Hotel Lawyer: Labor & Employment New Year Round-Up: What to Expect in 2020

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Hotel Lawyer with labor & employment law update for 2020

Several new pieces of California legislation will take effect on the first day of the new year, impacting nearly all employers and how they handle worker classification, discrimination disputes, arbitration agreements, and union organizing. Our round-up will help you determine which key issues may impact you in 2020; contact us to be sure you’re ready for all these upcoming changes.

Use of Independent Contractors Severely Limited as of New Year

On September 18, 2019, California Governor Gavin Newsom signed AB 5 into law, codifying the holding in Dynamex Operations West, Inc. v. Superior Court which severely curtailed when employers may use independent contractors. AB 5 is effective January 1, 2020 and sets forth an “ABC” tests to determine whether workers qualify as independent contractors.

The test examines whether:

1. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact
2. The worker performs work that is outside the usual course of the hiring entity’s business
3. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed

The “B” prong is new, and may be particularly problematic for businesses – potentially resulting in misclassification of individuals who were formerly properly classified as independent contractors.

AB 5 codifies a number of exceptions from the ABC test, including but not limited to:

1. A person or organization licensed by the Department of Insurance;
2. California licensed physician, surgeon, dentist, podiatrist, psychologist, or veterinarian;
3. California licensed lawyer, architect, engineer, private investigator, or accountant;
4. Securities broker-dealer or investment adviser or their agents and representatives registered with the SEC or FINRA or licensed by California;
5. Direct sales salespeople;

Workers in these categories are subject to the “Economic Realities” test set forth in Borello & Sons, Inc. v. Dept. of Industrial Relations. In applying the economic realities test, the most significant factor to be considered is whether the
person to whom service is rendered (the employer or principal) has control, or the right to control, the worker both as to
the work done and the manner and means in which it is performed.

AB 5 also provides for limited exemptions to the ABC test for certain professional services, business-to-business
contracts, construction subcontracts, relationships between referral agencies and service providers, and contracts
between motor clubs and third parties. When these categories of relationships qualify, they are subject to Borello’s
economic realities test.

What this means for you: All businesses using independent contractors should conduct audits and review written
independent contracts under the new standards to ensure that workers are properly classified. Misclassification can result
in significant penalties, wage and hour liability, EDD and other tax liabilities as well as trigger class action lawsuits.

Arbitration Agreements and More Hurdles for Employers
On October 10, 2019, Governor Newsom signed AB 51. Effective January 1, 2020, the new law will prohibit employers
from requiring arbitration of almost all employment-related claims from new employees, or employees whose employment
agreements are modified or extended. For any company that utilizes an arbitration agreement, the impact of this law is
substantial.

Specifically, under the new law, employers will be prohibited from requiring any applicant or employee to waive any right,
forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (FEHA) or any
section of the California Labor Code.

The new law also prohibits threatening, retaliating, or discriminating against any applicant or employee who refuses to
agree to an arbitration agreement; it also provides for attorneys’ fees to any prevailing employee who challenges an
unlawfully mandated arbitration agreement and/or proves that an employer threatened, retaliated, or discriminated against
an employee who refused to sign an arbitration agreement.

AB 51 includes a few restricted exemptions and provides for a one-year statute of limitation. For example, the new law
does not relate to self-regulatory organizations as defined by the Securities Exchange Act of 1934. Additionally, it does not
apply to arbitration clauses included in post-dispute settlement agreements or negotiated severance agreements.

Lastly, because the new law is codified under California’s FEHA, any employee alleging a violation of the new law will be
required to file an administrative claim with the Department of Fair Employment & Housing and demand a right-to-sue
letter within one year of the alleged violation.

The law is ambiguous regarding the treatment of existing arbitration agreements. Expressly, the law states that it is only
applicable to “contracts for employment entered into, modified, or extended on or after January 1, 2020.” A reasonable
interpretation of this language suggests that an employee working under an existing employment agreement that does not
have his or her agreement expressly “modified” or “extended” after January 1, 2020 may still be required to abide by his or
her existing arbitration agreement. On the other hand, the slightest change in the terms of the employment arrangement,
such as a minimal pay increase, may be interpreted by a court as a “modification” of the employment agreement, allowing
current employees the ability to revoke existing arbitration agreements.
Interestingly, the law expressly provides that it does not intend to invalidate an arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (FAA). The FAA is a federal statute outlining a policy favoring the speedy and cost-effective process of arbitration. Yet, laws like AB 51 have been held unlawful in other states specifically because courts have interpreted as contradicting the FAA.

