LA&K

Memorandum

TO: To Our Clients

FROM: Levinson Arshonsky & Kurtz, LLP

DATE: December 28, 2018

RE: New Law Affecting Employers in 2019

Once again, Governor Jerry Brown and the California Legislature were busy implementing new laws impacting employers and their employees. Some of these are widespread, touching every California employer, while others will not impact the majority of businesses. California laws that begin implementation in 2019 are discussed below. Please remember, only summaries are provided herein and further advice should be sought prior to enactment of any new employment policy. All laws take effect on January 1, 2019 unless otherwise noted.

Lactation Accommodation (AB 1976)

Under current state law, an employer may not provide a "toilet stall" as a location for an employee to express breast milk. The new legislation further specifies that the location may not be a "bathroom." As with the prior requirement, the location must be in a private location in close proximity to the employee's work area.

Gender Representation Requirement (SB 826)

Publicly-traded California companies are required to appoint a minimum number of women to their boards of directors. Covered corporations must have at least one female on the board by the end of 2019. By the end of 2021, boards with five directors total will need two female directors and boards with six total directors will be required to have three female members. A corporation may increase the number of directors to comply with this requirement.

Salary History (AB 2282)

Last year the legislature banned salary history inquiries during the interview process. This amendment clarifies that the ban applies to applicants who are not already employed by the employer in another position. It also clarifies that a reasonable request for pay scale information can be made after an applicant has completed an initial interview with the employer. The amendment specifies that an employer may still ask an applicant for salary expectations for the position.

Sexual Harassment

Training Requirement (SB 1343): All employers with at least five employees will be required to provide sexual harassment training to all employees. Existing law imposes a sexual harassment training requirement only on supervisors of companies with 50 or more employees. This new law now extends to smaller employers and includes training for non-supervisory employees. Specifically, employers with five or more employees will be required to provide (1) at least two hours of sexual harassment training to supervisory employees and (2) at least one hour of training to non-supervisory employees by January 1, 2020, and then once every two years thereafter. The law requires employees be trained during the 2019 calendar year, so any employees trained in 2018 or before must be retrained.

Settlement Agreements (SB 820, SB 3109): These new laws restrict the scope of settlement agreements. Settlement agreements entered into on or after January 1, 2019 cannot prevent the disclosure of information related to a civil or administrative complaint of sexual assault; sexual harassment and workplace harassment; or discrimination based on sex. Additionally, any provision that waives a party's right to testify in a legal proceeding regarding sexual harassment by the other party will be deemed void and unenforceable. However, settlement agreements can preclude the disclosure of the settlement amount and protect the claimant's identity if a) anonymity was requested and, b) the opposing party is not a government agency or public official.

New Privilege Created (AB 2770): Certain communications concerning sexual harassment claims are "privileged" and cannot be used as a basis for a defamation claim, unless they are made with malice. Complaints and investigations concerning sexual harassment are now classified as privileged communications. Additionally, an employer's response to reference checks is also privileged. However, it is still recommended that employers maintain a policy of limiting reference requests to dates of employment and job title.

Sexual Assault (AB1619): This law increases the statute of limitations for filing a civil action for damages for sexual assault to 10 years after the alleged assault or three years after the discovery of injury as a result of the assault, whichever is later.

Expansion of Those Covered Under Harassment Laws (AB 224): The Fair Employment Housing Act (FEHA) prohibits sexual harassment in the workplace. This new law expands the type of relationships that may be subject to sexual harassment claims and prohibits sexual harassment in professional relationships including those with an investor, elected official, lobbyist, director or producer, attorneys, real estate agents and appraisers, accountants, bankers, trust officers, financial planners, loan officers, collection service, building contractors, and others who hold themselves out as being able to help the plaintiff establish a business, service, or professional relationship with the alleged harasser or other third party.

Liability Expanded Generally (SB 1300): This new law expands FEHA in several aspects in an effort to protect against unlawful employment discrimination and harassment, including: (1) potential employer liability for any type of harassment under FEHA for the acts of nonemployees where the employer knew or should have known of the conduct and failed to take action; (2)

requiring an employee to release FEHA claims in exchange for a bonus, raise, or continued employment. This law also makes it more difficult for an employer to prevail in hostile environment cases in litigation.

