



IN-DEPTH DISCUSSION

California's Newest Laws: It's Shocktober for Employers!

BY BRUCE SARCHET, CORINN JACKSON, AND BETSY CAMMARATA ON OCTOBER 1, 2018

The September 30, 2018 deadline has come and gone for Governor Jerry Brown to evaluate the bills passed by the California legislature this year. In his last hurrah, Governor Brown has signed into law a jaw-dropping number of bills that pertain to labor and employment issues, ranging from expanded liability and training obligations surrounding sexual harassment to meal breaks for certain commercial drivers.

Now that the dust has settled in Sacramento, we briefly review the most significant developments applicable to private employers operating in California. On the whole, and unless otherwise indicated, these new laws will take effect on January 1, 2019, leaving employers precious little time to prepare. We'll also highlight a few bills that didn't make the final cut.

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Antidiscrimination and Antiharassment Measures. We begin our round-up with several new laws intended to increase diversity, to shed light on harassment complaints, and to clarify the types of individuals who may be liable for sexual harassment in California.

Board of Directors: Female Members. Our first item, SB 826, represents one of the most controversial bills that Governor Brown approved this year. SB 826 requires publicly held corporations, with principal executive offices located in California, to include women directors on their boards. Covered corporations must have at least one female director by the close of the 2019 calendar year. By the end of 2021, corporations with five or more directors on the board must include at least two female members. And boards with six or more board seats must include at least three women. Penalties will be imposed for failure to timely file board member information, if mandated by regulation; penalty amounts start at \$100,000 for a first violation and rise to \$300,000 for subsequent violations.

The bill also requires the California Secretary of State to issue annual public reports indicating the number of compliant corporations, the number of corporations that moved their domestic headquarters in or out of California per year, and the number of publicly held corporations that were covered by the law in the prior year but are no longer publicly traded.

Governor Brown acknowledged that “numerous objections” and “serious legal concerns” have been raised about SB 826. In his signing message, he recognized those potentially fatal flaws but doubled-down on the statute, arguing that “recent events in Washington, D.C.—and beyond—make it crystal clear that many are not getting the message.” He explained that “[g]iven all the special privileges that corporations have enjoyed for so long, it’s high time corporate boards include the people who constitute more than half the ‘persons’ in America.”

Harassment Complaints as Privileged Communications. In July, Governor Brown signed AB 2770, which treats internal sexual harassment determinations and complaints as “privileged communications” if they are disclosed without malice.¹ Statements designated as “privileged” cannot be used to support a defamation claim under state law. For example, privileged statements already include communication from a former employer to a potential employer concerning the job performance and qualifications of a job applicant. Accordingly, if a potential employer asks a former employer if it would rehire the applicant, it is privileged communication for the employer to say it would not rehire the applicant based on his or her job performance. AB 2770 extends the scope of that privilege to allow a former employer to say it would not rehire an applicant based on the employer’s determination that the former employee committed sexual harassment. The law also amends the section of the privileged communication law to include complaints of sexual harassment made by an employee to an employer.

Harassment Liability: The Casting Couch & Capitol Hill Amendments. Given the harassment scandals that have rocked both the entertainment industry and various governing bodies in California, Governor Brown agreed to an amendment of the Civil Code that includes additional examples of the types of defendants who may be liable for unlawful harassment. [SB 224](#) explains that a defendant may be liable for sexual harassment if the plaintiff can show that the defendant “holds himself or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party.” Statutory examples of potential defendants now include elected officials, lobbyists, directors, and producers.

Antiharassment Training. As of today, California law generally requires employers with 50 or more employees to provide supervisory personnel with training regarding sexual harassment and similar prohibited conduct. Governor Brown signed several training-related bills that impose additional duties on employers in the Golden State.

Extension to Smaller Employers & All Employees. Under [SB 1343](#), employers with five or more employees are obligated to provide antiharassment training. In addition to applying the supervisory training requirement to smaller employers, SB 1343 mandates sexual harassment training to all *non-supervisory* employees.

The first round of training must be completed by January 1, 2020, and all training must be repeated every two years. Beginning in 2020, training will also be mandated for seasonal and temporary employees, as well as for seasonal and migrant agricultural workers. This new law requires the Department of Fair Employment and Housing to develop one- and two-hour online training courses, to be posted with other resources on the agency's website.