In 2018, for example, New York passed a law to prohibit employers from mandating arbitration of sexual harassment claims. Earlier this year, the U.S. District Court for the Southern District of New York held that the law was preempted by the FAA and its strong policy of enforcing arbitration agreements, and thereby unenforceable. See *Latif v. Morgan Stanley & Co.*, 18-cv-11528 (DLC), 2019 U.S. Dist. LEXIS 107020 (SDNY June 26, 2019).

Nevertheless, although the new law may be challenged, until and unless the state or US Supreme Court rules it as preempted under the FAA, employers will be required to abide by the new prohibitions.

**What this means for you:** Employers should review their arbitration agreements to analyze AB 51’s possible impact on both existing agreements and anticipated new ones effective January 1, 2020 or later. Notably, challenges to AB 51 based on federal preemption principals have already begun in courts, and employers should stay tuned for further developments in this area.

**The Impacts of the #MeToo Movement Continue to Find Their Way Into California Law**

What has become an increasingly common provision in employment-related settlement agreements will soon be no more. With the implementation of AB 749, employers may no longer include a “no rehire” provision in a settlement agreement that prohibits, prevents, or otherwise restricts a settling employee who has filed a claim or internal complaint from obtaining future employment with the employer or with any of its parent companies, subsidiaries, divisions, affiliates, or contractors, for any settlement agreement entered into on or after January 1, 2020.

Like many other recently enacted employment laws in California, AB 749 was largely motivated by the #MeToo movement. In addition to providing further protections to employees against restraints on trade, this law is intended to protect employees who are victims of alleged harassment, discrimination or other labor or employment violations from being punished for reporting issues in the workplace.

AB 749 includes three exceptions that limit its scope and effect:

1. The new law does not prevent an employer and employee from mutually agreeing to terminate a current employment relationship;
2. No rehire provisions will still be permitted in settlement agreements with employees who engaged in sexual harassment or sexual assault if the employer has made a good faith determination that the employee engaged in such conduct.
3. Nothing in the bill requires an employer to continue to employ or rehire an employee if there is a legitimate, non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the employee.

**What this means for you:** Employers should review their current settlement agreements and rehiring standards and revise them as necessary to comply with AB 749. Employers still remain free to include “no rehire” provisions in their severance or separation agreements in which the employee is to receive a severance in exchange for a release of
potential claims, as long as the employee has not brought any legal claim, internal complaint or grievance. Such provisions should be used with caution, however.

**Employers Have Until January 1, 2021 to Comply with New Sexual Harassment Training Requirements**

Last year, the California legislature passed SB 1343, requiring most employers (those with 5 or more employees) to provide sexual harassment training to both supervisory and nonsupervisory employees by January 1, 2020. On August 30, 2019, SB 778 extended the time for employers to provide the mandatory sexual harassment training by January 1, 2021.

Employers must provide supervisory employees with two hours of training and nonsupervisory employees with one hour of training by the new deadline. Employers who already provided this training in 2019 are not required to provide refresher training and education again for another two years.

The new laws also require the DFEH to develop one-hour and two-hour online training courses on the prevention of sexual harassment in the workplace. Though the DFEH originally expected to have courses available in late 2019, that deliverable estimate has been pushed back to early 2020.

**What this means for you:** Employers should begin scheduling trainings for both supervisory and nonsupervisory employees. With the uncertainty as to when the DFEH will be able to make these training courses available online, employers may want to look to eligible trainers to conduct these sessions to ensure they comply with the new requirements by the deadline.

**AB 9 Extends Time for Employees to File a DFEH Complaint of Discrimination, Harassment, or Retaliation**

Employees previously had one year to file a complaint of discrimination, harassment, or retaliation under the FEHA with the DFEH. With the passage of AB 9, employees now have three years to file a complaint.

In the span of three years, memories can fade and employees may leave, making it harder to rely on witnesses to mount a defense. Clearly and thoroughly documenting and maintaining performance reviews, disciplinary actions, complaints (and responses), investigations, and resignations or terminations from employment is now even more important. To preserve this critical evidence, employers may want to review their record retention policies and procedures to ensure that they preserve all documents and communications that could potentially be helpful in responding to future claims.

**What this means for you:** Employers should review their complaint and response procedures with their supervisors, managers, and HR staff, emphasizing that clear, detailed, contemporaneous documentation is essential when counseling or meeting with an employee. Employers should also review their recordkeeping policies and procedures to make sure they are aware of what, where, and how documents are stored, and identify whether any of their systems are subject to auto-deletion of records to guard against loss of evidence in the event of a potential claim.

