RJO Update: Labor and Employment
Key Changes to California Employment Law for 2019

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Each new year always means changes to California employment law, and 2019 is no exception. Given the recent spate of high profile sexual harassment suits, it's no surprise that several new laws relate to workplace harassment. Notable developments also include a requirement that publicly traded companies headquartered in California must have at least one female on the board of directors by December 31, 2019, amendments to the lactation accommodation law that will require businesses to provide a separate room other than a toilet stall for lactation expression, and another statewide minimum wage increase.

What follows is a summary of the most significant changes to California employment laws for 2019. We strongly encourage employers with employees performing services in California to familiarize themselves with these developments as many of these new laws will affect day-to-day operations. Unless otherwise noted, the new law or amendment is effective January 1, 2019.

Harassment/Discrimination/Equal Opportunity	
Subject Matter (Bill No.: Affected Law)	**Summary Description**
Protection from Defamation Claims Relating To Sexual Harassment (AB 2770: Amends Civil Code § 47)	Cal. Civil Code § 47 is amended to provide protection from defamation claims arising from statements made *without malice* in connection with sexual harassment complaints. The following are considered privileged statements under the amended law: (1) employee complaints of harassment based on credible evidence; (2) statements made by the employer to other interested persons about the complaint; and (3) employer responses to the questions of whether the employer would rehire and whether or not a decision to not rehire is based on the employer's determination that the former employee engaged in sexual harassment.
"Stay Silent" Agreements (AB 3109: Adds Civil Code §1670.11)	As a result of this amendment to Civil Code § 47, any provision in a contract or settlement agreement that prevents a party from testifying in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or alleged sexual harassment is void and unenforceable.

Confidentiality Provisions in Settlement Agreements (SB 820, adds Code Civ. Proc. § 1001)	This new code section voids and prohibits any settlement agreement provision that would prevent disclosure of factual information about a civil or administrative claim alleging sexual harassment or sex discrimination, including claims for failure to prevent harassment or retaliation for engaging in protected activity. The new law does not prohibit a provision in any agreement that precludes the disclosure of the amount paid in settlement of a claim.
There are multiple changes to Fair Employment Housing Act (Govt. SB 1300, amends Code § 12920 et seq.)	
• Limits on releases and non-disparagement agreements.	Prohibits an employer from requiring a release of a claim or right under the Fair Employment & Housing Act in exchange for a raise or bonus, or as a condition of employment of continued employment. The same prohibition applies to non-disparagement agreements denying the employee the right to disclose information about unlawful acts in the workplace. This prohibition applies does not apply to a "negotiated settlement agreement" to resolve FEHA claims which have been filed in court, with an administrative agency, in an alternate dispute resolution forum, or through an employer's internal complaint process.
• Expands employer liability for non-employee harassment.	Existing law provides that an employer may be responsible for sexual harassment activity of nonemployees if the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action. This amendment provides for such liability as to all forms of harassment prohibited by FEHA, not just sexual harassment.
• Further limits employers' ability to be awarded fees and costs in FEHA claims.	Makes it more difficult for employers who prevail in FEHA actions to be awarded fees and costs; the court must now find that the action was "frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so." This higher standard for cost-shifting applies to Code of Civil Procedure § 998 settlement offers in FEHA cases.
• Declares Legislature's Intent as to several issues in FEHA harassment cases.	Affirms that in workplace harassment suits, plaintiffs need not prove that their productivity has declined as a result of the harassment. Instead it is sufficient to prove that a reasonable person would find that the harassment altered working conditions so as to make it more difficult to do the job (affirms Justice

	Ginsburg's concurrence in *Harris v. Forklift Systems* (1993) 510 U.S. 17). Declares that a "single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment" (rejects holding in *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917). Affirms that a discriminatory remark, even if not made directly in the context of an employment decision or made by a non-decision maker, may be relevant evidence of discrimination (affirms decision in *Reid v. Google, Inc.* (2010) 50 Cal. 4th 512). Confirms that the standard for what constitutes a valid claim for sexual harassment does not vary by the type of workplace (disapproves *Kelley v. Conco Companies* (2011) 196 Cal. App. 4th 191). Declares that harassment cases are "rarely appropriate for summary judgment" (affirms decision in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243)
• "By-Stander Training"	Encourages (but does not require) employers to include, in their sexual harassment trainings, information and practical guidance to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors.
Expands Sexual Harassment Training Requirement To Small Employers (SB 1343, Amends Govt. Code §§12950 and 12950.1)	Beginning January 1, 2020, employers with five or more employees (including temporary or seasonal employees), must provide at least two hours of sexual harassment training to all supervisory employees and at least one hour of sexual harassment training to all nonsupervisory employees. Training must occur once every two years. Department of Fair Employment and Housing (DFEH) to develop or obtain one-hour and two-hour online training courses and post the courses on the department's Internet Web site. (The existing law only applies to larger employers (50 or more employees) and does not expressly require training of non-supervisory employees).
Claims For Sexual Harassment (SB 224, amends Civil Code § 51.9 and Government Code §§12930 and 12948)	This amendment expands the types of relationships that can be subject to sexual harassment complaints to include an investor, elected official, lobbyist, director, and producer or any persons who hold themselves out as being able to help someone establish a business, professional or service relationship with that individual or a third party. The amended law also eliminates the requirement

