

Employment & Labor Law Updates for 2018

Seminar for California Primary Care Association

Presented By: Treaver K. Hodson

Palmer Kazanjian
Palmer Kazanjian Wohl Hodson LLP Attorneys

Employment and Labor Law Updates for 2018

- New Employment Laws for 2018
- Wage and Hour Updates
- Leaves of Absence
- Disciplinary Action and Termination of Employment
- Employment Classification: Independent Contractors and Exempt Employees
- Arbitration

New Employment Laws for 2018

Immigration Enforcement in the Workplace

AB 450

AB 450 is designed to protect immigrant employees from workplace raids. The new law will bar public and private employers, and anyone acting on their behalf, from voluntarily consenting to permit an immigration enforcement agent to enter nonpublic areas of a workplace, except if the agent provides a judicial warrant or as otherwise required by federal law. Subject to exceptions required by federal law, AB 450 prohibits employers from allowing immigration enforcement agents to:

- enter any nonpublic areas of a work place, absent a judicial warrant, or
- access, review, or obtain employee records, without a subpoena or court order.

Workplace Violence Prevention

SB 1299

SB 1299 addresses violence in community health centers. The law requires community health centers to adopt violence prevention plans. The bill defines workplace violence as:

- The use of physical force against a community health center employee by a patient or a person accompanying a patient that results in, or has a high likelihood of resulting in, injury, psychological trauma or stress, regardless of whether the employee sustains an injury.
- An incident involving the use of a firearm or other dangerous weapon, regardless of whether the employee sustains an injury.

Under these definitions, injury is limited to the use of physical force or incidents involving firearms or other dangerous weapons. An injury does not have to actually be sustained to be considered workplace violence. As long as the threat carries a high likelihood of violence, it is covered under the law.

Workplace Violence Prevention

SB 1299

To prevent violence, SB 1299 requires all community health center workplace prevention plans to include:

- Strong training policies for employees regarding how to recognize and respond to violence, and resources for employees who are victims of violence.
- Comprehensive mechanisms for responding to and investigating incidents of violence and situations involving the risk of violence.
- Sufficiency of security and staffing, including alarms and emergency responses, with particular attention on facility areas with uncontrolled access, early morning or late night shifts, and employee parking areas.
- Provisions protecting employees' rights when they seek help from law enforcement. Community health centers may not retaliate against an employee in any way for seeking assistance.
- Stringent requirements for community health centers and other medical facilities to report and document violations to the California Division of Occupational Safety and Health Administration.

Ban On Criminal Background History Inquiries

AB 1008

AB 1008 amends the Fair Employment and Housing Act ("FEHA") to make it an unlawful employment practice for employers with five or more employees to:

- include on any application for employment any question that seeks the disclosure of an applicant's conviction history;
- inquire into or consider an applicant's conviction history before the applicant receives a conditional offer of employment; and
- consider, distribute, or disseminate information related to arrests that did not result in convictions, convictions resulting in diversion program participation, and/or convictions that were sealed, dismissed, expunged or eradicated.

Exemptions

- Positions for which government agencies are required by law to check conviction history;
- Positions with criminal justice agencies; farm labor contractors; and
- Positions for which the employer is required by federal, state, or local law to check criminal history or to restrict employment based on criminal history.

National Origin Discrimination

SB 1001

This law protects CA applicants and employees by making it illegal to:

(1) request more or different documentation than is required under federal law;

(2) refuse to honor documents that reasonably appear genuine;

(3) refuse to honor documents or work authorization based on specific status or term that accompanies an applicant's authorization to work;

(4) attempt to re-verify or reinvestigate an employee's authorization to work

Employer Tips:

- ✓ Employers should update their Equal Employment Opportunities policy to ensure compliance with this new law
- ✓ Employers should also train Human Resources and management personnel to ensure that company hiring practices comply with the new laws

Anti-Harassment Training

SB 396

The Fair Employment Housing Act requires employers with 50 or more employees to provide two hours of sexual harassment education and training to supervisory and managerial employees, every two years.

SB 396, in an effort to further prevent sexual harassment, will require that anti-harassment training also include a component on harassment based on gender identity, gender expression, and sexual orientation. This training must include:

- practical examples inclusive of harassment based on gender identity, gender expression, and sexual orientation and
- must be presented by trainers or educators with knowledge and expertise in these areas.

The new law further requires employers with five or more employees to post a new workplace notice, to be developed by the DFEH, regarding transgender rights.