**Expanded Cal/OSHA Reporting Requirements in 2020**

Beginning January 1, 2020, employers are likely to see an increase in the number of workplace incidents that they need to report to The Division of Occupational Safety and Health of California (Cal/OSHA) due to a new piece of legislation, AB 1805. Under another new and related piece of legislation, AB 1804, employers will no longer be able to report such workplace incidents via e-mail as is currently permitted.

California has long required employers to immediately report to Cal/OSHA a work-related death or serious injury or illness. Until now, the definition of “serious injury or illness” for reporting purposes has been an injury or illness that requires inpatient hospitalization for more than 24 hours for treatment, or the “loss of member” or serious disfigurement. Any
serious injury caused by the commission of a penal code violation, or a vehicle accident on a public road or highway was specifically excluded from reporting requirements.

Under the newly-enacted AB 1805, the definition of serious injury or illness has been broadened to include one involving:

- Any hospitalization, regardless of the length, for something other than observation or diagnostic testing
- Any amputation
- The loss of an eye
- Any serious injury or death caused by the commission of a penal code violation—employers will need to report serious injuries, illnesses, or deaths in the workplace or in connection with any employment arising from crimes by coworkers, or even third parties
- Any serious injury or death caused by an accident that occurred on a public street or highway, if the accident occurred in a construction zone
- Effective January 1, 2020 under AB 1804, employers must report any serious injuries, illnesses or fatalities via an online portal (to be created and maintained by Cal/OSHA) or via telephone. Current law allows employers to report an incident via email and until the online portal goes live, email continues to be a permissible option. However, once the online portal is up and running, employers must either utilize the portal to report an incident or report the incident via telephone. Failure to report is subject to a minimum $5,000 civil penalty.

What this means for you: In light of the new definition of “serious injury or illness,” employers need to ensure that they fully understand what this new definition covers that was not covered under the previous definition. Employers should also ensure that employees within the organization who are responsible for making reports to Cal/OSHA are informed of both changes, including regarding which reporting methods are permissible. Furthermore, employers should take care in evaluating existing worker safety programs to ensure that they are in compliance with these new laws.

Responding to Labor Code Requests in Civil Lawsuits

The FEHA makes any harassment, retaliation, and discrimination based on a person’s protected trait in the workplace unlawful. Prior to filing a civil lawsuit, an employee must file a charge with the DFEH. As previously discussed, under AB 9, an employee now has three years from the date of the violation to file a charge with DFEH.

Before an employee files a civil lawsuit, their attorney often makes a request for the employee’s personnel file (under Labor Code section 1198.5) and earning history (under Labor Code section 226). Failure to produce timely records can result in a $750 penalty. In responding to these requests, employers should consider the following:

- **Earning History Requests:** Due within 21 days from the date of the request. Employers need only produce three years’ worth of earning history, and are not required to produce the actual paystubs; they can produce the information in a spreadsheet, as long as it contains complete information. Employers should audit their paystubs to ensure that they contain the nine categories of information specified under Labor Code section 226(a).

- **Personnel File Requests:** Due within 30 days from when the employer receives the request. Employees have a right to see personnel records relating to the employee’s performance or any grievances that were filed concerning them. Personnel records are documents that are used to determine an employee’s qualification for promotion, compensation, performance, and disciplinary action. Examples of documents that should be maintained in personnel files include: application for employment, payroll authorization form, discipline documents, wage garnishments, education and training records, and performance evaluations. Documents to exclude from personnel files are
investigation reports and related documents, internal email correspondence between HR and management, drafts of discipline documents, and medical documentation (including medical certifications and responses to accommodation requests). These documents should be maintained separately. In making the personnel file available, employers can redact information specified in Labor Code section 1198.5(h) (including letters of reference and documents obtained prior to the employee’s employment.)

**What this means for you:** As a result of the additional time employees will now have to bring a claim of harassment, retaliation, and/or discrimination, it is important that employers review and update document and electronic data retention policies to ensure the preservation of all investigatory documents, medical leave documents, employee personnel files, and time records for at least five years. Additionally, in preparation for any potential earning history requests and/or personnel file requests, employers should also ensure that they are properly documenting and maintaining this information so that it can be produced in a timely fashion and avoid any penalties.

**California Expands Protections to Hairstyles**

Under the FEHA, employers are prohibited from discriminating against employees on the basis of race. Effective January 1, 2020, according to SB 188, known as the “CROWN Act,” the definition of “race” will be expanded to include those “traits historically associated with race,” including, but not limited to hair texture and “protective hairstyles,” such as braids, locks, and twists. Accordingly, any workplace dress code or grooming policies that prohibit any of the aforementioned protective hairstyles may result in a California employer facing claims of racial discrimination.

To the extent an employer has a written policy with respect to acceptable hairstyles, such policies need to be revised to explicitly indicate that the employer does not prohibit protective hairstyles.