In-Home Supportive Services Employers. Meanwhile, [AB 3082](#) stakes out first steps for antiharassment training for entities covered by the In-Home Supportive Services (IHSS) program, which provides residential services to qualified aged, blind, and disabled citizens. The bill requires the State Department of Social Services, in consultation with stakeholders, to develop, by September 30, 2019, both educational material and a “proposed method for uniform data collection to identify the prevalence of sexual harassment in the [IHSS] program.”

Talent Agencies. The newly-enacted [AB 2338](#) requires talent agencies to satisfy certain notice obligations in order to be licensed in the state. Talent agencies must provide “educational materials regarding sexual harassment prevention, retaliation, and reporting resources to an adult artist within 90 days of agreeing to representation by the licensee or agency procurement of an engagement, meeting, or interview, whichever comes first.” Educational materials concerning nutrition and eating disorders are also mandatory. And before a minor may obtain an entertainment work permit, both the minor and his or her parent or guardian must complete similar antiharassment training. Under AB 2338, talent agencies must retain records for three years demonstrating compliance with these requirements.

Arbitration, Confidentiality, and Non-Disparagement Provisions. The #MeToo movement has resulted in criticism of various types of employment agreements, including arbitration and non-disclosure agreements. The legislature presented Governor Brown with numerous bills attempting to limit the use of such agreements as they relate to prohibited harassment in the workplace.

Governor Brown signed three of these bills into law. The first, [AB 3109](#), nullifies any term in a contract or settlement agreement that waives a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment. This law applies where "the party has been required or requested to attend the proceeding pursuant to a court order, subpoena, or written request from an administrative agency or the legislature."

[SB 820](#) focuses on confidentiality clauses in settlement agreements. The law prohibits terms in a settlement agreement that prevent the disclosure of factual information relating to claims of sexual assault, sexual harassment, harassment or discrimination based on sex, or retaliation for filing a claim of sexual harassment. Moreover, it precludes courts from restricting the disclosure of such facts, by stipulation or otherwise, in relevant civil proceedings. SB 820 does not ban provisions precluding the disclosure of a settlement payment *amount*. In addition, "a provision that shields the identity of the claimant and all facts that could lead to the discovery of his or her identity, including pleadings filed in court, may be included within a settlement agreement at the request of the claimant."

Finally, [SB 1300](#) curtails an employer's ability to utilize non-disparagement clauses and certain waivers for claims asserted under the California Fair Employment and Housing Act (FEHA). The bill 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 sign a release of a claim or right," including any release covering claims against an employer, the right to file and pursue civil action, or the ability to notify any court, law enforcement, or governmental agency. SB 1300 also prohibits non-disparagement or other agreements that would "deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment." These restrictions do not apply to "a negotiated settlement agreement to resolve an underlying claim . . . 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," so long as such agreement is voluntary and involves valuable consideration.

On another note, SB 1300 encourages (but does not require) employers to provide bystander intervention training. It also declares the legislature's intent about the standard of review to be used for evaluating sexual harassment claims.

Contractor Liability: Construction. Last year, California enacted a law ([AB 1701](#)) making direct contractors liable, under certain types of construction contracts, for unpaid wages, benefits, or contributions that a subcontractor owes for labor connected to the contract. AB 1701 further required subcontractors to provide required payroll records upon a direct contractor's request.

When approving AB 1701, Governor Brown explained that the sponsors of that law committed to introduce legislation in 2018 to clarify some confusion over its scope. Those sponsors delivered on their promise, in the form of [AB 1565](#), which Governor Brown signed on September 19, 2018. This bill strikes language providing that the direct contractor's liability for unpaid wages or benefits is in addition to any other existing rights and remedies. AB

1565 also explains that, in order for a direct contractor (or a higher-tiered subcontractor) to withhold disputed sums for a subcontractor's failure to provide information, the contractor must specify in the relevant contract the documents and information that must be provided on request. This legislation took immediate effect.

