What California’s Employment Law Landscape Means for Employers
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From #MeToo to Arbitration and Much More
Governor of California

Gov. Gavin Newsom
2019 -

Gov. Brown, you’re already missed!

Gov. Jerry Brown
1975-83 and 2011-19

“Not every human problem deserves a law.”

California’s Employment Law Landscape
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LEGISLATION & REGULATIONS
Statewide Hair Discrimination Law – Senate Bill 188

• Defines “Race,” for FEHA purposes, to include traits historically associated with race, including hair texture and protective hairstyles

• Defines “Protective hairstyles” to include braids, locks, and twists
A House of Cards?
#MeToo Movement Sparks Sexual Harassment Laws

What saved Harvey Weinstein and others for so long is gone

- Nondisclosure agreements to shield alleged harassers under increasing scrutiny, CA led the way
- STAND Act voids confidentiality/nondisclosure provisions in settlement agreements for sexual assault, sexual harassment, sex discrimination, or retaliation for reporting harassment/discrim.
- Lone exception is if harmed party requests privacy
STAND Act

• Took effect January 1, 2019 (Stand Together Against Nondisclosure Agreements)

• Tony, what’s been the impact so far?

• Settlement terms still confidential?
Tougher Training Requirements

- Must provide training if 5 or more employees (reduced from 50 or more)
- Not just for supervisors
- Two hours of training to all supervisory employees and at least one hour of training to all nonsupervisory employees by January 1, 2021
- Original compliance date just moved back from 1/1/2020—Why?
Sexual Harassment Training Compliance

- Tony’s warning:

- Don’t just require employees to click “comply” by clicking through online training.
- How real is that risk?
- Do we need to overhaul current training protocols?
- Training must be “interactive”
ARBITRATION

SEE YOU IN

Court

Arbitration
Santa Ana Winds Blowing Against Arbitration in CA

- US Supreme Ct. has upheld mandatory arbitration clauses as a condition of employment
- Often overruling 9th Circuit and Cal. Supreme Ct.
- Bill percolating in CA takes aim at mandatory arbitration—AB 51
- A handful of other states have limited mandatory arb. with sexual harassment cases (MD, NY (struck down), VT, WA, IL upcoming)
- Tony, would California’s go even further?
AB 51 – Potential Implications

• Assembly Bill 51 would make it a criminal misdemeanor to require applicant or employee to “waive any right, forum or procedure” for a violation of the CA Fair Employment and Housing Act or Labor Code.

• This includes the right to file and pursue a civil lawsuit in court under those statutes.

• Will Gov. Newsom sign and will it withstand legal challenge?

• What’s number one complaint you hear about arbitration?
  – The “confidentiality conundrum”

- When a contract delegates the question of the arbitrability to an arbitrator, the court must order the matter to arbitration even if the court thinks the argument that the arbitration agreement applies is wholly groundless.

- Supreme Court reaffirms that class arbitration may not be ordered unless the arbitration agreement clearly allows for it
- Silence or ambiguity is not a basis for ordering class arbitration

- Court finds an “extraordinarily high” degree of procedural unconscionability and “significant oppression”

- Court finds the arbitration agreement at issue to be “unfair” because it requires a “formal and highly structured arbitration process that closely resembled civil litigation”

- Earlier cases from the same court mandated such processes because they were “carefully crafted to ensure fairness to both sides”

- Holding that employee who continued employment after employer implemented arbitration agreement impliedly consented to arbitration
Gig Economy, What Gig Economy?

- Uber, Lyft, etc. not facing favorable climate in CA
- In early 2019, Uber settled CA lawsuit for $20 million that claimed the ride-sharing company had misclassified its drivers as independent contractors rather than employees
- There are a growing number of cases along these lines
- California courts taking broad view of employees
Dynamex Ruling and AB 5

- In *Dynamex*, California Supreme Court made it more difficult to classify workers as independent contractors.
- Under its “ABC test,” a worker is considered an employee unless the hiring entity can show that the worker:
  - A. Is free from control and direction of their work, both under contract and in fact;
  - B. Performs work that is outside the usual course of its business; and
  - C. Is customarily engaged in an independently established trade, occupation.
Dynamex and AB 5

• California's legislature has sent AB 5 to the governor, which would codify the Dynamex ruling as part of the state code.

• Would extend its application to include state labor and unemployment insurance laws, effective 1/1/2020

• Gov. Newsom indicated support

• Uber, Lyft, DoorDash have pledged $90 million toward a ballot initiative to overturn/modify AB 5 and Dynamex

• Tony, what would this mean as a practical matter?
Discrimination
Wilson v. CNN, 7 Cal. 5th 871 (2019)

• Television producer sued CNN for discrimination, wrongful termination and related claims

• CNN filed an Anti-SLAPP Motion in an effort to get an early dismissal of Wilson’s lawsuit – based upon CNN’s exercise of its right of free speech in making staffing decisions

• Cal. Supreme Ct. split the baby – some but not all of CNN’s staffing decisions may be shielded by free speech right

• CNN has burden of showing CNN was exercising its editorial control in making these employment decisions
BREACH OF CONTRACT

• Voris successfully sued Lampert for unpaid wages for both breach of contract and statutory wage/hour violations

• In this case, Voris recast his allegations into claims that his unpaid wages had been “converted” by the companies and that they were liable to him for tort damages (including punitive damages)

• Cal. S. Court declines to supplement existing law with an additional tort remedy for employees in this situation

• Employee may recover for breach of contract, but not for what it referred to as a “novel” theft of labor by false pretenses in violation of Cal. Penal Code §§ 484 and 496
PROCEDURAL ISSUES

• California employee is compelled to litigate his employment claims in Indiana.
EEOC v. Global Horizons, Inc., 915 F.3d 631 (9th Cir. 2019)

• Fruit growers may have been joint employers of Thai workers for purposes of Title VII

- No-rehire clause in settlement agreement is an unlawful restraint of trade

- Employee non-solicitation provision was an unenforceable restraint
MISCELLANEOUS
Connor v. First Student, Inc., 5 Cal. 5th 1026 (2018)

- Employer must obtain written authorization to conduct background check

- Any overlap between California Investigative Consumer Reporting Agencies Act (“ICRAA”) and California Consumer Credit Reporting Agencies Act does not render one superfluous or unconstitutionally vague
Gilberg v. California Check Cashing Stores, LLC, 913 F.3d 1169 (9th Cir. 2019)

- Employer’s disclosure form violated FCRA’s “standalone document requirement” because it contained “surplus language” involving applicants’ rights under various states’ laws.

- The language in the disclosure form was not “clear,” though it was “conspicuous” enough to pass muster under the statute.

- Employer may be liable for accident caused by on-call employee.
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