New Parental Leave Law

SB 63 requires small businesses to provide parental leave. The New Parent Leave Act amends the California Family Rights Act ("CFRA") to allow employees who work for an employer with 20 or more employees, within a 75 mile radius, to take 12 weeks of unpaid leave for new child bonding purposes. The new law applies to both private and public employers. The law applies to employees with more than 12 months of service with the employer, who have at least 1,250 hours of service with the employer during the previous 12-month period, and who work at a company in which the employer employs at least 20 employees within 75 miles. The new law does not affect an employee's right under California law to take up to four months of leave for pregnancy-related disability, in addition to the 12 weeks of parental leave. Also, the new law does not apply to employees who are already subject to the FMLA and CFRA.

S.B. 63

Requires employers to provide the employee with a **guarantee** of reinstatement to the same or comparable position following the leave.

Get Ready, It Is Time To Poll!

Prohibition on Salary History Inquiries

Sally works for a small business, Instant Healthcare, as a Human Resource Manager. She qualifies for parental leave and decides to take the 12 weeks off that are permitted to her. Her employer guarantees that her position as the Human Resource Manager will be waiting for her when she returns. However, being that the employer hires three new people while Sally is on leave and they need someone to oversee the hiring process, the employer had to fill Sally's position. When Sally returns from her parental leave, she is placed in the position of Compliance Specialist. She is making the same amount of money she was before, but instead of managing two Human Resource Assistants and one Recruiter, she manages one Human Resource Clerk. Sally is very angry her position got filled and feels she was demoted. **Would this comply with the new Parental Leave Law?**

A. Yes, it is a comparable position; the law requires employers to provide the employee with a guarantee of reinstatement to the same or comparable position following the leave. The position does not have to be the exact same one the employee had when they left.

<u>or</u>

B. No, this position is not comparable because Sally went from managing three people to one.

Prohibition on Salary History Inquiries

AB 168: Prohibits all employers, regardless of size, both public and private, from relying on "salary history information" as a factor in determining whether to offer employment and what salary to offer to an applicant.

<u>The bill does not prohibit an applicant from voluntarily disclosing salary history or stating salary needs</u>. An employer is permitted to use such information for salary consideration.

Wage and Hour Updates

California Minimum Wage Increase

On April 4, 2016, Governor Brown signed **S.B.3,** which incrementally increases minimum wage to $15/hour by the year 2023.

EFFECTIVE DATE	EMPLOYERS WITH LESS THAN 25 EMPLOYEES	EMPLOYERS WITH 26+ EMPLOYEES
January 1, 2017	$10.00/hour	$10.50/hour
January 1, 2018	$10.50/hour	$11.00/hour
January 1, 2019	$11.00/hour	$12.00/hour
January 1, 2020	$12.00/hour	$13.00/hour
January 1, 2021	$13.00/hour	$14.00/hour
January 1, 2022	$14.00/hour	$15.00/hour
January 1, 2023	$15.00/hour	

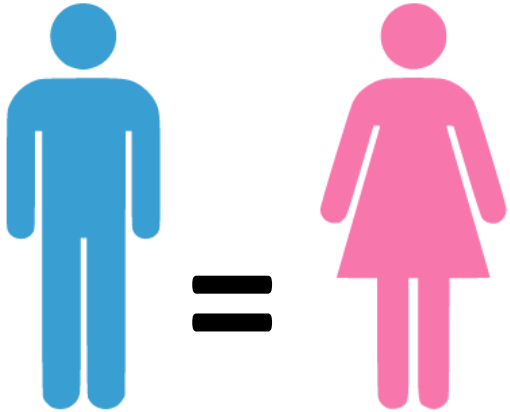
Wage Discrimination

On October 6, 2015, Governor Brown signed S.B. 358, which amended the Equal Pay Act.

- Required equal pay for **work of comparable character** and <u>eliminated</u> the same establishment requirement.
- Clarified the affirmative defense to mean "***bona fide*** factors other than sex."
- Prohibited retaliation or discrimination against employees who **disclose, discuss, or inquire** about their own or co-workers' wages for the purpose of enforcing their rights under the Act.

A.B. 1676 (Effective January 1, 2017):

Prior salary, by itself, may not be used as a bona fide factor to justify a disparity in pay among similarly situated men and women.



Wage Discrimination (AB 46)

The new law extends the Fair Pay Act protections to public employers by defining "employer" to include public and private employers.

