEPARATE

Restriction on Confidentiality Provisions in Settlement Agreements (SB 820; Code of Civil Procedure § 1001): Settlement agreement provisions that prevent the disclosure of factual information relating to legal claims of sexual assault, sexual harassment, or workplace harassment or discrimination based on sex are **void**. Employers can still prohibit disclosure of settlement amounts. It is also permissible to include a provision in the agreement concealing the identity of the claimant and all facts that could lead to the disclosure of the claimant's identity if such a provision is requested by the claimant. **No such protection is afforded to the accused.**

Employers Can't Prohibit a Party from Testifying (AB 3109; Civil Code § 1670.11): Provisions in contracts or settlement agreements that waive a party's right to testify in a legal proceeding concerning alleged criminal conduct or sexual harassment when the party has been required or requested to attend the proceeding pursuant to a court order, subpoena, or written request from an administrative agency or the legislature are void. This law applies to contracts entered into on or after January 1, 2019.

Construction Industry PAGA Prohibition (AB 1654; Labor Code § 2699.6): Construction industry employees are now prohibited from pursuing a PAGA claim where the worker is covered by a collective bargaining agreement ("CBA") if the CBA:

- Includes a grievance and binding arbitration procedure to address potential Labor Code violations;
- Applies to working conditions, wages, and hours of work of employees in the construction industry;
- Ensures employees receive a regular hourly wage not less than 30% more than the minimum wage;

Construction Industry PAGA Prohibition (AB 1654; Labor Code § 2699.6) (continued):

- Prohibits Labor Code violations redressable by PAGA;
- **Expressly waives the requirements of PAGA in clear and unambiguous terms;** and
- Authorizes an arbitrator to award all remedies available under PAGA, except for penalties payable to the LWDA.

This applies to CBA's in effect prior to January 1, 2025 and will remain in effect until January 1, 2028 or when the CBA expires, whichever is sooner.

Class Action Waivers are Valid! ***(Epic Systems Corp. v. Lewis (2018) 138 S.Ct. 1612):*** The U.S. Supreme Court upheld class action waivers in arbitration agreements governed by the Federal Arbitration Act. This is not new in California but gives employers more confidence that their class action waivers in arbitration agreements will be enforceable both in the state and nationally.

Non-Solicitation Provisions Called into Question ***(AMN Healthcare v. Aya Healthcare (2018) WL 3032552):*** The Court held that a non-solicitation provision prohibiting employees from practicing their trade violated California Business and Professions Code section 16600 and was therefore invalid. Because the employees involved in the case were recruiters for a staffing agency, a prohibition against soliciting temporary employees was equivalent to an impermissible non-compete restriction. The facts of the case are distinguishable from most industries, but the court raised the general question of whether any non-solicitation agreements could be valid.