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WHITE PAPER

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2019 California Employment Legislation Update

The new year brings significant changes to California's employment laws, many of which increase protection for victims of harassment while restricting the use of nondisclosure agreements. It remains to be seen whether new Governor Gavin Newsom will, like his predecessor Jerry Brown, veto the most controversial measures passed by the Legislature. Nevertheless, we expect 2019 to bring additional employment-related legislation that will create new challenges for employers.

This *White Paper* examines 2019's new employment-related laws, including Senate Bill 1300, one of the most critical pieces of legislation to arise from the #MeToo movement. Among the other bills we explore: Senate Bill 826, which requires publicly held, California-based corporations to have a minimum of one woman on their Boards of Directors by the end of 2019, and Assembly Bill 2282, which clarifies a 2017 statute that prohibited employers from inquiring about an applicant's salary history.

Finally, we describe bills that were vetoed by former Governor Brown or that failed to pass both Houses of the California Legislature, as well as other federal and state developments, and offer recommendations for employers in light of the new legislation.

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In California, 2019 brings a bumper crop of employment legislation signed by Governor Brown, many of which increase protection for victims of harassment while restricting the use of nondisclosure agreements. In addition, the Legislature clarified its 2017 statute which prohibited employers from inquiring applicants about salary history. We now have a new governor and two-thirds Democratic majority in both Houses of the California Legislature, and it remains to be seen whether Governor Newsom will, like his predecessor did in 2018, veto the most controversial measures passed by the Legislature. However, we expect that the new year, like the last year, will bring multiple employment-related measures that will create new challenges for employers.

On the federal level in 2018, the United States Supreme Court upheld the validity of class action waivers in arbitration agreements. Governor Brown vetoed a bill that purported to prohibit employers from requiring employees to sign arbitration agreements as a condition of employment. Governor Brown also vetoed a bill that would have extended the statute of limitations for filing employment discrimination claims from one year to three years after the alleged discrimination, and he vetoed a bill that would have required employers with 50 or more employees to retain records of sexual harassment complaints for five years after the last day of employment of the complainant or the alleged harasser, whichever is later.

NEW CALIFORNIA EMPLOYMENT-RELATED LEGISLATION

Harassment Liability; Releases of Claims; Non-Disparagement Agreements—SB 1300

Arguably the most important new legislation of the past year—and one of the most significant pieces of legislation to arise from the #MeToo movement—is Senate Bill 1300, which took effect on January 1, 2019. Senate Bill 1300 adds and amends various sections of the California Fair Employment and Housing Act ("FEHA"):

Employers' Expanded Harassment Liability for Third Parties. Under existing law, an employer may be responsible for sexual harassment of employees (and applicants, unpaid interns or volunteers, and persons providing services pursuant to a contract) by nonemployees if the employer knew or should have known of the sexual harassment and failed to take immediate and appropriate corrective action. Senate Bill 1300 expands this liability to all types of unlawful harassment (e.g., harassment based on race, national origin, disability, religious creed, etc.)—not just sexual harassment.

Releases of Claims and Non-Disparagement Agreements. Senate Bill 1300 makes it unlawful for an employer, "in exchange for a raise or bonus, or as a condition of employment or continued employment," to require an employee to: (i) sign a release of a claim or right under the FEHA, or requiring an individual to execute a statement that he or she does not possess any such claim or injury against the employer; or (ii) sign a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including sexual harassment.

These prohibitions do not apply to "a negotiated settlement agreement to resolve an underlying claim under [the FEHA] that has been filed by an employee in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process."

A Prevailing Employer Under FEHA Has Limited Right to Attorneys' Fees and Costs. Senate Bill 1300 states that a prevailing defendant in an action brought under the FEHA "shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so." Significantly, this new standard applies "notwithstanding Section 998 of the Code of Civil Procedure," which generally provides that if a plaintiff rejects a settlement offer and subsequently fails to obtain a more favorable judgment or award at trial (i.e., obtains anything less than what the defendant offered in exchange for a settlement), the plaintiff must pay the defendant's post-offer fees and costs. This provision essentially makes Section 998 of the Code of Civil Procedure useless in the vast majority of employment discrimination claims in California. This means that the employer now has lost the procedural mechanism to guard against a plaintiff and/or attorney who simply overworks a discrimination case, seeking eventually to obtain a large fee award.