Leaves of Absence

Medical Leaves of Absence

Family Medical Leave Act (FMLA)
Employers with at least 50 employees must provide qualifying employees with up to 12 weeks (26 weeks in certain instances) of unpaid leave for the birth or placement of a child for adoption, or to care for the serious health condition of the employee or the employee's close family member. **29 U.S.C. § 2611(4)(A)(i).**

Americans with Disabilities Act (ADA)
Employers with at least 15 employees must provide reasonable accommodations to employees with disabilities that require such accommodations due to their disabilities. **42 USC §12111(5)(A)**.

California Family Rights Act (CFRA)
Almost identical to FMLA, except pregnancy and military caregiver leave are not provided under CFRA. **Cal.Gov.Code §12945.2(c)(2).**

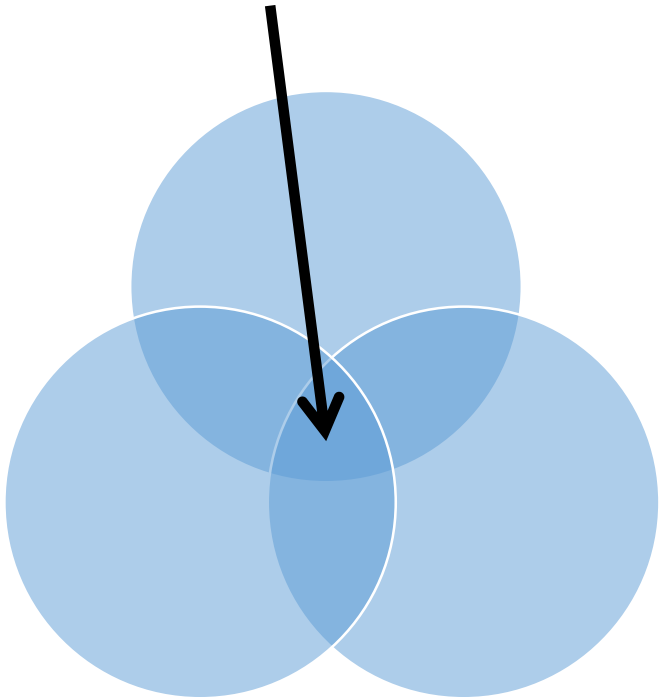
Fair Employment and Housing Act (FEHA)
Employers with at least 5 employees must reasonably accommodate employees with a known physical or mental disability, unless doing so would place an undue hardship on the employer. **West's Ann.Cal.Gov.Code § 12940(m).**

Pregnancy Disability Leave (PDL)
Employers with at least 5 employees must provide up to 4 months of unpaid leave per pregnancy to employees disabled by pregnancy, childbirth, or a related medical condition. **Cal. Gov't Code § 12945**.

Workers' Compensation Leave
Employers will provide leave to employees temporarily or totally disabled due to a work related illness or injury. The duration of the leave will depend upon the rate of recovery and the business needs of the Company. **Cal.Lab.Code § 3300.**

How do the Medical Leaves Interact?

Focus on whether the leaves run concurrently



For Example:

- PDL runs concurrently with FMLA, but not CFRA, which means an employee disabled by pregnancy may be entitled to up to 7 months of leave.
- Leave under workers' comp, ADA, or FEHA may be in addition to any leave provided under FMLA/CFRA.
  - But may also be the only leave required for employers with fewer than 50 employees.

Sick Leave

Sick Leave

Employers must provide at least 3 days or 24 hours of paid leave for employees suffering from illness or injury. The leave may also be used to attend to the diagnosis, care, or treatment of an existing health condition of, or preventative care for, the employee or the employee's family member. **Cal. Lab.Code §246**.

Disciplinary Action and Termination of Employment

Discipline & Termination: At-will employment in general

- Under California law, absent evidence of an agreement to the contrary, there is a statutory presumption of at-will employment (**Labor Code § 2922**)
- Even though California is an employment-at-will state, employers and employees may limit their otherwise at-will relationship by contract, either expressly or impliedly (***Guz v. Bechtel*, 24 Cal. 4th 317 (2000)**)

Get Ready, It Is Time To Poll!

Discipline & Termination: Preventing loss of at-will employment status

Scenario:

Will was hired by Intec Corp. Over the next seven years, Will received a series of salary increases, promotions, bonuses, awards and superior performance evaluations. Will's boss made repeated oral assurances of job security so long as her job performance remained adequate. Employment documents did not expressly state that Will's employment was at-will. The company also maintained a written "termination guidelines" policy that set forth express grounds for discharge and a mandatory seven-step pre-termination procedure. Then, about a month after his most recent promotion, he was terminated. Will filed a claim against the company, alleging that he had been fired in breach of his employment contract. **How is the court likely to rule?**

A. Grant Will's claim that there was a breach of his employment contract because his employment was not at-will and the employer did not follow the proper termination procedures.

