Folger Levin LLP

NEW LEGAL DEVELOPMENTS
FOR CALIFORNIA INDEPENDENT SCHOOLS
2020

Get ready for 2020!

The California legislature was busy at the end of the 2019 term, adding many laws that will impact California independent schools in the coming year. As you'll see from the summaries below, key items to add to your compliance "to do" lists include the following:

- ✓ Review record retention policies in light of the new statute of limitations for claims of childhood abuse
- ✓ Review any employee arbitration agreements before reissuing them in 2020
- ✓ Review status of all independent contractors for compliance with California's new law on independent contractor classification
- ✓ Start preparing for new standards for medical exemptions from vaccination requirements
- ✓ Update leave of absence policies and notices
- ✓ Add temporary and seasonal employees to the 2020 harassment prevention training schedule
- ✓ For the 2020-2021 school year, update student IDs and include harassment prevention information in orientation for all students

Start on that list soon but enjoy the upcoming holidays first!

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NEW LAWS FOR SCHOOLS

NEW LAW EXPANDS THE STATUTE OF LIMITATIONS FOR CLAIMS OF CHILDHOOD SEXUAL ASSAULT, REVIVES EXPIRED CLAIMS

AB 218, a new law effective in 2020, will dramatically extend the statute of limitations for claims of childhood sexual assault and put schools and other organizations at risk for claims that sexual assault happened any time in the past. In addition to extending the statute of limitations, AB 218 also allows a claimant to recover three times the claimant's actual damages against a party that is found to have engaged in a concerted effort to hide evidence relating to childhood sexual assault.

The current statute of limitations requires claims against parties other than the perpetrator of the abuse—third parties such as schools, churches and other organizations where a perpetrator was employed—to be brought generally no later than the time a claimant turns twenty-six. Under AB 218, claims against these third parties will generally need to be brought by a claimant's fortieth birthday. A claimant is permitted to bring claims against third parties after age forty, however, if the claimant can show (1) that the third party knew or should have known of any misconduct by an employee, volunteer, representative, or agent that created a risk of childhood sexual assault, or (2) the third party failed to take reasonable steps or implement reasonable safeguards to avoid acts of childhood sexual assault. If the claimant can make this showing, the claimant can bring the action at any age so long as the claimant brings the claim within five years of when the claimant knew or should have discovered that their injury was caused by the prior abuse.

AB 218 dramatically extends the statute of limitations for claims of childhood sexual assault and put schools and other organizations at risk for claims that sexual assault happened any time in the past.

The new law also revives claims that were barred by the prior statute of limitations. Adults of any age whose claims were previously barred by the prior statute of limitations will have the longer of three years (until December 31, 2022) or the period provided by the extended statute of limitations to bring claims for childhood sexual abuse occurring at any time in the past.

What should schools do?

Schools should take steps now to preserve any records that still exist concerning past complaints of abuse and any evidence of past insurance coverage.

NEW LAWS OVERHAUL REQUIREMENTS FOR IMMUNIZATION MEDICAL EXEMPTIONS

Two new laws, SB 276 and SB 714, make significant changes to the requirements for physicians to issue medical exemptions from state immunization requirements and the requirements for schools to admit or continue to enroll students who are not fully immunized. They also create a new state review process for medical exemptions.

Starting January 1, 2021, physicians must use an electronic, standardized form for all medical exemptions. The form will request detailed information in support of the medical exemption and will be transmitted directly to the California Immunization Registry.

The new form will be the only documentation of a medical exemption that schools can accept beginning January 1, 2021 and, beginning July 1, 2021, a school cannot "unconditionally admit or readmit" a student or "admit or advance" any student to 7th grade unless the student is fully immunized or has a medical exemption that complies with the new law. However, medical exemptions issued before January 1, 2020, are grandfathered until the student enrolls in the next grade span, defined as: (a) birth to preschool, (b) transitional/kindergarten to 6th grade, and (c) 7th to 12th grade. Due to the one-year gap between the cutoff date for the grandfathered exemptions and the new requirements taking effect, any student with an exemption issued in 2020 will need to get a new exemption that complies with the new law to enroll in any grade in 2021.

Schools must submit a report at least annually on the immunization status of new entrants, and the state Department of Public Health will review all

medical exemptions from:

- Schools with an overall immunization rate of less than 95%;
- Schools that do not submit the required report; and
- Physicians and surgeons submitting more than five exemptions per year.

Schools should review relevant policies to ensure they comply with the new legal requirements for vaccinations.

The Department of Public Health and schools cannot accept exemptions under certain circumstances, and the Department has the authority to revoke exemptions--including grandfathered exemptions--through its review. The law provides that the Department will notify the school if an exemption is denied or revoked.

What should schools do?

Schools should review relevant policies to ensure they comply with the new legal requirements for vaccinations. Staff who are responsible for the review and recordkeeping of immunization documentation should be made aware of the new requirements and should expect further guidance from the Department of Public Health before the requirements take effect.