Optional Bystander Intervention Training. Senate Bill 1300 says that an employer "may" (not "must") provide "bystander intervention training that includes information and practical guidance on how to enable bystanders to recognize potentially

problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors. The training and education may include exercises to provide bystanders with the skills and confidence to intervene as appropriate and to provide bystanders with resources they can call upon that support their intervention." The new statute does not define what is meant by "potentially problematic behaviors."

Judicial Decisions Involving Sexual Harassment. Senate Bill 1300 expressly affirms or rejects the following judicial decisions, which, in sum, will make it more difficult for employers to obtain summary judgment on harassment claims:

- *Harris v. Forklift Systems*, 510 U.S. 17 (1993) (Ginsburg, J., concurring) – Affirmed by the Legislature. Justice Ginsburg's concurrence states 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."
- *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000) – Rejected by the Legislature. Contrary to the Ninth Circuit's opinion in Brooks, "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment."
- *Reid v. Google, Inc.*, 50 Cal.4th 512 (Cal. 2010) – Affirmed by the Legislature. "The existence of a hostile work environment depends upon 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, circumstantial evidence of discrimination." This aspect of Senate Bill 1300 severely restricts the "stray remarks" doctrine used frequently in federal court decisions.
- *Kelley v. Conco Companies*, 196 Cal.App.4th 191 (Cal. Ct. App. 2011) – Disapproved of by the Legislature to the extent that any language, reasoning, or holding in the decision conflicts with the proposition that "[t]he legal standard for sexual harassment should not vary by type of workplace. It is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past. In determining whether or not a hostile environment existed, courts should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties."
- *Nazir v. United Airlines, Inc.*, 178 Cal.App.4th 243 (Cal. Ct. App. 2009) – Affirmed by the Legislature. "Harassment cases are rarely appropriate for disposition on summary judgment…. [H]ostile working environment cases involve issues 'not determinable on paper.'"

Recommendations for Employers. Employers have much to unpack from Senate Bill 1300. Employers should review their policies and procedures to ensure they have sufficient systems in place to prevent, detect, and report incidents of unlawful harassment, including acts committed by nonemployees. In particular, every employer should ensure that its anti-harassment training is compliant with the statutory requirements and the regulations from the California Fair Employment And Housing Council, and that the employer's anti-harassment policy contains all provisions required by the regulations of the Council. Employers should also review their employment agreements to verify that they do not include any release of claims or rights under the FEHA. Employers should also review any non-disparagement or nondisclosure agreements to verify that the agreements do not deny any employee the right to disclose information about unlawful acts in the workplace. The new standards for establishing a harassment claim (or for defeating the employer's summary judgment motion) mean that, more than ever, investigations of discrimination or harassment claims must be professionally conducted and thoroughly documented. On the whole, employers should prepare for increased difficulties when faced with allegations of unlawful harassment, especially sexual harassment.

Confidentiality Agreements in Settlements of Sexual Offenses—SB 820

Effective January 1, 2019, Senate Bill 820 adds Section 1001 to the California Code of Civil Procedure. Known as the Stand Together Against Nondisclosure ("STAND") Act, the new law prohibits any provision in a settlement agreement entered into on or after January 1, 2019, that prevents the disclosure of factual

information relating to "a claim filed in a civil action or a complaint filed in an administrative action" regarding certain acts of:

- Sexual assault;
- Sexual harassment in certain "business, service, or professional" relationships; or
- Workplace harassment or discrimination based on sex, or failure to prevent workplace harassment or discrimination based on sex, or retaliation against a person for reporting harassment or discrimination based on sex.

A provision that shields the identity of the claimant and all facts that could lead to the discovery of his or her identity may be included within a settlement agreement "at the request of the claimant," though this exception does not apply if a government agency or public official is a party to the settlement agreement. Additionally, this new law does not prohibit the entry or enforcement of a provision in any agreement that precludes the disclosure of the amount paid in settlement of a claim.

This measure does *not* apply where there is not yet a claim filed in a civil action or an administrative complaint (e.g., no FEHA complaint with the California Department of Fair Employment and Housing).

Recommendations for Employers. Senate Bill 820 applies only to settlement agreements entered into on or after January 1, 2019 (not before), to resolve claims filed in civil actions or complaints filed in administrative actions (not pre-litigation claims or complaints) and covers only the types of claims listed above. However, beginning in 2019, employers must be cautious not to include any provision in a settlement agreement that would violate this new law.