National Origin Discrimination

On July 1, 2018, new regulations from California's Fair Employment and Housing Council (FEHC) clarify protections from national origin discrimination. These new regulations broaden the prior definition to include the individual's or ancestors' actual or even *perceived* characteristics associated with a national origin group, including by marriage, association or affiliation. Under these new regulations, national origin discrimination may include any of the following:

- **Language Restriction Policies**. Language restriction policies (English-only rules) are now *presumed unlawful* unless the employer can meet the very high legal burden of establishing the "business necessity."
- **Accent Discrimination.** Employers cannot discriminate based on an applicant or employee's accent except where the employer proves that the accent materially interferes with the ability to perform the job.
- **English Proficiency Discrimination.** Employers cannot discriminate based on English proficiency unless the employer can show that the proficiency requirement is justified by a "business necessity."
- **Height/Weight Requirements.** The new regulations state that height and weight requirements may be unlawful because they may impact certain protected groups more than others.
- **Recruitment and Job Segregation.** It is unlawful to recruit or assign positions, facilities or geographical areas of employment to applicants or employees based on national origin.
- **Immigration-Related Practices.** Employers may not make any inquiry into an applicant or employee's immigration status, including requiring documentation, unless the employer can that such inquiry is *required* by federal law. This means that the only time such inquiries will likely be permitted is during the I-9 process.
- **Conduct.** The new regulations describe various conduct considered national origin harassment, such as ethnic epithets, derogatory comments, slurs, threats of deportation, derogatory comments about immigration status, or mocking a person's accent, language or its speakers. Even non-verbal conduct (such as gestures) may be deemed illegal

Paid Family Leave

Insurance Program (AB 2587): This law amends Section 3303.1 of the Unemployment Insurance Code. Previously, Paid Family Leave imposed a seven-day waiting period prior to the payment of benefits. The waiting period was eliminated as of January 1, 2018. The new law removes the requirement that up to one week of vacation leave be applied to the waiting period for receipt of benefits, although employers may still require an employee to take up to two weeks of vacation during Paid Family Leave.

Military Service (SB 1123): This law expands the scope of Paid Family Leave to include time off to participate in leave related to covered active duty, or call to cover active duty of the individual's spouse, domestic partner, child, or parent in the armed forces.

Wage Statements (SB 1252)

An amendment to the current law concerning pay statements now requires employers to provide an actual copy of pay statements upon request, rather than merely the opportunity for the employee to copy the records.

Required "Human Trafficking" Training for Hotel Employers (AB 970)

Beginning on January 1, 2020, all hotels and motels (excluding a bed and breakfast inn) must provide at least 20 minutes of classroom training or other effective training regarding human trafficking awareness to each employee who is likely to interact with victims of human trafficking, within 6 months of employment in that role and to each new employee.

Miscellaneous

Mileage rate: The standard mileage rate has been increased from 54.5 to 58.0 cents per mile beginning on January 1, 2019.

Minimum Wage: The current hourly minimum wage beginning on January 1, 2019 for the state of California is $12.00 ($11.00 for employers with 25 or fewer employees.) For companies with employees working in Los Angeles city or unincorporated areas of Los Angeles County, the hourly minimum wage will increase from $13.25 to $14.25 on July 1, 2019 (employers with 25 or fewer employees have an extra year to comply, i.e., increased to $13.25 from $12.00 on July 1, 2019.) Please check local ordinances for other cities where employees perform services to determine the applicable minimum wage.

Independent Contractors: Following the California Supreme Court's decision this past spring in D*ynamex Operations West v. Superior Court*, employers are still left with more questions than answers about the future viability of independent contractors. The requirement that independent contractors only perform work outside the scope of the company's business has caused many companies to re-classify their independent contractors as employees. Businesses should examine any use of independent contractors for an assessment of the legality of the relationship in the event of a claim, audit, or other challenge.

This material is for informational purposes only and does not constitute legal advice. If you have any questions regarding these new laws and applicability to your business, please contact:

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