<u>or</u>

B. Deny Will's claim because despite Intec Corp. not expressly stating Will's employment was at-will, California is an at-will state and all positions are at-will.

Discipline & Termination: Lessons

Lessons:

- ✓ Progressive discipline policies may have the unintended consequence of creating an expectation that improvement of performance guarantees continued employment

- ✓ Oral assurances of job security and consistent promotions during performance reviews in conjunction with promotions imply that employment status is not at-will

- ✓ To ensure that the employment at-will status is maintained, employers in California should:
  - Ensure that employment documents , including the company handbook, offer letter, disciplinary policies and procedures contain disclaimer that an employee is at-will
  - Properly train supervisors and managers to ensure that employment practices do not negate the disclaimer

Discipline and Termination: Prohibitions

Under California law, an at-will employee may not be terminated on the basis of:

- Age (40 and above)
- Ancestry
- Color
- Disability
- Gender, gender identity, or gender expression
- Marital status
- Medical condition
- Military or veteran status
- National origin
- Race
- Religion
- Sex
- Sexual orientation

Discipline and Termination: Prohibitions

Under California law, an at-will employee may not retaliate against an employee for:

- Protesting in-house reporting or outside whistle blowing against
  - Discrimination
  - Harassment
  - Wage and hour violations
  - Unsafe work conditions
  - Rest break and meal time violations

- Filing administrative complaints with state or federal agencies
- Filing a workers' compensation claim
- Taking time off for protected leaves

Discipline and Termination

Recommended Practices:

- ✓ Proper documentation of disciplinary action and performance
- ✓ Consistent application of policies
- ✓ Maintain standard of conduct policies
- ✓ Limit risk by executing a waiver and release of claims/severance agreement

Employment Classification: Independent Contractors

Independent Contractor Classification

Wrongfully classifying workers as independent contractors instead of employees can subject companies to legal liability for:

- Failure to pay minimum wages or overtime
- Unpaid taxes and unemployment insurance payments
- Failure to provide benefits
- Violations of anti-discrimination laws that protect only employees
- Penalties and fines, in cases of willful misclassification

Tests to Determine Classification as Independent Contractor or Employee

Workers Compensation Test

Presumption of employee status for occupations requiring contractor's license is overcome if the individual:

- **Has the right to control manner and means of performance**
- Is customarily engaged in independent business
- Has bona fide independent contractor status and status is not a subterfuge to avoid employee status based on the following cumulative factors:

✓ IC controls time and place
✓ IC is licensed under the Business and Professions Code
✓ Intention of the parties
✓ IC represents oneself as having own business
✓ IC is paid on basis of project completion and not by time spent on work
✓ IC invests substantially in own business, supplies tools used in the work, and hires employees
✓ IC performs work not ordinarily in the course of principle's work
✓ Parties have an agreement that relationship is not terminable at-will by principal

(Cal. Lab. Code § 2750.5 (a)-(c))

Unemployment Insurance

- For unemployment insurance benefit purposes, the most important factor is the existence of **employer control** **(Cal. Code Regs. tit. 22 § 4304-1)**

- Company's right to discharge at will constitutes strong evidence of employer's right to control **(Cal. Code Regs. tit. 22 § 4304-1)**

- Other factors (similar to factors used for Workers' Compensation Test) are also considered **(Cal. Code Regs. tit. 22, § 4304-1)**

Tests Continued

Wage and Hour Laws-California

The DLSE applies the Multi-Factor or "Economic Realities" test adopted by the California Supreme Court in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal. 3d 341 at pp. 349, 354 :

- Whether engaged in business distinct from that of principal
- Whether work is part of the regular business of principal
- Whether principal supplies tools
- Level of skill required, type of work
- Duration of work
- Method of payment
- Understanding by the parties

- Right to control the work (DLSE maintains that control remains an important factor but is not to be applied in isolation)

FEHA (Harassment Protection)

The totality of the circumstances test is applied with particular emphasis placed on the amount of control the principal exercises over the individual and how the work is done **(*Bradley v. Calif. Dep't of Corr. and Rehab.,* 158 Cal. App. 4th 1612, 1626 (2008))**

An Independent Contractor is a person who:

- Has the right to control the performance of the contract and discretion as to the manner of performance
- Is customarily engaged in an independently established business
- Has control over the time and place of work performed, supplies the tools and instrumentalities
- Has particular skills that are not used in the course of employer's (principal's) work

(Cal. Gov't Code § 12940(j)(5)

Taxicab Driver—Employee or Independent Contractor?