Contractual Waiver of Right to Testify Concerning Sexual Harassment—AB 3109

Effective January 1, 2019, Assembly Bill 3109 adds Section 1670.11 to the California Civil Code. Under this new law, a provision in a contract or settlement agreement entered into on or after January 1, 2019, is void and unenforceable if it waives a party's right to testify in an administrative, legislative, or judicial proceeding concerning the other party's alleged criminal conduct or alleged sexual harassment when the party has been required or requested to attend the proceeding pursuant to a court order, subpoena, or written request from the legislature or an administrative agency.

Recommendations for Employers. Employers should carefully review any nondisclosure agreements and settlement agreements, entered into on or after January 1, 2019, to ensure that the agreements do not prohibit any party from testifying in a legal proceeding—when "required or requested" to do so—concerning alleged sexual harassment or "alleged criminal conduct" (a broad prohibition). Employers should also note that Assembly Bill 3109 does not permit a party who signed a confidentiality agreement to breach that agreement by voluntarily testifying (i.e., without being required or requested to do so) in a legal proceeding concerning information covered by the agreement. However, confidentiality agreements are subject to Senate Bill 820 (discussed above).

Privileged Communications Regarding Sexual Harassment—AB 2770

Under existing law, an employer may inform a current or former employee's prospective employer whether the employer would rehire the employee. For example, the employer may tell the prospective employer that the employer would not rehire the employee due to job performance issues. Under California Civil Code Section 47, such a communication—if made without malice—is privileged and protected from a defamation lawsuit.

Effective January 1, 2019, Assembly Bill 2770 clarifies that the Section 47 protection applies to certain communications regarding sexual harassment claims. Specifically, the following three types of communications from an employer to a prospective employer are privileged, if made without malice:

- A complaint of sexual harassment by an employee to the employer based upon "credible evidence";
- Previous communications between the employer and "interested persons" regarding a complaint of sexual harassment;
- Whether the decision not to rehire an employee is based on the employer's determination that the employee engaged in sexual harassment.

Recommendations for Employers. Generally, employers should limit the information they provide to prospective employers. While Assembly Bill 2770 provides some protection against defamation lawsuits, the burden is on the employer to prove that a communication is privileged—for example, that the communication was made without malice and concerned a complaint based upon "credible evidence." One approach would

be to obtain from the former employee, prior to providing any response to a prospective employer, a release that the former employee consents to disclosure of such information. However, no such release is required under the statute, and it may be impossible to obtain in many cases. Further, the statute does not *require* that such communications be provided. This statute creates, at most, a conditional privilege to make a disclosure without malice that is based upon credible evidence.

Sexual Harassment Prevention Training to All Employees—SB 1343

Under existing law, California employers with 50 or more employees are required to provide two hours of sexual harassment prevention training to all supervisory employees once every two years or within six months of assuming a supervisory position. This training is often referred to as "AB 1825 training."

Senate Bill 1343, among other things, amends California Government Code Section 12950.1 to expand the number of employers who are required to provide anti-harassment training and to expand training obligations in many cases to nonsupervisory employees. Under the new law, California employers must now do the following:

- By January 1, 2020 (and once every two years thereafter), employers with five or more employees must provide at least two hours of sexual harassment prevention training to all supervisory employees in California within six months of their assumption of a position.
- By January 1, 2020 (and once every two years thereafter), employers with five or more employees must provide at least one hour of sexual harassment prevention training to all nonsupervisory employees in California within six months of their assumption of a position.
- Beginning January 1, 2020, for temporary and seasonal employees, or any employees hired to work for less than six months, employers must provide the required training within 30 calendar days after the date of hire, or within 100 hours worked, whichever occurs first.

Fortunately for employers, Senate Bill 1343 also requires the California Department of Fair Employment and Housing to "develop or obtain two online training courses on the prevention of sexual harassment in the workplace," one for supervisory employees and one for nonsupervisory employees. "The department shall make the online training courses available on its Internet Web site."

Recommendations for Employers. Most California employers must now provide some amount of sexual harassment prevention training to all of their employees. Before January 1, 2020, smaller employers must become familiar with their obligations to train both supervisory and nonsupervisory employees. Employers who are already providing training to supervisory employees must become familiar with the requirement, by January 1, 2020, to train nonsupervisory employees within six months of their assuming of a position. The availability of the California Department of Fair Employment and Housing online courses may, however, help reduce the expense of training. In short, employers should begin preparing now in order to meet the January 1, 2020, deadline.

