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New California Employment Laws Impact Statutes of Limitations, Arbitration, Lactation Accommodation, Rehire and Organ Donation Leave

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On October 10, California Governor Gavin Newsom signed several notable new employment laws, effective on January 1, 2020.

AB 9: Extended statute of limitations for administrative exhaustion of California FEHA claims

Under current law, an employee who wants to sue his or her employer for employment discrimination, harassment and/or retaliation under the California Fair Employment and Housing Act (FEHA) must first file an administrative complaint with the California Department of Fair Employment and Housing (DFEH) within one year after the alleged act, and then the employee has one year from the date of the DFEH's issuance of a right to sue notice to file a lawsuit against the employer. AB 9 extends the period within which an employee must file an administrative complaint from one year to three years, tripling the applicable California state statute of limitations and making it six times longer than the applicable statute of limitations under federal law. In practice, this means that employers may be required to defend a filed lawsuit regarding conduct that allegedly occurred more than four years earlier, when access to documentary evidence and reliable witnesses may be more limited. Employers should consider evaluating their record retention policies and practices, as well as their documentation of employee complaints and the employer's response thereto, in light of this new law.

AB 51: Prohibition of mandatory arbitration of California FEHA and Labor Code claims

Under current law, California employers can require employees to resolve employment-related disputes through a neutral arbitrator instead of a jury or judge, and waive participation in employment class actions, subject to legal requirements regarding procedural and substantive fairness. For agreements entered into, modified or extended on or after January 1, 2020, AB 51 prohibits employers from requiring as a condition of employment, continued employment or the receipt of any employment-related benefit that a job applicant or employee waive any right, forum or procedure for a violation of FEHA or the California Labor Code, including any requirement that an employee "opt out" of an arbitration agreement or provision. Rather, the employee must voluntarily and affirmatively choose to enter into such an agreement or provision. Threatened or actual retaliation against an employee who refuses to consent to arbitration is prohibited. AB 51 does not apply to negotiated severance agreements or post-dispute settlement agreements. AB 51 also states that it is not intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act.

Despite this final provision, we anticipate legal challenges to AB 51, including arguments that the law is preempted under the Federal Arbitration Act. In the interim, employers can continue to implement mandatory arbitration programs for the remainder of 2019 (but may not modify or contractually extend them after January 1, 2020). Please contact us to discuss other possible steps to consider, including potential modification of your current standalone arbitration agreements and/or employee offer letters containing arbitration provisions, and implementation of new practices.

SB 142: Lactation accommodation

SB 142 imposes lactation accommodation requirements for employers which are similar to those provided under San Francisco's lactation accommodation ordinance, including requiring that the employer provide a safe, clean and private space (other than the bathroom) that can be used for lactation, which has electricity, a table or other surface to hold equipment, and a place to sit. An employee's normal workspace may be used if it otherwise complies with the new law. The employer must also provide a sink and refrigerator for storing milk in close proximity to the employee's workspace. Employers with less than 50 employees may seek an exemption from these requirements if compliance would impose an undue hardship, but must still accommodate employees' lactation needs (e.g., by providing a bathroom). Employers must also roll out a written lactation accommodation policy to employees. Finally, the new law states that the denial of reasonable break time or adequate space to express milk shall be treated the same as a failure to provide mandated rest breaks under California wage and hour law.

AB 749: Prohibition of no-rehire provisions in settlement agreements

AB 749 prohibits an agreement to settle an employment dispute that is entered into after January 1, 2020 from containing a provision whereby the employee agrees that he or she may not seek re-employment with the employer or its affiliated entities and is not eligible for rehire. A no-rehire provision is permissible if the employer found, in good faith, that the employee engaged in sexual harassment or sexual assault. Employers should review and update, as necessary, their current form settlement agreements for compliance with this new law.

AB 1223: Additional unpaid organ donor leave

California employers are legally required to provide an employee with up to 30 days of paid leave during a one-year period for purposes of organ donation. AB 1223 requires employers to provide employees an additional 30 days of unpaid leave during a one-year period, if needed, for purposes of organ donation. Employers should update their employment policies accordingly.

Feel free to contact us with any questions about these new laws or how to comply.

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