Contractor Liability: Port Drayage Customers. Governor Brown also approved a measure extending wage and hour liability to customers of port drayage services. SB 1402 applies to customers, with 25 or more employees, that rely on port drayage motor carriers to perform transportation services. The statute covers customers that directly engage a carrier as well as those that indirectly hire a carrier through a freight forwarder, motor transportation broker, ocean carrier, or other agent. Relevant services include the movement of cargo or intermodal equipment by a commercial motor vehicle within California, where the point-to-point movement has either its origin or destination at a port.

Under SB 1402, the Division of Labor Standards Enforcement (DLSE) will create and post on its website a list of port drayage motor carriers with any unsatisfied final court judgments, tax assessments, or tax liens that may be released to the public under federal and state disclosure laws. Customers that use a port drayage motor carrier appearing on that list will be held jointly and severally liable with the motor carrier for port drayage services obtained after the date the motor carrier appeared on the list. In other words, a motor carrier on the DLSE list and its customer will share civil responsibility and liability owed to port drayage drivers for port drayage services, for the full amount of unpaid wages, unreimbursed expenses, damages and penalties for:

- minimum, regular, or premium wages unpaid by the motor carrier, including for rest and recovery periods;
- unlawful wage deductions made by the motor carrier;
- the commercial driver's unreimbursed out of pocket business expenses not paid by the commercial driver as required by law;
- civil penalties for failing to secure workers' compensation insurance;
- damages or penalties due to the driver or the state for the motor carrier's failure to pay wages owed; and
- any applicable interest on the above.

Motor carriers are obligated to provide notice to customers of any unsatisfied judgments and the text of the new law. Nonetheless, a motor carrier's failure to provide the notice is *not* a defense to joint and several liability.

Human Trafficking Training Requirements. Existing California law requires certain businesses to post notice pertaining to slavery and human trafficking. Two new laws will obligate specific types of employers to provide training on these topics as well.

Hotels and Motels. The first measure, SB 970, applies to hotel and motel employers. By January 1, 2020, such employers must provide "at least 20 minutes of classroom or other effective interactive training and education regarding human trafficking awareness." Training must be delivered to any employee who is likely to come into contact with victims of human trafficking, such as "an employee who works in a reception area, performs housekeeping duties, helps customers in moving their possessions, or drives customers." SB 970 identifies several topics to be covered in the training curriculum and requires the training to be repeated every two years.

Mass Transit Employers. AB 2034 imposes similar training requirements on mass transit employers, *i.e.*, those that operate intercity passenger, rail, light rail, or bus facilities. Training is mandatory for employees who may interact with victims, or who may receive reports from other employers about suspected human trafficking. Under AB 2034, training must include specified components and must be completed by January 1, 2021.

Labor Organizing: Home Care Aide Registry. Although he vetoed a nearly identical bill last year, Governor Brown endorsed a measure (AB 2455) that requires the disclosure of certain information about home care workers to labor organizations.

AB 2455 amends the California Home Care Services Consumer Protection Act, which governs the licensing and registration of home care organizations. Currently, the State Department of Social Services maintains a registry of home care aides and applicants on its website. Although consumers can use this registry to confirm that a particular aide is licensed, an aide's personal contact information is not available to the public.

AB 2455 will require the disclosure of certain information, however, to labor organizations. For any new registrations or renewals of home care aide registrations on or after July 1, 2019, the Department must provide an electronic copy of a home care aide's name, telephone number, and cell phone numbers to a labor union, upon request. The statute requires advance written notice of this potential disclosure to home care aides and applicants beginning in July 2019. Aides may opt out by requesting that their contact information not be shared. Unions that receive aide contact information are forbidden from disclosing it to other parties or from using it for reasons other than the organization and representation of employees.

Lactation Accommodation. Under the California Labor Code, all employers currently must grant "a reasonable amount of break time to accommodate an employee desiring to express breast milk" for a child.² Employers also must provide employees with a location, other than a toilet stall, that is near their work area, to express milk in private.

A newly-enacted bill—AB 1976—clarifies that the lactation space must be some location other than a bathroom. This measure seems to eliminate the possibility that an employer could provide space *within* a bathroom as long as the space is not a toilet stall. It also details the circumstances under which an employer may provide a temporary lactation location and how agricultural employers may comply. Under AB 1976, employers may be exempt if they can show undue hardship and if they otherwise make reasonable efforts to provide a lactation space other than a toilet stall.