	that a plaintiff prove an inability to easily terminate the relationship.
Boards of Directors: Publicly Traded Corporations (SB 826, adds §§ 301.3 and 2115.5 to the Corporations Code)	This new law requires publicly held corporations with principal executive offices located in California to have a minimum of one female on its board of directors by the close of 2019. The minimum increases by the close of 2021 depending on the number of directors: two female directors if the corporation has five directors or three female directors if the corporation has six or more directors.
Military and Vets Code Anti-Discrimination Provisions Updated (SB 1500 amends Military and Veterans Code § 394)	This amendment updates existing state laws protecting military service members from discrimination to ensure protection for members of all federal service branches (Army, Navy, Air Force, Marines, Coast Guard) and all components (active, reserve, National Guard).
Human Trafficking Training for Hotel and Motels (SB 970 Adds Govt Code § 12950.3)	This new law requires hotels and motels (except bed and breakfasts) to provide, by January 1, 2020, at least 20 minutes of classroom or interactive training and education about human trafficking awareness to employees likely to interact or come into contact with victims of human trafficking. Training must be provided to new employees within six months of employment in such a role and must occur every two years.
Benefits and Leaves of Absence	
Amended Lactation Accommodation Law (AB 1976 amends Labor Code §1031)	Existing law requires all California employers to provide a reasonable amount of break time to accommodate an employee desiring to express breast milk and requires an employer to make reasonable efforts to provide the employee with the use of a room or other location, other than a ***toilet stall***, in close proximity to the employee's work area for the employee to express milk in private. AB 1976 amends existing law to require that the location be one other than a ***bathroom*** for lactation purposes. Temporary locations are acceptable under the amended law if the location is used only for lactation purposes while an employee expresses milk. Agricultural employers may provide a private, enclosed, and shaded space, as specified. The amended law includes an undue hardship exemption for an employer who can demonstrate that it cannot provide a location other than a bathroom. In such cases the employer must use reasonable efforts to provide a room or location that is not a toilet stall.

	Note: Employers in San Francisco are subject to San Francisco's Lactation Accommodation Ordinance, which imposes stricter requirements.
Paid Family Leave Wage Replacement Benefits Available For Certain Military-Related Absences (SB 1123, Unemployment Ins. Code § 3301)	California's Paid Family Leave (PFL) program is an employee-funded wage replacement program providing partial wage replacement to workers who take time off to care for a seriously ill family member or to bond with a minor child within one year of birth or placement. Employees who are eligible for leave under the Family Medical Leave Act (FMLA) and/or California Family Rights Act (CFRA) must take FMLA and CFRA leave concurrently with PFL benefits. The FMLA provides eligible employees with time off for a "qualifying exigency" arising out of the foreign deployment of the employee's spouse, son, daughter, or parent. SB 1123 expands the scope of the PFL program, beginning January 1, 2021, to allow employees to collect PFL benefits for time off work due to these military related qualifying exigencies.
Hiring: Salary and Criminal History Inquiries	
Clarifications To Laws Prohibiting Applicant Salary Inquiries and Equal Pay Law (AB 2282, amends Labor Code §§ 432.3 and 1197.5)	Last year's salary history ban (AB 168) enacted Cal. Labor Code § 432.3, which prohibits employers from seeking salary information of applicants and from relying on salary history to determine whether to hire or how much to offer an applicant. AB 2282 amends § 432.3 to clarify several issues that were previously open questions under the law: • The "pay scale" employers must provide applicants means a salary or hourly wage range. • A "reasonable request" for a pay scale means a request made after an applicant has completed an initial interview with the employer. • Employers may ask applicants about their salary expectation for the position being applied for. • The term "applicant" does not include current employees (in any capacity or position). Labor Code §1197.5 prohibits paying wage rates less than those for employees of the opposite sex for substantially similar work, unless the employer demonstrates that the wage differential is based on a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or bona fide factor other than sex, such as education, training, or experience. AB 2282 amends §1197.5 to clarify that employers

