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LABOR & EMPLOYMENT LAW UPDATE 2019

If you have any further questions regarding employment related issues, please do not hesitate to contact Kristen M. Bush at (619) 236-8821 or by email at kristenb@sscmlegal.com.

WAGE & HOUR

1. Minimum Wage

San Diego: Applicable to employees who perform at least two (2) hours of work in one or more calendar weeks of the year within the geographic boundaries of the City of San Diego, minimum wage is $12.00. See https://www.sandiego.gov/treasurer/minimum-wage-program for details regarding the geographic boundaries.

2. Right to Receive Pay Statement – SB 1252

Provides an explicit right to employees to receive a copy of their paystubs – and not just inspect.

EMPLOYMENT PRACTICES

1. Sexual Harassment Training – SB 1343

Current California law requires employers with 50 or more employees provide 2 hours of sexual harassment training to supervisory employees every two years. Beginning January 1, 2020, employers with **five** or more employees (including seasonal & temporary) are required to provide the following sexual harassment training:

- 2 hours of training to supervisors/1 hour to non-supervisory employees within six months of hire or promotion and every two years after that.

- Temporary and seasonal employees will be required to be trained within 30 days of hire or 100 hours worked—whichever is earlier.

Training must meet the needs of particular workplace as well as the type of employee being trained. Anyone who is trained needs to understand what sexual harassment is, what the law requires, how to report it, and the company's policy and reporting mechanisms. Supervisors need additional information on their prevention obligations, including handling complaints,

investigations, and corrective actions. Employers must publicly display info sheet outlining the illegality of sexual harassment, its definition, a description of sexual harassment with examples.

2. Sexual Harassment Redefined – SB 1300

- **"Reasonable Person" Replaces "Severe or Pervasive" Standard** – affirms U.S. Supreme Court Justice Ginsburg's concurrence in *Harris v. Forklift Systems* that, in a workplace harassment suit, "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find…that the harassment so altered working conditions as to make it more difficult to do the job."

- **Single Incident Sufficient** – declares that a "single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment."

- **Rejection Of "Stray Remarks Doctrine"** –existence of a hostile work environment claims depends on the totality of the circumstances, and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a non-decision maker, may be relevant and circumstantial evidence of discrimination.

- **Legal Standard For Sexual Harassment** – standard for what constitutes a valid claim for sexual harassment does not vary by the type of workplace.

- **Summary Judgment "Rarely Appropriate"** – declares legislative intent that harassment cases are "rarely appropriate for summary judgment"

3. Added Protection for Sexual Harassment Victims – AB 2770

Makes certain communications regarding sexual harassment "privileged" so that they cannot be used as a basis for defamation claim including:

- Reports of sexual harassment made by an employee to their employer based on credible evidence and without malice;

- Communications made without malice regarding the sexual harassment allegations between the employer and "interested persons" (such as witnesses or victims); and

- Non-malicious statements made to prospective employers as to whether a decision to rehire, or not, would be based on a determination that the former employee engaged in sexual harassment.

4. Sexual Harassment Settlement Agreement Confidentiality Restrictions – SB 820

Settlement agreements entered into on or after January 1, 2019, may not include a provision that prevents the disclosure of information related to civil or administrative complaints of sexual assault, sexual harassment, and workplace harassment or discrimination based on sex. The amount paid in a settlement and the claimant's identity can still be made confidential.

5. Lactation Accommodation – AB 1976

Requires an employer to make reasonable efforts to provide an employee with use of a room or other location, other than a bathroom, to accommodate an employee desiring to breast feed an infant child. If an employer can demonstrate to the Department of Industrial Relations that this requirement would impose an "undue hardship," the bill requires the employer to make reasonable efforts to provide a temporary room or location for expressing milk that is not a toilet stall.

6. Applicants for Employment: Criminal History – SB 1412

Limits the information an employer may ask a job applicant about his or her criminal history.

- Previously under California Labor Code section 432.7, employers were prohibited from asking a job applicant to disclose:
  - information concerning arrests that did not result in a conviction,
  - information concerning a referral to pretrial or posttrial diversion programs,
  - convictions that have been sealed, dismissed, expunged, or statutorily eradicated pursuant to law, or
  - information concerning or related to an arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while the person was subject to the process and jurisdiction of juvenile court law.

Employers are not prohibited from asking an applicant about a criminal conviction if any of the following apply:

- Where the employer is required by law to obtain information regarding a conviction of an applicant.
- Where the applicant would be required to possess or use a firearm in the course of his or her employment.
- Where an individual who has been convicted of a crime is prohibited by law from holding the position sought by the applicant, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.
- Where the employer is prohibited by law from hiring an applicant who has been convicted of a crime.

The amended law changes the above-mentioned exception to the law by limiting the inquiry to

- Where an employer is required to inquire into a particular category of criminal offenses or criminal conduct, or
- Where the employer is prohibited from hiring an individual with a particular conviction.

"Particular conviction" means a conviction for specific criminal conduct or a category of criminal offenses prescribed by any federal law, federal regulation, or state law that contains requirements, exclusions, or both, expressly based on that specific criminal conduct or category of criminal offenses.

Reporting Requirements

1. OSHA Reporting Requirements Expanded - AB 2334

Currently, the Division of Occupational Safety and Health ("Division") can issue a citation for employer violations of recordkeeping requirements. As of now, the Division is prohibited from issuing a citation more than six months after the "occurrence" of the violation. The new law provides, among other things, that an "occurrence" continues until (a) it is corrected, (b) the Division discovers the violation, or (c) the duty to comply with the requirement that was violated no longer exists. As a result, employers must now be hyper-vigilant to maintain all records required under OSHA law.