In Linton v. DeSoto Cab Co., the Court of Appeal held that despite the employment disclaimer in the Lease Agreement and the fact that the plaintiff had a significant amount of control over his job, there was still strong evidence of an employment relationship. ***Linton v. DeSoto Cab Co. 15 Cal.App.5th 1208, 1209.***

●The Court explained that the labels used by the parties were not dispositive and the degree of freedom permitted to a worker does not automatically lead to the conclusion that the worker is an independent contractor. The key issue is the control retained by the employer.

●The plaintiff presented "strong evidence of an employment relationship", including that: (1) defendant terminated the parties' relationship based on a single passenger complaint without investigation, (2) defendant monitored Linton's driving by video review, (3) defendant required Linton's social security number and maintained his personal information, (4) Linton was required to return the taxicab on request and his vehicle could be leased to another driver if he was late, and (5) Linton did not represent himself as an independent business and could not drive a taxicab independent of defendant or for another taxicab company.

Get Ready, It Is Time To Poll!

Independent Contractor or Employee?

Scenario:

Tom transports boxes of cupcakes for Diana's Bakery. Diana provides Tom with a car and uniform that have been customized with Diana's company name and contact information. Tom has been trained in the procedure for delivering the orders, which includes a specific manner of greeting customers and, at the close of the delivery, a recitation of Diana's company slogan. Although Tom receives a list of addresses from Diana, he is free to deliver the orders in any order that he chooses. He is not permitted to run personal errands in the company vehicle. **Tom is an independent contractor.**

A. True

or

B. False

Pink Cake Box Boutique

Arbitration

Arbitration in Employment

Federal Arbitration Act (FAA) is an act of Congress that provides for judicial facilitation of private dispute resolution. Arbitration provides an alternate method of resolving a dispute than filing a lawsuit and going to court

- Provides a more efficient means of resolving disputes than formal litigation.
- Often less costly than litigation because the process is faster
- The rules of evidence and procedure are simplified leading to a shorter "discovery" period
- If the arbitration decision is binding, there is limited opportunity to appeal, making the award final
- Arbitration proceedings are held privately. Parties may in most cases agree to keep the terms of the final resolution confidential and also the proceedings.

The Enforceability of Class Claim Waivers in an Arbitration Agreement

Ernst & Young LLP v. Morris (No. 16-300):

Stephen Morris and Kelly McDaniel worked for the accounting firm Ernst & Young. As a condition of employment, Morris and McDaniel were required to sign agreements not to join with other employees in bringing legal claims against the company. This "concerted action waiver" required employees to (1) pursue legal claims against Ernst & Young exclusively through arbitration and (2) arbitrate only as individuals and in "separate proceedings." The effect of the two provisions is that employees could not initiate concerted legal claims against the company in any forum—in court, in arbitration proceedings, or elsewhere. The lower court granted the Company's motion to dismiss and compel arbitration. On appeal, the Ninth Circuit reversed and remanded the case, holding that the agreement violated the employee's rights to engage in concerted activity under the National Labor Relations Act.

The U.S. Supreme Court has granted certiorari in **National Labor Relations Board v. Murphy Oil USA (No. 16-307), Epic Systems Corp. v. Lewis (No. 16-285),** and **Ernst & Young LLP v. Morris (No. 16-300),** consolidating them for oral argument.

Issue before the U.S. Supreme Court: Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

PAGA Representative Actions and Arbitration

PAGA Claims Cannot Be Waived

A complete waiver of PAGA claims is prohibited (*Iskanian v. CLS Transp. Los Angeles, LLC* and *Sakkab v. Luxotica Retail N. Am. Inc*.).

Federal Law: PAGA claims MAY be arbitrated pursuant to a pre-dispute arbitration agreement

Both the *Iskanian* and *Sakkab* decisions contemplate that an individual employee may pursue a PAGA claim in arbitration. (*Valdez v. Terminix International company LLC*).

California Law: PAGA claims MAY NOT be arbitrated pursuant to a pre-dispute arbitration agreement

California courts have held that an employer may not rely on a pre-dispute agreement requiring arbitration in a PAGA case. (*Bentacourt v. Prudential Overall Supply*)

Questions???