PRIVATE SCHOOLS CAN NOW POST NONDISCRIMINATION POLICY STATEMENT ON WEBSITE TO COMPLY WITH IRS PUBLICATION REQUIREMENT

The Internal Revenue Service's Revenue Procedure 75-50 requires private schools to adopt and publicize a racially nondiscriminatory policy as to students as a condition of receiving and maintaining a tax exemption. The IRS has explained that a racially nondiscriminatory policy means that the school admits the students of any race, color, or national or ethnic origin

> "to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs."

Among other requirements, the IRS rules mandate that schools publicize their nondiscriminatory policy to the community serviced by the school. Until now, that meant either publishing a policy statement in a newspaper of general circulation or broadcasting its policy on radio or television stations.

IRS Revenue Procedure 2019-22 (May 28, 2019) now adds a third, and likely preferable, option that schools may use to publicize their policy: the school's website. To comply with IRS guidance, the policy must be posted on the school's "primary publicly accessible Internet homepage at all times during its taxable year (excluding temporary outages due to website maintenance or technical problems) in a manner reasonably expected to be noticed by visitors to the homepage." The IRS provides the following additional guidance:

- Access to the homepage cannot require a visitor to input information such as an email address or username and password.
- In determining whether a notice is sufficiently noticeable, the IRS will consider factors such as the size, color, and graphic treatment of the notice in relation to other parts of the homepage, whether the notice is unavoidable, whether other parts of the homepage distract from the notice, and whether the notice is visible without requiring a visitor to do anything other than scroll.
- A link on the homepage to another page where the policy appears or placing the notice in a carousel, dropdown, or hover is not acceptable.
- If the school does not have its own website but has webpages contained in a website, the policy must appear on its primary landing page within the website.

Schools may want to adopt this option to publicize their nondiscriminatory policy—not only because it may be easier and less expensive—but also because it seems more likely to effectively communicate the policy.

NATIONAL DOMESTIC VIOLENCE HOTLINE NUMBER MUST BE PRINTED ON THE BACK OF STUDENT ID CARDS

In addition to the existing requirement to print the telephone number for the National Suicide Prevention Lifeline on students' ID cards, SB 316 requires schools that serve pupils in any of grades

7 to 12 and that issue student ID cards to print the telephone number for the National Domestic Violence Hotline (1-800-799-7233) on the back of the cards. This requirement is effective October 1, 2020. Covered schools should ensure any ID cards printed for the 2020-2021 school year contain the required phone numbers.

CHANGE TO STUDENT SEXUAL HARASSMENT PREVENTION POLICY DISTRIBUTION REQUIREMENTS

California law requires all public and private schools to publish a policy prohibiting sexual harassment of students (with different requirements than harassment prevention policies for employees). A minor change made by AB 543 now requires schools to provide their student sexual harassment prevention policy as part of any orientation program not only for new students, but also for continuing students. AB 543 is a good reminder for schools to review policies concerning student harassment prevention to ensure they align with best practices and legal requirements.

In reviewing student harassment prevention policies, schools should consider suggestions in a 2019 National Association of Independent Schools *Legal Advisory on Allegations of Student-on-Student Sexual Misconduct in the Independent School Setting*. The *Advisory* provides schools with a helpful framework for thinking through legal and policy considerations related to student-to-student sexual misconduct.

WAGE AND HOUR

AB 5: *DYNAMEX'S* ABC TEST CODIFIED AND EXPANDED; EXEMPTIONS ADDED FOR SPECIFIC OCCUPATIONS AND TYPES OF CONTRACTS

Last year, our Newsletter discussed the California Supreme Court's decision in *Dynamex*, which adopted the ABC test to determine whether a worker should be classified as an employee or independent contractor for purposes of the California wage orders. This year, it's the legislature and governor who have made their mark in this area with the passage of AB 5.

AB 5 codifies the ABC test in the Labor Code. As a reminder, the ABC test provides that a worker is an employee rather than an independent contractor, unless the hiring entity demonstrates that all of the following conditions are satisfied:

A. The person 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; and

B. The person performs work that is outside the usual course of the hiring entity's business; and

C. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Additionally, AB 5 expands the application of the ABC test to all provisions of the Labor Code, unemployment insurance and, effective July 1, 2020, workers' compensation, meaning the ABC test will be used to determine whether workers are covered by these laws.

AB 5 also exempts numerous occupations and business relationships from the ABC test, in some instances requiring analysis of multiple criteria to determine whether the exemption applies. If the criteria are met and an exemption does apply, the relationship must then be analyzed under the multi-factor *Borello* test that governed prior to *Dynamex*. Some of the exemptions from the ABC test apply to:

- Specific occupations
- Professional service contracts
- Real estate and repossession licensees
- Certain business-to-business contracts
- Construction subcontractors
- Referral agencies
- Motor clubs

Unfortunately, the application of these exemptions is not always straightforward, and employers should consult with counsel to determine how the exemptions may apply to specific scenarios.

> Schools who have not yet assessed whether their current independent contractors are correctly classified after *Dynamex* should not delay in doing so.

