California Employment Law Update

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Your Presenter

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KEY TAKEAWAYS

FOR CALIFORNIA'S EMPLOYMENT LAWS

Sexual Harassment Prevention Training

- California law requires that all employers or 5 or more employees provide training to their employees regarding sexual harassment and abusive conduct prevention. (Government Code Section 12950.1)

  - Every two years:
    - Non-supervisory employees must receive 1 hour of training
    - Supervisors must receive 2 hours of training

Personnel Record Retention

- SB 807 went into effect on January 1, 2022.
- Requires certain employers to maintain all ***applications and personnel records*** for at least 4 years from the date the records were created or received

This is different from the 7 year retention requirement applicable to audit and review records. (17 CFR § 210.2-06 - Retention of audit and review records)

Settlement Agreements

Existing Laws Governing Settlement Agreements in CA:

- **AB 2143 (Effective January 1, 2021)**
  - ***Expanded AB 749*** to also allow a "no-rehire" provision if the employee engaged in "any criminal conduct."
  - Employer must document a *good-faith determination* that the employee engaged in criminal conduct
  - The restriction on "no-rehire" provisions applies only to employees whose claims were filed in "good faith."

- **AB 749 (Effective January 1, 2020)**
  - Created Code of Civil Procedure Section 1002.5, which prohibits the inclusion of "no-rehire" provisions in settlement agreements
  - ***EXCEPTION***: a "no-rehire" provision is allowed in a settlement agreement with an employee whom the **employer, in good faith, determined engaged in sexual harassment or sexual assault**

Settlement Agreements (Con't.)

- **SB 331 - Silenced No More Act**
- A **settlement agreement** cannot contain a provision that restricts disclosure of **sex-based harassment; discrimination; and/or assault in the workplace;**
- Where a claim is filed before an administrative agency or in a civil action, related to:
- ***Expands the prohibition on settlement confidentiality and non-disparagement provisions to **include all types of workplace harassment or discrimination.**

- Employers should ensure *separation-related agreements* contain:
  - **non-disparagement carve out language** permitting disclosure of unlawful conduct [*"Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."]*
  - ***Notice of an employee's right to consult an attorney*** re agreement (5 day min.)

AB 51 Update

- Under AB 51 California employers ***would be prohibited from*** requiring applicants and employees to enter into **mandatory arbitration agreements** as a condition of employment.
- This was slated to become effective on January 1, 2020 but was challenged

So Where Does That Leave Us?

- AB 51 WAS going to ban most mandatory employment arbitration agreements in CA starting January 1, 2020, BUT at present AB 51 is still not in effect pending the current litigation

What should employers do?

- *Conservative Approach*:
  - Do away with all mandatory arbitration agreements that require opt out, and make them voluntary for new hires and current workforce.
- *Less Conservative Approach*:
  - Wait and see if the decision is stayed pending decision

Electronic Posting of Workplace Notices – AB 657

- When employer is required to physically post information in the workplace, related to employee rights under applicable statutes, it may also distribute that information to employees via email.

- Electronic distribution via email is *not* a substitute for physical postings of required workplace notifications.

FMLA versus CFRA

- **FMLA** (29 USC § 2601 et seq.)
  - Private employers are covered by the **FMLA** if they have employed 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.
  - *Exception—fewer than 50 employees within 75 miles of worksite.*

- **CFRA** (Gov.C. § 12945.2)
  - The **CFRA** covers California employers who directly employ *five* or more persons to perform services for a salary or wage
    - "Directly employs five or more persons" means the employer maintains an aggregate of at least five part or full-time employees who performed services for wages or salary on a "regular basis"
    - The employees can be located anywhere in the U.S. or any territory or possession of the U.S.

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CFRA Versus FMLA (and PDL)

- **FMLA**
  - To be eligible for leave under FMLA, an employee must meet all of the following criteria:
    - Employed by the employer for *at least 12 months* as of the date leave commences
    - Employed for *at least 1250 hours of service* during the 12-month period immediately preceding commencement of the leave; *and*
    - Employed at a worksite where the employer employs at least 50 employees within 75 miles

- **CFRA**
  - To be eligible for leave under the CFRA, an employee must meet both the following criteria but is not restricted by a 75-mile radius limitation:
    - Employed by the employer for *at least 12 months* as of the date leave commences; and
    - Employed for *at least 1250 hours of service* during the 12-month period immediately preceding commencement of the leave.
- **PDL (Pregnancy Disability Leave)**
  - Up to 16 Weeks Leave for pregnancy related medical issues
  - No length of service requirement, minimum of 5 employees

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COVID-19 Exposure Reporting --Expanded - AB 654

- Within one day, employers must provide **all** employees who were at the same worksite as infected individual with:
  1. Written notice that the employee may have been exposed to COVID-19;
  2. Information regarding COVID-19-related benefits that the employee may be entitled to; and
  3. Notice of the cleaning and disinfection plan that the employer is implementing.
- Requires employer to notify the local public health agency of an "outbreak" within 48 hours. An **outbreak** is defined as **three or more probable or confirmed cases within a 14-day period**

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COVID-19 Supplemental Paid Sick Leave

- ***EXPIRED***: California's 2021 COVID-19 Supplemental Paid Sick Leave (2021 SPSL) law effective January 1, 2021, expired on September 30, 2021.

- ***NEW:*** On January 25, 2022, Governor Newsom and state lawmakers agreed to provide employees with up to **2 weeks of supplemental paid sick leave** to recover from COVID-19 or to care for a family member with COVID-19, through September 30, 2022
  - **Covered Employers:**
    - All businesses with *26 or more employees*
  - **Employer Obligations:**
    - **Full-time workers** would be entitled to **40 hours of flexible paid sick leave**, and **additional 40 hours with proof of a positive test**
    - **Part-time workers** would be eligible for sick leave **equal to the number of hours they typically work in a week**, or **twice that amount with a positive test**

COVID-19 and Medical Disclosures of Employees

- From the beginning of the COVID-19 pandemic in March 2020 through April, 2022, approximately **5,659** COVID-19 related employment lawsuits have been filed in state and federal court, including **646** class actions. California leads the litigation with 1,780 lawsuits.

- Many of these suits relate to the **disclosure** of private health information, status of infection, or vaccine status.

- Treat all employee health information as **private** and do not disclose to anyone else unless required by law. Consult with HR if you have any concerns

RECENT CASES OF NOTE

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Cases of Note

- *Christian v. Umpqua Bank* (9th Circ. 2021)

- Bank employee was able to proceed with a hostile work environment claim due to repeated conducted by a bank customer. Despite the infrequency of the conduct, and gaps between interactions, employee was found to experience harassment as part of a pattern that made her feel afraid in her workplace.
- This evidence was sufficient to show that employer ratified this harassing conduct by not taking effective preventative/corrective steps to prevent it from occurring despite notice.

Cases of Note

- *Diaz v. Tesla Motors, Inc.: $137 Million verdict against Tesla for Racial Harassment*

- A contractor working at a Tesla facility for less than a year was subjected to harassment including repeated use of N word, racist drawings and pictures left around his work area, among other claims.

- Employee complained to both Tesla and his staffing firm, but measures taken were not sufficient.

Cases of Note

- *Ibrahim v. Alliance for Sustainable Energy, LLC (10th Cir 2021)*

- A Pakistani employee was terminated in violation of employer's sexual harassment policy.

- Claim was able to proceed with race discrimination claim given that employer failed to terminate a white employee for the same policy violation.

For More Information – Your California Risk Advisors

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Thank you!