**What this means for you:** Handbooks should be updated to include the new protections and dress code policies modified to reflect the new law. In situations where an employer maintains hair-related requirements for employees due to industry requirements or general health and safety concerns, they should consult with counsel to ensure such requirements do not run afoul of the new law.

**Good News from the National Labor Relations Board**

**Employers Can Cut off Dues Once Collective Bargaining Agreement Expires**

In a decision issued by the National Labor Relations Board (NLRB) in December 2019, *Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139, the Board held that the employer hospital was permitted to unilaterally cease checking off and remitting employees' union dues after the contract establishing the checkoff arrangement expired. This reversed a 2015 decision, *Lincoln Lutheran of Racine*, 362 NLRB No. 188, which had determined that dues checkoff provisions remain active even after collective bargaining agreements expire. As a result, employers could not cease deducting dues until the parties either reached a successor collective bargaining agreement or a valid overall bargaining impasse permitted unilateral action by the employer.

In rejecting the 2015 decision, the Board asserted that dues checkoff provisions are rooted in the contract and not in the National Labor Relations Act. As such, the statutory obligation to check off and remit union dues does not exist until a contract provision imposing the obligation goes into effect, and, importantly, when the contract expires so does the employer’s obligation.
Thus, while it is well-established that an employer must refrain from unilaterally changing bargaining unit employees’ terms and conditions of employment from the beginning of a bargaining relationship until a lawful impasse in good faith attempts to negotiate has been reached, there are exceptions to this prohibition; as a result of this decision, dues checkoffs will again be treated as one such exception.

What this means for you: Employers will now have this leverage as collective bargaining agreements near their expiration during labor negotiations. Absent express language in a collective bargaining agreement which states something to the contrary, employers may legally cease checking off and remitting employees’ union dues after the contract which established this obligation has expired.

Employers’ Expanded Rights to Limit Union Access to Their Property

In *UPMC Presbyterian Hospital*, 368 NLRB No. 2, the NLRB held that an employer hospital did not violate the National Labor Relations Act (NLRA) by removing union representatives from the hospital’s cafeteria when they had gathered there to discuss union organizational campaign matters and to distribute union flyers.

The Board clarified the circumstances under which an employer may lawfully exclude union organizers from its privately-owned, but public, spaces, emphasizing that an employer has the right to determine what kinds of activities, nonemployees can engage in on the employer’s property—provided that the employer does not discriminate between nonemployee union representatives and nonemployees of other organizations.

Thus, so long as an employer maintains a policy or practice of prohibiting distribution or solicitation on its property, and so long as the policy or practice is enforced in a non-discriminatory manner, employers retain the right to prevent union organizers from accessing their privately-owned, but public, spaces.

In another decision that further expands employer property rights, *Kroger Limited Partnership I Mid-Atlantic*, 368 NLRB No. 64, the NLRB held that an employer grocery store acted permissibly and did not engage in discrimination when it removed nonemployee union organizers from its parking lot who were soliciting participation of the store’s boycott, even though the store had allowed the Salvation Army and Girl Scouts to engage in solicitation on its property.

In reaching this holding, the Board overruled prior NLRB precedent that did not permit employers to ban nonemployee agents from their premises if they allowed civic and charitable activities on their property. The Board explained that a union soliciting participation in a boycott and a Girl Scout troop selling cookies are not engaged in solicitation of the same nature. Accordingly, an employer unlawfully discriminates against nonemployee union representatives only when it treats nonemployee activities that are similar in nature disparately.

What this means for you: Although these Board decisions expand the circumstances in which employers can prevent unions from accessing their property, these decisions do not supersede what has been contractually agreed to, and employers should always consult collective bargaining agreements to determine whether they can legally deny a union access to their property. If collective bargaining agreements provide union representatives with greater access rights, the agreement governs.

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our clients in all federal and state courts, before the Department of Labor, the NLRB, and other federal, state and local agencies, as well as in private arbitration forums. We represent employers in collective bargaining negotiations and arbitration.

This is Jim Butler, author of www.HotelLawBlog.com and hotel lawyer, signing off. Please contact us if you would like to discuss any issues that affect your hotel interests or see how our experience might help you create value and avoid unnecessary pitfalls. Who’s your hotel lawyer?

Jim Butler is a founder of the JMBM law firm and chairman of its Real Estate Department. He founded and chairs the Firm’s Global Hospitality Group® which provides business and legal advice to owners, developers and investors of commercial real estate, particularly hotels, resorts, restaurants, spas and senior living. This advice covers purchase, sale, development, financing, franchise, management, labor & employment, ADA, IP, and litigation.

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