Notably, AB 5 did not address the outstanding questions about whether *Dynamex* applies retroactively—it merely states that it is "declaratory of existing law." However, the exemptions do apply retroactively where they would relieve an employer of liability.

While the legislature did not address retroactivity, a California Court of Appeal has held that *Dynamex* does apply retroactively. In *Gonzales v. San Gabriel Transit, Inc.*, 40 Cal. App. 5th 1131 (2019) the court held that there was no reason to deviate from the usual rule that court decisions apply retroactively in civil litigation. Furthermore, the Ninth Circuit has certified the question of retroactivity to the California Supreme Court in *Vazquez, Roman & Aguilar v. Jan-Pro Franchising Int'l,* No. S258191, 2019 Cal. LEXIS 8736 (Nov. 20, 2019).

What should schools do?

Schools who have not yet assessed whether their current independent contractors are correctly classified after *Dynamex* should not delay in doing so. AB 5's expanded application of the ABC test is all the more reason to conduct this analysis to ensure workers are correctly classified. Schools conducting this analysis should be sure to consider whether one of the exemptions under AB 5 applies.

NO VIOLATION FOR INCLUDING FICTITIOUS BUSINESS NAME ON WAGE STATEMENT

Many employers have faced lawsuits for technical violations of the Labor Code's wage statement requirements. In *Savea v. YRC, Inc.*, 34 Cal. App. 5th 173 (2019), an employee sued his employer for violations of California Labor Code section 226(a)(8) because the employer allegedly failed to include the employer's correct name and address, where it used its fictitious business name and did not include the mail stop code (the ZIP+4 digits code). However, the California Court of Appeal affirmed the dismissal of the plaintiff's complaint, holding that an employer may use its "actual, recorded fictitious business name" on the wage statements, and California law does not require the additional four-digit mail stop code.

However, this case is an important reminder for employers to review their wage statements (i.e., the actual pay stubs employees receive with their paychecks) and ensure they meet all the requirements of Section 226(a)(8). Wage statements must include all of the following: (1) gross wages earned; (2) total hours worked by the employee; (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis; (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item; (5) net wages earned; (6) the inclusive dates of the period for which the employee is paid; (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number; (8) the name and address of the legal entity that is the employer; and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

Common errors often involve an hourly or overtime rate that does not show the hours worked at that rate, not including the employer's address, or not clearly indicating a line for missed meal or rest period premiums. Additionally, employers must remember the additional California requirement to list an employee's available paid sick leave on the wage statements or otherwise in writing. Finally, employers should be sure to keep copies of wage statements, or have electronic access to these records, for at least seven years.

BAR ON "NO-REHIRE" PROVISIONS IN SETTLEMENT AGREEMENTS

As of January 1, 2020, California employers may no longer include a "no-rehire" provision in a settlement or severance agreement. A no-rehire provision generally provides that as a condition of the settlement, the employee may not work for the employer or any related entity in the future. The reason employers typically have wanted to include no-rehire provisions in settlement agreements with former employees has been to avoid potential retaliation claims if an employer did not re-hire an employee in the future.

Under the new law, any agreement that settles an employment dispute may not "contain a provision prohibiting, preventing, or otherwise restricting a settling party that is an aggrieved person from obtaining future employment with the employer." If an agreement contains a no-hire provision after January 1, 2020, that provision will be "void as a matter of law and against public policy."

The definition of "aggrieved person" is a person who has filed a claim against that person's employer: (1) in court, (2) before an administrative agency, (3) in an alternative dispute resolution forum, *or* (4) through the employer's internal complaint process. However, because "internal complaint process" is not defined, the term "aggrieved person" may apply widely.

Exceptions: There are a few key exceptions to the law. First, if the employer "has made a good-faith determination that the person engaged in sexual harassment or sexual assault," then an employer may include a no-rehire provision. Second, nothing in the law requires an employer to continue to employ or rehire a person "if there is a legitimate non-discriminatory or non-retaliatory reason" for doing so. Thus, for example, if an employee has embezzled from the company, there is no requirement for the employer to rehire that former employee, and the employee also may be deemed "ineligible for rehire" in the employer's own systems.

What should schools do?

California employers should not routinely include "no-rehire" provisions in standard severance agreements but instead should determine on a case-by-case basis whether AB 749 applies to a specific agreement. Additionally, this is a good opportunity for employers to ensure they have updated their agreements with other recent legal changes, including: (1) updating the California Civil Code section 1542 waiver language; and (2) ensuring that agreements covering claims related to sexual assault or harassment do not have broad confidentiality and non-disparagement sections, as discussed in last year's New Developments Newsletter.

HARASSMENT PREVENTION TRAINING DEADLINE EXTENDED TO JANUARY 1, 2021

At the beginning of 2019, a new California law mandated that employers with five or more employees provide two hours of sexual harassment prevention training to supervisors and one hour of training to non-supervisors, with a compliance deadline of January 1, 2020. The California Department of Fair Employment & Housing (DFEH) was required to provide free on-line training for employers to meet the requirements of the training law. Due to delays in the DFEH's development of the training and confusion over deadlines, the legislature extended the deadline for employers to provide most of the required training to January 1, 2021.