Boards of Directors: Female Members—SB 826

Senate Bill 826 adds Sections 301.3 and 2115.5 to the California Corporations Code. Senate Bill 826 requires that, by December 31, 2019, a publicly held corporation—(whether domestic or foreign) whose principal executive offices are located in California, according to the corporation's SEC 10-K form—must have a minimum of one female director on its board of directors. By December 31, 2021, the required minimum number is increased to two female directors if the corporation has five directors, and to three female directors if the corporation has six or more directors. "Female" means an individual "who self-identifies her gender as a woman, without regard to the individual's designated sex at birth." Corporations will not violate Senate Bill 826 if a female director holds a required seat on the board "for at least a portion of the year."

Senate Bill 826 also requires the California Secretary of State to issue an annual report regarding the following: (i) the number of corporations subject to Senate Bill 826 that were in compliance during at least one point in the preceding calendar year; (ii) the number of publicly held corporations that moved their U.S. headquarters to California from another state or out of California into another state during the preceding calendar year; and (iii) the number of publicly held corporations that were subject to Senate Bill 826 during the preceding year but are no longer publicly traded. The Secretary of State may impose fines for violations of Senate Bill 826: $100,000 for the first violation and $300,000 for subsequent violations.

Recommendations for Employers. Senate Bill 826 is likely to face numerous legal challenges. In his signing message, Governor Brown acknowledged that "[t]here have been numerous objections to this bill and serious legal concerns have been raised. I don't minimize the potential flaws that indeed may prove fatal to its ultimate implementation." However, for the time being, covered corporations must install female directors according to the ratios and deadlines mandated by Senate Bill 826.

Lactation Accommodation—AB 1976

Under the current version of California Labor Code Section 1031, employers are required to make reasonable efforts to provide employees with the use of a room or location, other than a "toilet stall" in close proximity to the employee's work area, for the employee to express breast milk in private. Effective January 1, 2019, Assembly Bill 1976 amends Section 1031 to replace the term "toilet stall" with "bathroom." If an employer can demonstrate that this requirement would impose an undue hardship when considered in relation to the size, nature, or structure of the employer's business, then the lactation accommodation room or location must not be a "toilet stall."

An employer that makes a "temporary lactation location" available to employees complies with Assembly Bill 1976 if: (i) the employer is unable to provide a permanent lactation location because of operational, financial, or space limitations; (ii) the temporary location is private and free from intrusion while an employee expresses milk; (iii) the temporary location is used only for lactation purposes while an employee expresses milk; and (iv) the temporary location otherwise meets the requirements of state law concerning lactation accommodation. Additionally, Assembly Bill 1976 states that an "agricultural employer" will be deemed to be in compliance with Assembly Bill 1976 if the employer provides an employee wanting to express milk with a private, enclosed, and shaded space, including, but not limited to, an air-conditioned cab of a truck or tractor.

Recommendations for Employers. Employers should review and update their procedures for providing lactation accommodation to ensure that the location provided is not a bathroom, unless an exception applies. This might require some employers to make physical alterations to their workplaces.

Clarification on Salary History Legislation—AB 2282

Effective January 1, 2019, Assembly Bill 2282 provides some much-needed clarification on Assembly Bill 168 (California Labor Code Section 432.3), which took effect on January 1, 2018. Under Section 432.3, an employer may not seek or inquire about the prior salary history of an "applicant" or rely on such information "as a factor" in making a hiring or a compensation decision with respect to that applicant. If an applicant voluntarily, and without prompting, discloses salary history information to a prospective employer, then the prospective employer may consider or rely on that information in determining the applicant's salary (but not in determining whether to offer employment to the applicant). Additionally, Section 432.3 requires employers, upon "reasonable request," to disclose the "pay scale" for a position to an applicant.

Assembly Bill 2282 amends Section 432.3 to provide the following clarifications. For purposes of Section 432.3:

- "Applicant" or "applicant for employment" means an individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position.
- "Reasonable request" means a request made after an applicant has completed an initial interview with the employer.
- "Pay scale" means a salary or hourly wage range.
- An employer is not prohibited from asking an applicant about his or her salary expectation for the position being applied for.

Assembly Bill 2282 also amends California Labor Code Section 1197.5 (the Fair Pay Act) to clarify that an employer may make a salary decision based on the existing salary of a current employee (i.e., an internal applicant), so long as the existing salary is not itself a product of unlawful salary discrimination.