	are not prohibited from making a compensation decision based on a current employee's existing salary, so long as any resulting wage differential is justified by one or more of these factors.
Tightens Exceptions to Certain Criminal History Inquiries About Pre or Post Trial Diversion Programs, and Expunged, Sealed or Judicially Dismissed Convictions (SB 1412, amends Labor Code § 432.7)	Employers conducting criminal background checks may not ask or seek information about, or consider, participation in a pretrial or post-trial diversion program, or expunged, judicially dismissed or sealed convictions. Exceptions to this rule exist where other laws require the employers to obtain conviction information of an applicant or prohibit hiring applicants with certain convictions into certain jobs. This amendment tightens this exception to only the "particular convictions" that would disqualify the applicant.
Wage and Hour	
Minimum Wage Increase (Scheduled Increase to State Minimum Wage)	On January 1, 2019, California's minimum wage increases to $12 per hour for employers of 26 or more employees and $11 per hour for employers of 25 or fewer employees. Minimum salaries for the California's white-collar exemptions, which are based on the minimum wage, will also increase. Employers should also remember to check local minimum wage laws, many of which require higher hourly rates.
Employee Requests For Payroll Records (SB 1252 amends Labor Code § 226)	Clarifies that under the existing law, employers must make available for inspection and if requested, provide employee copies, of their payroll records within 21 days of such a request.
Customer Joint and Several Liability for Wage Violations for Port Drayage Motor Carrier Service (SB 1402 adds Labor Code § 2810.4)	SB 1402 addresses concerns about misclassification and other wage and hour violations relating to port truck drivers – those who move goods between California's ports and various inland distribution centers – by making the ***customer*** of the trucking company jointly liable for violations under certain circumstances. This law requires the Division of Labor Standards Enforcement (DLSE) to maintain and post a list of any port drayage motor carrier with any unsatisfied final court judgment, tax assessment, or tax lien, including DLSE administrative hearing awards, for various wage and hour violations, unreimbursed employee expenses, payroll tax, failure to provide workers' compensation insurance, or misclassification of employees as independent contractors. As a result of this new law, business entities with 25 or more workers (including temps and those hired through a labor contractor) that engage the services of a port drayage motor carrier identified on the DLSE list will jointly and severally liable be for numerous wage violations--minimum and overtime wages, breaks

	and recovery periods, vacation pay, paid sick leave, expense reimbursement, unlawful deductions, penalties for not having workers compensation coverage, other penalties and interest. Joint and several liability will apply from the time the driver is dispatched to begin work on behalf of the customer until all tasks are completed incidental to that work, and the driver is ready to be dispatched to haul freight on behalf of another customer. The law provides a carve out in some limited circumstances—it will be inapplicable to employees covered by certain collective bargaining agreements, provided the CBA, among other requirements, includes a specific waiver of § 2810.4. Also, if the customer and the trucking company have an existing contract at the time the company is listed on the "blacklist," joint liability shall not apply until the expiration of that contract or 90 days, whichever is shorter. While businesses cannot agree to contractual waiver of joint and several liability, the law does allow parties to establish contractual rights of contribution and indemnity.
On-Call Rest Breaks For Certain Employees in Petroleum Facilities (AB 2605, adds Labor Code § 226.75)	In response to California Supreme Court's decision in Augustus v. ABM Security Services, Inc. (2016) 2 Cal.5th 257, this new Labor Code section allows on-call rest breaks for certain union employees who hold safety sensitive positions at petroleum facilities. The law only applies to employees subject to IWC Wage Order 1 (Manufacturing Industry) who meet specified criteria; not applicable to gas station employees (who are typically subject to Wage Order 7 - Mercantile Industry). This law was effective immediately on September 20, 2018 and will be repealed on January 1, 2021.
Late Meal Periods For Certain Drivers Transporting Commercial Feed (AB 2610 amends Labor Code § 512)	Existing law requires employees be provided meal breaks by the end of the first 5 hours of work. This amendment to Labor Code § 512 allows certain drivers transporting commercial feed to remote rural areas to commence their meal breaks after 6 hours of work if the drivers' regular rate of pay is at least 1.5 times the state minimum wage and the driver receives overtime in accordance with the California Labor Code § 510.