- By January 1, 2021, employers with 5 or more employees must provide:
  - 2 hours of harassment prevention training to all supervisors;
  - 1 hour of harassment prevention training to all non-supervisors; and
  - Additional training every two years thereafter
- Employers that provided training in 2019 are not required to provide refresher training until 2021.

- New non-supervisory employees or employees promoted to supervisor must receive training within six months of hire or promotion.
- Beginning January 1, 2020, employers must provide training to seasonal or temporary employees hired to work for less than 6 months within 30 calendar days of hire or 100 hours of work, whichever occurs first. This means that schools will need to develop a process for providing training to substitutes, specialists and other employees who may work sporadically as well as seasonal athletic coaches.

STATUTE OF LIMITATIONS EXTENDED FOR DISCRIMINATION AND HARASSMENT CLAIMS

Under AB 9, also known as the Stop Harassment and Reporting Extension ("SHARE") Act, California employees now will have three years, rather than one year, to file a workplace discrimination or harassment complaint with the DFEH.

To bring a lawsuit based on discrimination or harassment in California, an individual must first file a discrimination complaint with the DFEH. Employees may ask that the DFEH investigate their complaint or ask the DFEH to issue a Right-to-Sue Notice immediately. Once individuals receive a Right-to-Sue notice, they then have one year to file a lawsuit in court.

With this extension giving employees three years to file a complaint with the DFEH, the law makes clear that it will not extend the statute of limitations for claims that are already barred under the one-year rule. In essence, if an individual did not file a DFEH complaint within the one-year deadline in 2019, AB 9 will not revive that claim.

However, for claims that arose in 2019, the question remains whether on January 1, 2020, those claims will be subject to a one-year or three-year statute of limitations. Although AB 9 does not directly address this question, the Senate Judiciary Committee's position is that for 2019 claims for which the statutes of limitations did not expire, the three-year, rather than one-year statute of limitations would apply.

Thus, as always employers should be sure to investigate all complaints of discrimination or harassment promptly and thoroughly. Additionally, given the expanded timeline to file claims, employers generally should be sure to retain employee records, including payroll records, and personnel and investigation files, for at least seven years.

CALIFORNIA BANS HAIRSTYLE DISCRIMINATION

California is now the first state to enact a ban on hairstyle discrimination. The CROWN Act, "Create a Respectful and Open Workplace for Natural Hair," expands the definition of "race" under the Fair Employment & Housing Act (FEHA) to include hair texture and protective hairstyles and defines protective hairstyles. Employers found to discriminate based on hair texture or protective hairstyles may thus be found to have discriminated based on race.

The California Legislature found that "workplace dress code and grooming policies that prohibit natural hair, including afros, braids, twists, and locks, have a disparate impact on Black individuals as these policies are more likely to deter Black applicants and burden or punish Black employees than any other group." As described by the bill's author, the purpose is to dispel myths about black hair, and to challenge what constitutes professionalism in the workplace. The bill passed unanimously in the California Assembly and Senate.

What should schools do?

Schools should review and update their dress code and grooming policies to ensure compliance with this new law, as well as previous laws that require exceptions to grooming policies for disability and religious accommodations. Employers also should not ban natural hair, afros, braids, twists or locks. However, employers may still require employees to secure their hair for safety and hygienic reasons.

COVERED EMPLOYERS NOW HAVE UNTIL JANUARY 31, 2020 TO PROVIDE EEO-1 COMPONENT 2 DATA

All private employers with 100 or more employees must file an EEO-1 report with the U.S. Equal Employment Opportunity Commission (EEOC). Covered employers must report the race, ethnicity, and gender of their employees by specific job categories, which is referred to as Component 1 data. Under the Obama administration, the EEO-1 form was revised to add Component 2 data, which required employers also to report hours worked and pay data to the EEOC. However, Component 2

requirements were put on hold in 2017 by the Trump administration.

Then, earlier this year, a federal judge lifted the hold and ordered the EEOC to start collecting the Component 2 data. After a long court battle, the EEOC proposed a September 30, 2019, deadline for employers to submit Component 2 data. However, on October 29, 2019, the court ordered the EEOC to "take all steps necessary to complete the EEO-1 Component 2 data collection for calendar years 2017 and 2018 by January 31, 2020." Thus, employers who have not yet submitted Component 2 data for the calendar years 2017 and 2018, should do so as soon as possible, but no later than January 31, 2020.

Employers may find additional resources on the EEO-1 reporting requirements, including Frequently Asked Questions (FAQs), Sample Data Collection Form, Instruction Booklet for Filers, User's Guide, Fact Sheet, and more here.

SOCIAL SECURITY ADMINISTRATION BEGINS ISSUING "NO-MATCH" LETTERS AGAIN

Suspended since 2012, this year the Social Security Administration (SSA) resumed its practice of issuing so-called "No-Match" notification letters. Formally called "Employer Correction Requests," the notices inform employers when there is a mismatch between information on an employee's W-4 and the SSA's records.