Recommendations for Employers. Employers must continue to avoid seeking or inquiring about applicants' prior salary history. It is important that all human resources staff and supervisors who are involved in interviewing understand the restrictions on seeking information regarding salary history. Questions regarding an applicant's salary expectations should be raised only by trained human resources personnel who would understand

not to inquire about salary history or ask questions that would appear to require the applicant to disclose his or her salary history. Employers should also be prepared to provide an accurate salary or hourly wage range for the position sought, if requested by the applicant any time after the initial interview. Employers are not required to disclose to the applicant information regarding benefits, bonuses, equity, or other forms of compensation.

Considering Applicants' "Particular" Criminal Convictions—SB 1412

Senate Bill 1412 amends California Labor Code Section 432.7 (California's "Ban the Box" law). Under the previous version of Section 432.7, employers were prohibited from asking an applicant to disclose—or seeking from any source whatsoever, or utilizing as a factor in determining any condition of employment—information concerning: (i) an arrest or detention that did not result in conviction; (ii) a referral to, and participation in, any pretrial or post-trial diversion program; or (ii) a conviction that has been judicially dismissed or ordered sealed pursuant to law. This prohibition applied unless:

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

Senate Bill 1412 clarifies and limits the first, third, and fourth exceptions above. Those exceptions do not apply to any and all convictions. Instead, they apply only to "particular conviction[s]." In other words, the first exception applies if the employer is required by law to obtain information regarding "the particular conviction" of the applicant; the third exception applies if an individual with "that particular conviction" is prohibited by law from holding the position sought by the applicant; and the fourth exception applies if the employer is prohibited by law from hiring an applicant who has "that 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."

Senate Bill 1412 should clarify some of the confusion between the "Ban the Box" statute and the recent regulations issued by the California Fair Employment and Housing Council. Senate Bill 1412, we believe, provides a safe harbor for employers to ask about criminal convictions within the scope of the statute.

Recommendations for Employers. Employers should review their hiring procedures and policies to confirm that they comply with these new clarifications to California's "Ban the Box" law. Also, note that the California Fair Employment and Housing Council's regulations on the use of criminal history in hiring and employment decisions are being reviewed by the Council to harmonize those regulations with the recent statutory activity on the same subject.

Right to "Receive" a Copy of Pay Statements—SB 1252

Under the previous version of California Labor Code Section 226, an employer's current and former employees can inspect "or copy" their wage statements. Senate Bill 1252 amends Section 226 to clarify that current and former employees have the right to inspect "or receive a copy of" their wage statements.

Recommendations for Employers. Employers must, upon request, provide a copy of an employee's wage statements to the requesting employee, rather than simply making the wage statements available, or requiring the requesting employee to make the copy. However, employers may charge the requesting employee for "the actual cost of reproduction."

Minimum Wage Increases

Beginning January 1, 2019, the California minimum wage increases to $12 per hour for employers with 26 or more employees, and $11 per hour for employers with less than 26 employees. Certain California cities have specific local minimums that increase in the new year as well. For example, beginning July 1, 2019, the Los Angeles minimum wage increases to $14.25 per hour for employers with 26 or more employees and $13.25 per hour for employers with less than 26 employees. Currently, the San Francisco minimum wage is $15 per hour, and on July 1, 2019, the rate will be adjusted based on the annual increase in the Consumer Price Index.

The state minimum wage increase will also result in an increase to the minimum threshold for exempt status in California under the executive, administrative, and professional exemptions. For employers with 26 or more employees, the minimum threshold will be $49,920 annually, or $4,160 per month. For employers with less than 26 employees, the minimum threshold will be $45,760 annually, or $3,813.33 per month.

BILLS VETOED BY GOVERNOR BROWN OR THAT FAILED TO PASS BOTH HOUSES

Ban on Mandatory Arbitration Agreements—AB 3080

Assembly Bill 3080, the most significant employment law bill on Governor Brown's desk in 2018, was vetoed by the governor. The bill would have, among other things, prohibited employers from requiring applicants or employees to sign arbitration agreements as a condition of employment, employment benefit, or contract. In his veto message, the governor stated that Assembly Bill 3080 "plainly violates federal law" (i.e., the Federal Arbitration Act and the U.S. Supreme Court's interpretation of the Act). The governor vetoed a similar bill in 2015.

Retention of Sexual Harassment Complaint Records—AB 1867

Governor Brown vetoed Assembly Bill 1867, which would have required employers with 50 or more employees to retain records of sexual harassment complaints for five years after the last day of employment of the complainant or any alleged harasser named in the complaint, whichever is later.

Statute of Limitations for Employment Discrimination Claims—AB 1870

Governor Brown vetoed Assembly Bill 1870, which would have extended the statute of limitations for filing FEHA claims with the California Department of Fair Employment and Housing from one year to three years after the alleged incident.