Rest and Meal Breaks. Governor Brown approved two bills affecting the rest or meal break obligations of employers in specified industries.

Petroleum Facilities. Under [AB 2605](#), employers operating petroleum facilities³ may require employees who hold safety-sensitive positions to be on call, to carry phones (or other instant communication devices), and to respond to emergencies during their rest periods. If safety-sensitive employees must work during a rest period to address an emergency, they are entitled to another rest period, to take place “reasonably promptly” after the situation is resolved. If the rest period cannot be rescheduled, the employer must pay the employee one hour of pay at his or her regular rate for the missed break.

AB 2605 took effect when signed on September 20, 2018, does not apply retroactively, and is scheduled to sunset on January 1, 2021.

Commercial Drivers. [AB 2610](#) creates an exception for meal breaks typically afforded certain commercial motor vehicle drivers. The amended law applies to a commercial driver, employed by a motor carrier transporting nutrients and byproducts from a commercial feed manufacturer subject to section 15051 of the Food and Agricultural Code, to a customer located in a remote rural location.⁴ Any such driver may start a meal period after six hours of work (rather than within the fifth hour of work), if the driver’s regular rate of pay “is no less than one and one-half times the state minimum wage rate and the driver receives overtime compensation.”

Salary History and Equal Pay. As we’ve previously reported, California’s statewide salary history ban took effect on January 1, 2018.⁵ Earlier this summer, however, Governor Brown signed [AB 2282](#), which amends the salary history law and takes effect on January 1, 2019.⁶

AB 2282 clarifies that employers need not provide pay scales except to applicants, upon their request, who have completed at least one interview. Employers need not divulge their pay scales to every applicant, in other words, or even current employees. AB 2282 also provides some guidance regarding the questions an employer may ask during an interview with an applicant. It specifically authorizes employers to ask applicants about their “salary expectations” for the position sought. Finally, AB 2282 fortifies the distinction between job applicants and current employees. More specifically, it provides that, when making internal salary decisions regarding current employees, an employer may base compensation decisions on the current employees’ salary history.

Of course, California employers must bear in mind that they may not pay any of their employees—including current employees—less than they pay employees of a different sex, race or ethnicity for substantially similar work.⁷

Workplace Safety. [AB 2334](#) amends the Labor Code with respect to certain workers’ compensation and health and safety provisions. As to the former, the bill authorizes the Department of Industrial Relations (DIR) to publish information about “the costs of administration, workers’ compensation benefit expenditures, and solvency and performance of public self-insured employers’ workers’ compensation programs.” No data may be released concerning private self-insured employers or individual identifiable claimants.

AB 2334 also clarifies that, under the California Health and Safety Code, record-keeping violations continue until corrected or discovered. The statute further acknowledges that the U.S. Occupational Health and Safety Administration (OSHA) issued a proposed rule to relax illness and injury reporting obligations adopted under the Obama administration. AB 2334 provides that if OSHA "eliminate[s] or substantially diminishe[s] the requirement that employers electronically submit OSHA injury and illness data," the DIR will convene an advisory committee to assess what changes might be needed at the state level to protect the goals of current OSHA requirements.

Additional Noteworthy Laws. While we cannot recount every piece of legislation adopted in the Golden State, we list a few more new laws that may affect private employers.

Bill	Topic
<u>AB 375,</u> <u>SB 1121</u>	California Consumer Privacy Act ⁸ (effective January 1, 2020) and amendments
<u>AB 2587</u>	Technical amendments to paid family leave (the Family Temporary Disability Insurance Program)
<u>AB 2844</u>	Written agreements for commissions payable to insurance broker-agents
<u>SB 1252</u>	Employee records: clarifies that employees are entitled to receive a copy of their employment records, in addition to their right to inspect
<u>SB 1412</u>	Criminal history regulations: additional circumstances where employers may ask an applicant about, or seek information about, a particular conviction
<u>SB 1428</u>	Minor work permits: limited restriction on denials based on grades or attendance
<u>SB 1500</u>	Antidiscrimination protections for members of federal reserve components of the U.S. Armed Forces and State Military Reserve
<u>SB 3247</u>	Arbitration: requires a court to order arbitration pursuant to a written agreement between the parties unless there are grounds for rescission (rather than revocation)

All in all, California employers have numerous, substantial compliance challenges to tackle before they ring in the new year.