The new no-match letters instruct employers to register online and provide any corrections within 60 days of receipt of the letter. Registering online is the only way employers can view the names and Social Security numbers that may need correction. This marks a change from no-match letters issued prior to 2012.

The SSA has stated that it will "not take any action, nor are there any SSA-related consequences, for employers' non-compliance with [the] letters."

What should schools do?

If schools receive no-match letters, they should investigate and contact legal counsel. Employers should not ask an employee to complete a new I-9 (or produce any specific documents) to address the mismatch. The mismatch could arise for innocuous reasons, such as a clerical error, so it is important that no disciplinary action be taken against an employee without further inquiry.

HIRING

NINTH CIRCUIT MAKES REQUIREMENTS STRICTER FOR BACKGROUND CHECKS

Employers who use an outside background check vendor must meet extremely strict requirements under federal, state, and local laws. A Ninth Circuit decision earlier this year made those requirements even stricter. In *Gilberg v. Cal. Check Cashing Stores*, *LLC,* 913 F.3d 1169 (9th Cir. 2019), the Ninth Circuit held that the background check disclosure document provided to applicants must consist solely of the disclosure and may not contain any additional information about rights under various state laws.

As background, the federal Fair Credit Reporting Act ("FCRA") and the California Investigative Consumer Reporting Agencies Act (ICRAA) are two of the laws that govern an employer's use of background check reports. Under FCRA, an employer who wishes to obtain a background check, known as an "investigative consumer report" regarding a job applicant or current employee must provide a "clear and conspicuous disclosure" to the individual and receive written authorization from the individual before obtaining any such report. See 15 U.S.C. § 1681b(b)(2)(A). The disclosure form must "consist solely of the disclosure" notice and be a standalone document. *California law mirrors these federal requirements.* Employers have faced a wave of class action lawsuits for even minor violations under the ICRAA and FCRA.

The Gilberg decision made clear that the FCRA disclosure document must consist solely of the federal disclosure and may not include information about various state law requirements. The Ninth Circuit held that the employer violated state and federal laws when it included the various state law disclosures (most of which did not apply to the applicant) in the same document as the FCRA disclosure.

What should schools do?

Schools should note that this ruling does not affect the criminal background checks California schools conduct using Livescan. If schools do use vendors

to conduct other background checks, such as credit checks or verification of prior employment and education, they should consult with counsel to evaluate the background check notices used by vendors to ensure they meet the very strict requirements of federal, state and local laws.

NON-SOLICITATION REQUIREMENTS ARE NO LONGER PERMISSIBLE UNDER CALIFORNIA LAW

Last year, the case of *AMN Healthcare Inc. v. Aya Healthcare Services., Inc.*, 28 Cal. App.5th 923 (2018), called into question the legality of employee non-solicitation clauses. This year, both a California and federal court have held that employee non-solicitation clauses violate California Business & Professions Code section 16600, California's unfair competition law. In one case, the court specifically held that a non-solicitation clause was "void under California law."

California law has long held that non-competition agreements are generally unenforceable. However, until these recent decisions, non-solicitation agreements were permissible under a 1985 California Court of Appeal case, *Loral Corp. v. Moyes*, 174 Cal. App. 3rd 268 (1985). Post-termination non-solicitation clauses typically ban employees from recruiting employees of their former employer. However, it is now clear from these recent decisions that employers may no longer utilize non-solicitation provisions.

What should schools do?

Employers should remove post-termination non-solicitation provisions from their employment and confidentiality agreements, as well as any separation, severance, or settlement agreements. Employers should also consult with legal counsel to determine what limitations are still permissible under California law.

LEAVE & BENEFITS

CALIFORNIA PAID FAMILY LEAVE INCREASES TO EIGHT WEEKS

As of July 1, 2020, California Paid Family Leave (PFL) wage replacement benefits will increase from six weeks to eight weeks. Employees are eligible for PFL benefits from the EDD when taking time off from work to: (1) care for a seriously ill family member (child, spouse, parent, grandparent, grandchild, sibling, or domestic partner) or (2) bond with a new child within one year of the child's birth, adoption, or foster placement.

Employers should remember that the California PFL program only provides for wage replacement benefits and does not require employers to grant employees additional leave beyond the leave to which they are entitled under other laws, such as the California Family Rights Act or the federal Family and Medical Leave Act.

San Francisco employers should also know that, with the increase in PFL benefits, the amount of supplemental pay required under the San Francisco Paid Parental Leave Ordinance (PPLO) will also increase. The PPLO requires San Francisco employers with 20 or more employees to pay "supplemental compensation" to eligible employees when they receive PFL benefits to bond with a new child. On July 1, 2020, when PFL increases from six to eight weeks, San Francisco employers will also be required to provide eligible employees PPLO supplemental compensation for up to eight weeks.