Destruction or Withholding of Immigration Documents—AB 2732

Governor Brown vetoed Assembly Bill 2732, which would have, among other things, prohibited employers from knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported immigration document, or any other actual or purported government identification document, of another person in the course of committing, or with the intent to commit, trafficking, peonage, slavery, involuntary servitude, or a coercive labor practice.

Annual Pay Data Report—SB 1284

Senate Bill 1284 passed the Senate but was shelved by the Assembly. It would have required certain private employers with 100 or more employees to submit an extremely detailed pay data report, with specified wage information, to the California Department of Fair Employment and Housing. Such reports would be publicly available.

OTHER FEDERAL AND STATE DEVELOPMENTS

Class Action Waivers in Arbitration Agreements—*Epic Systems Corp. v. Lewis*

On May 21, 2018, the U.S. Supreme Court, in a 5–4 decision, held "that arbitration agreements providing for individualized proceedings must be enforced, and neither the [Federal] Arbitration Act's saving clause nor the [National Labor Relations Act] suggests otherwise."[1] In other words, class action waivers in arbitration agreements are enforceable. In response to *Epic Systems Corp.*, congressional Democrats recently introduced H.R. 7109, which would overturn the *Epic Systems Corp.* decision and, importantly, prohibit agreements that require future employment disputes to be arbitrated.

Recommendations for Employers. Although H.R. 7109 is highly unlikely to become law, employers can expect the California Legislature to continue to introduce similar measures designed to overturn—or at least evade or diminish the impact of—the *Epic Systems Corp.* decision, and other measures that will attempt to void and prohibit arbitration agreements generally. With the appointment and confirmation of new Justice Brett Kavanaugh, we expect no change in the pro-arbitration majority on the U.S. Supreme Court. If anything, that majority is stronger now than before the retirement of Justice Anthony Kennedy. Every employer should consider, based upon the nature of its workforce, the location of its employees, and other relevant factors, whether to adopt an arbitration program and whether in such a program to include a class action waiver.

Employer Conduct with Federal Immigration Officials—AB 450 and *U.S. v. California*

Assembly Bill 450, which took effect on January 1, 2018, generally limits a California employer's ability to voluntarily comply with federal immigration authorities:

- Except as otherwise required by federal law, employers may not voluntarily allow an immigration enforcement agent to enter nonpublic areas of a place of labor unless the agent provides a judicial warrant. The employer may, however, take the agent to a nonpublic area where employees are not present to verify whether the agent has a judicial warrant, as long as the employer does not give the agent consent to search that area.
- Employers may not voluntarily allow an immigration enforcement agent to access, review, or obtain an employee's records without a subpoena or warrant, with the exception of I-9 Employment Eligibility Verification forms and other forms for which a Notice of Inspection has been provided to the employer.
- Employers must provide their employees notice of certain immigration enforcement actions. For example, an employer must provide notice to an employee within 72 hours of receiving a notice of inspection for I-9 Forms or other employment records by an immigration agency. Additionally, once an employer has received the results of that inspection, the employer has 72 hours to provide the affected employee a copy of the written results and the obligations of both the employer and the affected employee that arise from the results of the inspection.

On July 5, 2018, Judge John A. Mendez of the Eastern District of California held that, while the employee-notice provision of Assembly Bill 450 (third bullet point above) is a permissible exercise of California's sovereign power, the other Assembly Bill 450 provisions impermissibly infringe on the sovereignty of the United States. The court granted a preliminary injunction enjoining California from enforcing those impermissible provisions of Assembly Bill 450. *U.S. v. California*, 314 F.Supp.3d 1077 (E.D. Cal. 2018).

Recommendations for Employers. Until further notice, employers will not be penalized for voluntarily allowing an immigration enforcement agent to enter nonpublic areas of a place of labor, or for voluntarily allowing an immigration enforcement agent to access, review, or obtain an employee's records. However, the onerous notice provision remains unaffected by the injunction. An employer who receives a notice of inspection of I-9 forms or other employment records by an immigration agency must give notice to the employees within 72 hours of receipt of such a notice. Further, once the results of an inspection are obtained, the employer must provide the affected employee(s) with a copy of the results within 72 hours, including any obligations that the affected employee(s) may have as a result of the inspection.

ENDNOTES

1 Syllabus, *Epic Systems Corp. v. Lewis*, 584 U.S. _____ (2018).

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