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Courtside Legal Update

Major Changes in California Law for Employers

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This year the California Legislature passed new laws that drastically change the responsibilities of employers in California. What do the new laws mean for you as an employer?

Classification of Employees Versus Independent Contractors

The California Supreme Court issued a seminal ruling in *Dynamex Operations W. v. Superior Court* (2018) 4 Cal. 5th 903 on April 30, 2018. This case substantially limits the ability to classify individuals as independent contractors as opposed to employees. Under earlier case law, there were various elements to consider as to whether an individual could properly be classified as an independent contractor. In other words, there was wiggle room to argue that an individual should be classified as an independent contractor because there was vagueness in the "wage and hour" laws and regulations. This is no longer the case.

The California Supreme Court chose to clarify previous decisions regarding wage and hour regulations and recognized that the purpose of wage and hour laws are to (1) "[E]nsure that such workers are provided at least the minimal wages and working conditions that are necessary to enable them to obtain a subsistence standard of living and to protect workers' health and welfare"; (2)

Protect those law-abiding businesses that comply with the wage and hour laws and regulations from the unfair competition of those businesses that do not comply; (3) Prevent the public at large from having to "assume the responsibility for the ill effects to workers and their families resulting from substandard wages or unhealthy and unsafe working conditions."

The California Supreme Court applied the "ABC Test" and ruled that in order for an individual to be classified as an independent contractor, the hiring entity (i.e. the employer) must be able to prove all the following:

(A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact, (B) that the worker performs work that is outside the usual course of the hiring entity's business, and (C) that the worker is customarily engaged in an independently established trade, occupation, or business ….

The court clearly stated that the presumption is that a hired individual is an employee and that independent contractor status is narrowly applicable.

New Requirements for Sexual Harassment Training

The California legislature responded to the *#MeToo* movement by enacting new laws that govern sexual harassment training in the workplace. Under prior law, sexual harassment, gender harassment, and abusive conduct training was required for supervisory employees once every two years for employers with fifty or more employees.

As of January 1, 2019, all employers with **five or more employees** are required to provide sexual harassment training. Training must be provided before January 1, 2020 and must be conducted once every two years thereafter. The new training requirements require employers to provide at least **two hours of sexual harassment training to all supervisory employees and at least one hour to all non-supervisory employees**. The training must include practical examples aimed at instructing supervisors in prevention of harassment, discrimination, and retaliation. Further, the training must be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation. Our firm can help you by providing that training.

Abusive Conduct in the Workplace

The legislature raised the bar again for employers in SB 1343. Employers with **five or more employees** are also now required to include "**prevention of abusive conduct**" as part of their sexual harassment training. This is important because it can argued that this give a foot in the door for plaintiff's lawyers to argue that "abusive conduct" alone, unrelated to sexual harassment, creates liability to an employer. However, there no case or statute we are aware of that establishes "abusive conduct" as an actionable independent claim in court. But it is defined below and provides employers with a responsibility to address this type of conduct:

"Abusive conduct" means conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious.

Impact on Employers

In an ever changing legal atmosphere, employers should exercise an abundance of caution when addressing these major changes. The severe ramifications of non-compliance with these laws can devastate small businesses and large businesses alike. Employers should seek qualified legal counsel to assess employment concerns and ensure they are in compliance with these new laws.

1. Reconsider all of your independent contractor relationships to consider whether they should be classified as employees.
2. Provide qualified training to prevent harassment. Do not focus only on sexual harassment. Include the prevention of "abusive conduct."

We can help you determine whether your independent contractors are properly classified. Furthermore, our firm also provides the required training in the prevention of sexual harassment and abusive conduct. Contact us soon before it's too late.

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