CALIFORNIA ORGAN DONOR LEAVE EXTENDED

Currently, California employers with 15 or more employees must provide employees with 30 days of paid leave for organ donation and five days of paid leave for bone marrow donation. Effective January 1, 2020, employees also must be provided an additional 30 business days of unpaid leave for organ donation in a one-year-period. Employers must continue to pay premiums for an employee's health benefits during organ or bone marrow donor leave, and this leave does not count against CFRA or FMLA leave entitlements.

UPDATED NOTICES FOR FAMILY AND MEDICAL LEAVES

This year, California agencies updated a number of notices employers are required to post or distribute concerning family and medical leaves under the California's New Parent Leave Act (NPLA) and the California Family Rights Act (CFRA). Employers should make sure they are using the most recent forms:

- An updated *Family Care and Medical Leave and Pregnancy Disability Leave Notice* for employers to post and provide to employees requesting family or medical leave.
- A new *Certification of Health Care Provider* form for employee medical leave or leave to care for a family member with a serious health condition. ***California employers should remember to use this California form rather than the form published by the US Department of Labor, as the federal form seeks information that California employers are not permitted to request.***
- Updated notices: (1) California PFL Benefits (DE2511), and Disability Insurance Provisions (SDI) (DE 2515). Employers must provide these to employees when hired and when they request leaves of absence.
- Employers should also remember that under amendments to the lactation accommodation law discussed below, they are required to provide employees a copy of the employer's lactation accommodation policy when they request leave to care for a new baby.

CALIFORNIA EXPANDS LACTATION ACCOMMODATION REQUIREMENTS

California significantly expanded lactation accommodation requirements this year with the passage of SB 142, including mandating specific provisions to be included in written lactation accommodation policies.

California employers must provide lactation space that is not a bathroom, is in close proximity to the employee's work area, and is "shielded from view and free from intrusion while the employee is lactating." Lactation spaces must also be safe, clean, and free of hazardous materials; contain a place to sit and a surface to place a breast pump and personal items; and have access to electricity or alternative devices, including extension cords or charging stations. Employers also must provide access to a sink with running water and a refrigerator (or another cooling device) suitable for storing milk in close proximity to the employee's workplace. Finally, if a multipurpose room is used for lactation, the use of the room for lactation must take precedence over the other uses, but only while the room is being used for lactation purposes.

Mandated Lactation Accommodation Policy: California employers are also required to develop and implement a lactation accommodation policy that includes: (1) a statement about an employee's right to request lactation accommodations; (2) the process for making a request; (3) an employer's obligation to respond to the lactation accommodations request; and (4) a statement about an employee's right to file a complaint with the Labor Commissioner for any violation of the law regarding lactation accommodations. The policy must be in an employee handbook or other set of policies and must be distributed to new employees and when employees (male or female) ask about or request parental leave.

Note: The new lactation accommodations law also contains a number of exceptions for some employers, including employers with fewer than 50 employees who can demonstrate that providing lactation accommodations would be an undue hardship

Consequences of Non-Compliance: If an employer does not comply with these new requirements, the Labor Commissioner may issue a citation and impose a $100 civil penalty for each day that the employee is denied break time or adequate space to express breast milk. It is also unlawful for an employer to discriminate or retaliate against employees for exercising their rights under the new lactation accommodation law.

NEW NOTICE REQUIREMENT FOR FLEXIBLE SPENDING ACCOUNTS

Beginning in 2020, California employers must provide participants in Flexible Spending Account (FSA) plans, including health care, dependent care, and adoption assistance plans, at least two communications notifying them of deadlines to withdraw funds. The law does not specify when the notifications must be provided, but it requires notice to be in different forms, only one of which can be electronic, including by email, telephone, text message, mail, or in-person.

EMPLOYERS WITHOUT RETIREMENT PLANS MUST ENROLL IN CALSAVERS RETIREMENT SAVINGS PROGRAM

In an attempt to encourage workers to save for retirement, California launched the CalSavers Retirement Savings Program in November 2018. The CalSavers program offers Roth IRA (after tax)

retirement savings accounts for private sector workers whose employers do not offer a retirement plan.

To date, employer registration for the program has been voluntary. However, starting in 2020, employers who do not provide retirement plans for their workers must register for CalSavers and will be required to administer employees' participation in the program. Employers with more than 100 employees must register by June 30, 2020; employers with more than 50 employees must register by June 30, 2021; and employers with five or more employees must register by June 30, 2022.

Once an employer registers for CalSavers, the employer must upload its roster of eligible employees within thirty days. Employees may then enroll in the program and select a percentage of pay to be withheld, with the default amount being 5%. Employees who do not register for the program will be automatically enrolled within thirty days of eligibility unless they opt-out. CalSavers will contact employees directly to make them aware of the program and provide information on opting-out or customizing their retirement accounts.

Employers' administrative duties under the program are to (a) upload employee information; (b) add or remove employees from the program; (c) withhold the designated percentage of each enrolled employee's pay; and (d) submit that amount to CalSavers for the employee's individual retirement account. Employers may delegate administrative responsibility to payroll vendors or administrators. More information about the CalSavers program is available here.