Construction Industry	
PAGA Claims in the Construction Industry (AB 1654, adds Cal. Labor Code § 2699.6)	This amendment creates a limited exception claims for penalties under Labor Code Private Attorney General Act (PAGA) for construction industry employees who perform work under a valid collective bargaining agreement in effect any time before January 1, 2025. For the exception to apply, the CBA must contain certain provisions, including, • premium wage rates for all overtime hours worked; • a regular hourly pay rate of not less than 30 percent more than the state minimum wage; • an express and clear and unambiguous waiver of PAGA requirements; • prohibitions of all Labor Code violations that would be redressable under PAGA; and • a grievance and binding arbitration procedure to redress these violations that authorizes the arbitrator to award otherwise available remedies (except for the award of PAGA penalties that would be payable to the Labor and Workforce Development Agency) The exception will only apply until the earlier of the date the CBA expires or January 1, 2028, when the new law is scheduled to be repealed.
Construction Contracts: New Requirements Regarding Liability for Unpaid Wages and Fringe Benefits to Subcontractor Employees (AB 1565, amends Labor Code § 218.7)	Last year, a new law (Labor Code § 218.7), made general contractors on private construction contracts entered after January 1, 2018 jointly liable for their subcontractors' failure to pay wages or fringe benefits owed to or on behalf of its workers. Only Labor Commissioner, unions and joint labor-management committees have standing to enforce the law. Applicable to contracts entered into on or after January 1, 2019, direct contractor or a subcontractor must include a contract provision specifying the documents or information that the direct or subcontractor will require a lower tiered subcontractor to produce. *Absent this provision, the direct contractor or subcontractor cannot withhold any disputed payments.* This amendment also removes a provision of section 218.7 that indicated the direct contractor's liability for unpaid wages and benefits was in addition to obligations and remedies otherwise provided by law.

	These changes were effective immediately upon the Governor's signature on September 19, 2018.
Public Contractors	
Clarification of "Skilled and Trained Workforce" Requirements and Changes To Enforcement (AB 3018 amends Public Contact Code §§ 2601 and 2602, adds § 2603)	In 2015, the Legislature passed AB 556 requiring contractors on some projects to use a "skilled and trained" work force. This amendment clarifies those requirements and changes the enforcement rules. Specifically, the amendment: • Clarifies that the same set of specified occupations are subject to the current requirement that only 30% of skilled journeypersons employed to perform work on those contracts or projects be graduates of an apprenticeship program. • Requires public agency or other awarding body to forward a copy of the monthly report to the Labor Commissioner for issuance of a civil wage and penalty assessment and a copy of the plan, if any, to achieve substantial compliance (if the monthly report does not demonstrate compliance.) • Limits withholding to 150% of the value of the monthly billing for a subcontractor that fails to timely submit the required information or does not demonstrate compliance, and would allow the contractor, bidder, or other entity to withhold the same amount from the subcontractor. • Requires penalties of $5,000 per month of non-compliant work ($10,000 per month in the case of second or subsequent violations within 3 years) when the Labor Commissioner determines that a contractor or sub failed to use the required skilled and trained workforce. • Requires contractors to obtain a declaration under penalty of perjury from subcontractors that they have met the skilled and trained workforce requirements before making the final payment to subcontractors. • Makes contractors and subcontractors ineligible to bid on, be awarded, or perform work on a contract for a public works project for violations of these requirements with the intent to defraud and requires the Labor Commissioner to publish on the commissioner's Internet Web site a list of ineligible contractors.
Prequalification Questionnaire and	This amendment, extends indefinitely the requirement that a prospective bidder for a construction contract for certain school

Financial Statements for Bidders for School Construction Contracts (AB 2031 amends PUC § 20111.6)	facility projects use a standardized proposal form and submit a prequalification questionnaire and financial statement, under oath, as part of the bidding process. The amendment eliminates the requirement for the Director of Industrial Relations to submit a report to the Legislature on whether Labor Code violations on school district projects have decreased during the years these provisions are applicable to contracts.

VETOED BILLS

Notably, the Governor vetoed several bills employers have been closely watching this year, including:

- AB 3080 (which would have prohibited employers from requiring arbitration of FEHA and Labor Code claims);
- AB 3081 (which would have made a client of a labor contractor jointly liable for harassment by an employee provided by the contractor); SB 937 (which would have established state-wide lactation accommodation requirements similar to those in San Francisco's Lactation Accommodation Ordinance);
- AB 1870 (which would have extended the statute of limitations for filing an administrative complaint under FEHA from 1 year to 3 years); and
- AB 1867 (which would have required employers with 50 or more employees to retain records of any complaint of sexual harassment until the later of 5 years following the last day of employment of the complaining employee or any alleged harasser).

About Rogers Joseph O'Donnell Labor & Employment Law Practice Group

Rogers Joseph O'Donnell's Labor and Employment Law Practice Group is comprised of experienced labor and employment attorneys with extensive experience representing and advising businesses, government contractors, and public entity employers.

The depth and breadth of our employment law experience allows us to offer the same quality of representation usually expected from much larger law firms, while our relatively small size enables us to maintain highly competitive rates and a more direct and personal relationship with our clients.

Our labor and employment practice encompasses counseling, and defending employers against single and multiple plaintiff litigation, class and collective actions, and PAGA actions. While we believe that early case evaluation and mediation are often advantageous ways to minimize the costs and disruption of protracted litigation, we are also skilled, trial-ready attorneys with a winning record in court, administrative hearings and arbitration.

If you have questions about California labor and employment law, please contact the Rogers Joseph O'Donnell attorney with whom you regularly work, or the authors of this legal update:

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