Significant Vetoes. Finally, we pay our respects to a number of major employment-related bills that died on Governor Brown's desk.

Bill	Topic	Reason for Veto
<u>AB 1867</u>	Retention of records of harassment complaints	Per <u>veto message</u> : unwarranted in light of existing, sufficient retention requirements. AB 1867 could have obligated employers to keep records for decades, even for unfounded complaints
<u>AB 1870</u>	Extension of deadline for filing employment discrimination claims with Department of Employment and Housing to three years	Per <u>veto message</u> : current filing deadline (one year) is long-standing and sufficient
<u>AB 2079</u>	Janitorial services: clarification of record-keeping and registration requirements for providers	Per <u>veto message</u> : Labor Commissioner still implementing the underlying Property Service Worker Protection Act; prefer to give it time to fully implement and promulgate regulations, before amending
<u>AB 2496</u>	Janitorial services: rebuttable presumption that workers of property service employers are "employees"	Per <u>veto message</u> : statutory changes premature while the legislature evaluates a 2018 California Supreme Court decision that established a new test for classifying independent contractors ⁹
<u>AB 2732</u>	Janitorial services: prohibits confiscation of immigration documents and requires dissemination of "Worker's Bill of Rights" to all employees	Per <u>veto message</u> : requirement that each covered employee "a new and detailed list of rights related to labor trafficking" is excessive and overly burdensome

<u>AB 3080</u>	Restrictions on non-disparagement and mandatory arbitration agreements	Per <u>veto message</u> : according to Governor Brown, this bill "plainly violates federal law" (the Federal Arbitration Act)
<u>AB 3081</u>	Anti-sexual harassment measures: joint liability, protection for victims, and rebuttable presumption of retaliation	Per <u>veto message</u> : existing protections are sufficient, and the bill is confusing to the extent new protections are asserted
<u>SB 937</u>	Lactation accommodation	Per <u>veto message</u> : unnecessary because Governor Brown signed a different (and narrower) bill on the subject, AB 1976

¹ Bruce Sarchet, *California Enacts a Privileged Communication Law Regarding Sexual Harassment Claims*, Littler ASAP (July 12, 2018).

² Cal. Lab. Code § 1030.

³ "Petroleum facilities" is defined in the bill as "petroleum refineries, marine and onshore terminals handling crude oil and petroleum products, bulk marketing terminals, asphalt plants, gas plants, catalyst plants, carbon plants, and any other facility involved in the processing, refining, transport, or storage of crude oil or petroleum products."

⁴ See Cal. Food & Agric. Code § 15051 (regulating the licensing of locations "where commercial feed is manufactured, distributed, sold, or stored for later sale").

⁵ Bruce Sarchet, *New California Law Prohibits Salary History Inquiries*, Littler ASAP (Oct. 13, 2017).

⁶ Alexandra Hemenway, *California Provides Guidance Regarding Its Salary History Ban*, Littler ASAP (Aug. 7, 2018); see also *New and Already Improved! California Clarifies Its Salary History Ban*, Littler Podcast (Aug. 21, 2018).

⁷ If there is a wage differential between employees of a different sex, race or ethnicity who perform substantially similar work, California employers may avoid liability only if they can establish the disparity is due to one of the statute's four permitted exceptions: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a bona fide factor other than sex, race or ethnicity, such as education,

training or experience, that is job-related with respect to the position in question. Thus, even though employers may use current employees' salary history in making compensation decisions going forward, they should pay close attention to any resulting wage disparities and any potentially applicable exceptions.

⁸ Philip L. Gordon and Andrew Gray, *Unraveling the Newest Development in the Data Protection Juggernaut: What Does the "California Consumer Privacy Act of 2018" Mean for Employers?*, Littler Insight (July 9, 2018).

⁹ See William Hays Weissman, *The Implications of Dynamex Operations West v. Superior Court: California's Adoption of the ABC Test for Purposes of the Wage Orders*, Littler Report (June 11, 2018); Stephen Melnick, *California Announces a New Wage and Hour Independent Contractor Test*, Littler ASAP (May 1, 2018).

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