IRS ISSUES GUIDANCE ON EMPLOYER-PROVIDED MEALS AND SNACKS

The IRS issued a Technical Advice Memorandum earlier this year, providing guidance on when employers may provide free meals and snacks to employees without triggering taxable income for employees. Internal Revenue Code Section 119 provides a limited exception for excluding the value of free on-site meals from employees' taxable income, but only if the meals are furnished for the "convenience of the employer."

To meet this standard, meals must be provided for a "substantial noncompensatory business reason." 26 CFR § 1.119-1. Recognized business reasons for providing free on-site meals include: (a) a need for employees to be available to respond to emergencies; (b) a need to restrict employees to a short meal period because, for example, an employer's peak workload occurs during a meal period; and (c) circumstances in which there are insufficient eating facilities nearby (so that providing employees on-site meals results in time savings).

Employers bear the burden of proving they are entitled to the meal exclusion. However, if the employer can demonstrate that more than half of the employees to whom it provides free on-site meals qualify for the exclusion, then all free on-site meals provided to employees will be treated as qualifying for the exclusion.

Schools who provide free on-site meals to all employees should ensure that at least half of their employees are eligible to receive the meals for substantial noncompensatory business reasons.

The IRS also found that snacks continue to remain tax-free as a *de minimis* fringe benefit if they are not offered in unusually large portions or are not of unusually high value.

What should schools do?

Schools who provide free on-site meals to all employees should ensure that at least half of their employees are eligible to receive the meals for substantial noncompensatory business reasons, as outlined in the 50-page Technical Advice Memorandum. Schools should also work with counsel to develop formal written policies that connect the provision of free on-site meals to their specific business objectives so that they can meet their burden of showing they qualify for the tax exclusion.

MANDATORY EMPLOYMENT ARBITRATION IN CALIFORNIA NO MORE (FOR NOW)

In a further attempt to curtail arbitration in the workplace, California has passed Assembly Bill 51. The bill prohibits any person (including employers) from requiring an applicant or employee, as a condition of employment, continued employment, or the receipt of any employment-related benefit, to "waive any right, forum, or procedure" for alleged violations of the Fair Employment and Housing Act (FEHA) and the Labor Code. Thus, the new law purports to totally bar mandatory arbitration agreements that cover any state discrimination claims or claims brought under the Labor Code. It also explicitly prohibits retaliation or discrimination against an employee for failing to sign an arbitration agreement.

The bill specifically addresses "opt-out" clauses, an approach employers have used to ensure that employee participation in arbitration programs is voluntary. The law provides that any agreement that "requires" an employee to "opt out of a waiver or take any affirmative action in order to preserve their rights" is considered a condition of employment and thus prohibited.

On top of all this, new Section 12953 of Government Code states that any violation of AB 51 will be an "unlawful employment practice." This opens the door for a private right of action under FEHA, creating even more exposure to litigation fees related to arbitration agreements.

The law, which applies to contracts for employment entered into, modified, or extended on or after January 1, 2020, has already been challenged in court.

The law, which applies to contracts for employment entered into, modified, or extended on or after January 1, 2020, has already been challenged in court by business groups and the U.S. and California Chambers of Commerce who argue that the law is preempted by the Federal Arbitration Act. Similar attempts to restrict arbitration by California courts and lawmakers have been struck down because of the strong federal policy in favor of arbitration.

What should schools do?

This law is likely to be tied up in litigation for years. In the meantime, schools should consult with legal counsel to carefully review any arbitration agreements going forward, including arbitration provisions included in annual agreements for faculty or staff. The contract language should make clear that entering the agreement to arbitrate is completely voluntary and, of course, remove any opt-out provisions. Alternately, some schools may elect to give up arbitration programs altogether, which could be an attractive option in light of the legal uncertainty. Employers should be sure to carefully weigh the pros and cons, and proceed cautiously.

ARBITRATION AGREEMENTS SHOULD EXPLICITLY CARVE OUT NLRB CHARGES

In a series of decisions, the National Labor Relations Board (NLRB) examined arbitration agreements and found that agreements that did not carve NLRB charges out from the claims employees were required to arbitrate violated federal labor law (the NLRA).

In *Prime Healthcare Paradise Valley, LLC*, 368 NLRB 10 (June 18, 2019), the NLRB determined that arbitration agreements that explicitly prohibit the filing of claims with the NRLB or administrative agencies generally are unlawful. Where agreements do not expressly prohibit filing charges with the NLRB, the NLRB will determine whether the agreement could be reasonably construed to potentially interfere with NLRA rights and weigh that interference against an employer's legitimate interests.

A few months later, in a separate case, *Brad Wenco, LLC*, 368 NLRB 72 (September 11, 2019) the NLRB determined that an arbitration agreement did not interfere with employee rights under the NLRA where it included a prominent savings clause stating that nothing in the arbitration agreement should be construed to prohibit the filing of a

charge or participation in the processes of the NLRB.

What should schools do?

Schools should ensure their arbitration agreements expressly exclude NLRB charges from the types of claims that must be submitted to arbitration.

DON'T DELAY - FAILURE TO PROMPTLY PAY COSTS AND FEES ASSOCIATED WITH ARBITRATION HAS SERIOUS CONSEQUENCES

For the nearly 20 years since the decision in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000), California employers have been effectively required to pay all costs of arbitration claims brought under arbitration agreements with employees. But attorneys for some employees complained that employers would fail to pay the bills, in effect denying these individuals access to the arbitral forum. As a result, this year Senate Bill 707 was signed into law, imposing strict consequences for the failure to pay arbitration fees. The law codifies - and expands - rules drawn from three court decisions (including *Armendariz)* addressing fee shifting in arbitration agreements in the consumer and employment context. It seeks to prevent companies from "gaming" arbitration agreements by forcing parties into arbitration and then refusing or neglecting to pay on time.

Under SB 707, if an employer fails to pay arbitration fees within 30 days of when due, the employee may withdraw the arbitration claim and proceed in court and may recover attorneys' fees and costs from the employer.

NLRB

WORKPLACE POLICIES AFTER *BOEING*

Last year, the National Labor Relations Board's (NLRB) General Counsel issued guidance reflecting the significantly relaxed standard the NLRB would use to analyze whether handbook rules interfere with employees' rights under the National Labor Relations Act (NLRA) in light of the 2017 NLRB decision in *The Boeing Co.*, 365 NLRB No. 154 (2017).

In 2019, the NLRB and General Counsel applied and clarified the relaxed *Boeing* standard to employers' policies addressing a range of topics, including confidentiality, media contact, the personal use of employers' time and resources, social media, and arbitration agreements. While the permissibility of a given policy will depend on the specific language used and the circumstances in which it is applied, the guidance from these decisions should be helpful for employers in assessing their own policies.

Policies found to be <u>lawful</u>:

- A confidentiality policy that required employees to protect information related to confidential and proprietary matters, including *customer and vendor lists*, but which did not prohibit employees from disclosing the names of the employer's customers or vendors to a third party, such as a labor organization. *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019).
- A media contact rule stating that employees could not provide information to the media when approached for an interview or comments, and that the employer's president was the only person authorized and designated to speak on behalf of the company, but that did not restrict all communication with the media. *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019).
- A rule prohibiting the use of the employer's time and resources for personal use unrelated to employment. *Southern Bakeries*, LLC, 368 NLRB No. 59 (2019).
- A policy prohibiting social media posts disparaging other employees. General Counsel's Memorandum in *Coastal Industries, Inc.* (August 30, 2018).
- A policy requiring employees to identify themselves as employees of the company when linking to the employer's website on social media. General Counsel's Memorandum in *Coastal Industries, Inc.* (August 30, 2018).
- A policy prohibiting the sharing of "personal information" in the context of the illustrative examples included in the policy (Social Security

numbers and account information). General Counsel's Memorandum in *CVS Health* (September 5, 2018).

Policies found to be <u>unlawful</u>:

- A rule prohibiting employees from making disparaging comments about the employer on social media, despite a disclaimer stating that nothing in the policy was intended to infringe upon employees' rights under the NLRA. General Counsel's Memorandum in *Coastal Industries, Inc.* (August 30, 2018).
- A policy requiring employees to identify themselves *by name* when mentioning the employer or discussing their work on social media. General Counsel's Memorandum in *CVS Health* (September 5, 2018).
- A policy prohibiting the sharing of "employee information" through social media or online communications. General Counsel's Memorandum in *CVS Health* (September 5, 2018).

WORKPLACE SAFETY

CALIFORNIA EMPLOYERS MUST NOW REPORT SERIOUS WORK-RELATED INJURIES ELECTRONICALLY

Currently, California law requires an employer to make a report to Cal-OSHA by telephone or email within eight hours after the employer knows or, with diligent inquiry, should have known, of a serious work-related injury, illness or death of an employee.

However, Cal-OSHA has found email reporting inefficient because it often resulted in incomplete or inadequate information about the workplace injury or fatality. AB 1804 amends current law to allow Cal/OSHA to implement "a more effective and responsive reporting system." Thus, moving forward, employers must make these reports via telephone or through the online reporting system, once that system becomes available. Until then, employers should make any workplace injury reports by telephone or email.

CALIFORNIA LAW NOW PERMITS GUN VIOLENCE RESTRAINING ORDERS

Under a new California law, AB 61, California will give employers another tool to address threats of gun violence in the workplace by allowing employers to file petitions for Gun Violence Restraining Orders.

Currently, employers may obtain a stay-away order (known as a Workplace Violence Restraining Order) on behalf of an employee who has experienced unlawful violence or credible threats of violence. A Workplace Restraining Order requires the individual who poses a threat of violence to stay away from the employee as well as the employee's worksite.

AB 61 will allow employers and, in some situations, coworkers, to obtain a Gun Violence Restraining Order. A Gun Violence Restraining Order prohibits an individual subject to a stay-away order from possessing or buying guns, ammunition or magazines. Currently only the individual subject to threats of violence, the individual's close family members and law enforcement can seek a Gun Violence Restraining Order.