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The best and worst employment developments of 2018 – Part I

AN OVERVIEW OF THE LEGISLATIVE DEVELOPMENTS THAT SHAPED THE YEAR IN EMPLOYMENT LAW (WITH A BIT OF COLOR COMMENTARY)

In my "employment developments" article in Advocate two years ago, I warned about the Trump presidency, describing Trump as "Orange. Incurious. Angry. Vengeful. Prevaricator. Tyrant. Dangerous. Unhinged. Unbalanced. Unfit." Unfortunately, my warning remains all too prescient as President Trump and his administration immediately launched and have since continued an all-out war on worker rights (not to mention democracy and freedom of the press at home and throughout the world).

The sharp and indelible contrast between Trump's efforts to eviscerate employee protections and the robust efforts of both the Obama administration and California to expand those protections inevitably brings to mind Dickens' famous opening sentence: "It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way . . ." (Charles Dickens, *A Tale of Two Cities* (1859).)

If you are a worker seeking protections under California law in California state court, it is a Golden Age promising to get even better with Governor Gavin Newsom taking the reins from Governor Brown and the Democrats holding not just supermajorities in both houses of the California State Legislature but also comprising all of the California Statewide constitutional officers. If, on the other hand, you are a worker seeking to vindicate your rights in the federal courts (which are increasingly dominated by hard right-wing anti-employee/consumer judges) or trying to obtain help under

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federal law, it is a Dark Age (strangely reminiscent of Sauron's near undisputed dominion over Middle-earth).

Part I of this article will compare and contrast and summarize legislative/regulatory developments during 2018 in federal and California State employment law.

Part II (in this issue) covers not just the most important cases of 2018 and early 2019, but also those of the most utility to plaintiff employment practitioners.

The Trump administration's anti-worker efforts

President Trump's most notorious anti-employee/consumer accomplishment will undoubtedly be his reshaping of the federal courts in his image with judges who are hostile to the rights of workers, consumers, unions, women, and the LGBTQI community. Indeed, President Trump's two confirmed Supreme Court nominees (Justices Neil Gorsuch and Brett Kavanaugh) have already repeatedly ruled in favor of big business, stacking the deck even further against employees and consumers.

In a little over two years, the Trump administration has also taken so many other steps to eviscerate employee rights and protections that it is literally impossible to detail all those anti-employee actions in the space allotted for this article. His actions against consumers and workers are, particularly given his campaign rhetoric in support of workers, simply inexplicable and bring to mind the following lyrics:

You're mean to me
Why must you be mean to me?
. . . .
I don't know why
. . . .
You treat me coldly
Each day in the year
You always scold me
. . . .
It must be great fun to be mean to me

(The Platters, *Mean To Me*, The Flying Platters (1957).)

Accordingly, what follows are just a few examples of the efforts by President Trump and his administration during the last year to curtail employee rights and protections.

While the Obama administration attempted to bolster employee wages by increasing the salary threshold for the White-Collar Exemption from $455/workweek (or $23,660 for a full-year worker) to $913/workweek (or $47,476 for a full-year worker) so that more employees would be eligible for overtime, the Trump administration immediately made clear its opposition to this Obama initiative and began a review of those Obama regulations.

Salary level for White-Collar Exemption

On March 7, 2019, the Trump DOL completed its review and announced a proposed rule hiking the salary threshold for the White-Collar Exemption to a level significantly below that proposed by Obama. Trump's proposed rule, if it takes effect, would raise the current minimum salary level for exempt employees to $679 per week or $35,308 annually – i.e., to a level 26% lower than the level proposed by Obama. Currently, the DOL anticipates that the earliest possible date for this proposed rule to take effect would be January 2020. In sharp contrast to the impecunious federal minimum salary level for exempt employees, in California, effective January 1, 2019, most employees must receive an annual salary of at least $49,920 for large employers (26 or more employees) and $45,760 for small employers (25 or fewer employees) to qualify for the White-Collar Exemption.

Of course, certain employees in California (i.e., computer professional employees) must be paid an annual salary of at least $94,603.25. (See Maria Y. Robbins, Overtime Exemption for Computer Software Employees (October 19, 2018) Dept. of Industrial Relations <https://www.dir.ca.gov/OPRL/ComputerSoftware.pdf> [as of March 27, 2019].) Others (licensed physicians and surgeons) must receive a minimum $82.72 hourly rate of pay. (See Maria Y. Robbins, Overtime Exemption for Licensed Physicians and Surgeons (October 19, 2018) Dept. of Industrial Relations <https://www.dir.ca.gov/OPRL/Physicians.pdf> [as of March 27, 2019].)

Minimum wage

Similarly, although President Trump campaigned on promises to raise the federal minimum wage from $7.25 an hour to $10.00 or $15.00 an hour (depending on the campaign stop), the Trump administration has made no efforts to try to raise the minimum wage. In sharp contrast to the $7.25 an hour federal minimum wage, California's hourly minimum wage is $12.00 per hour for employers with more than 25 employees (and $11.00 an hour for employers with 25 or fewer employees) and scheduled to rise to $15.00 an hour for employers of all sizes by January 2, 2023.

While the Obama administration took the position that Title VII protected LGBTQI employees from discrimination, harassment, and retaliation, the Trump Justice Department has reversed course and taken the position that those employees are not entitled to Title VII protection. (See e.g., *Zarda v. Altitude Express, Inc.* (2d Cir. 2018) 883 F.3d 100 [Justice Department arguing that discrimination because of sexual orientation is not prohibited by Title VII]; *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, Docket No. 18-107 [Justice Department arguing that gender-identity discrimination is not prohibited by Title].)

In sharp contrast to the efforts of the Trump Justice Department to ensure that employers can fire, demote, harass, and retaliate against LGBTQI employees, California's Fair Employment and Housing Act expressly guarantees protections for LGBTQI employees.

In order to collect data about and eventually take steps to address pay equity, the Obama EEOC issued proposed revisions to the Employer Information Report (EEO-1) that would obligate businesses with 100 or more employees to annually turn over pay data by gender, race, and ethnicity. Not surprisingly, the Trump Office of Management and Budget ("OMB") stayed that requirement. On March 4, 2019, the District of Columbia Federal Court ruled that OMB improperly issued the stay without good cause, and put the wage report back into

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effect. (See *National Women's Law Center v. OMB* (D.D.C. March 4, 2019, No. 1:17-cv-2458) ___ F.Supp.3d___.)

Unions

The Trump administration has also taken affirmative steps to dramatically curtail the rights of unions and unionized workers. For example, in *SuperShuttle DFW, Inc.* (2019) NLRB Case No. 16-RC-010963, the Trump NLRB overruled an Obama-era decision (*FedEx Home Delivery* (2014) 361 NLRB 610) focused on determining whether workers were independent contractors or employees and reinstated "entrepreneurship" as a key element in the NLRB's analysis of the ten factors that go into determining whether a worker is an independent contractor or employee. This decision will dramatically reduce the number of employees eligible to unionize and receive the protections of the National Labor Relations Act. Likewise, in *United Nurses and Allied Professionals (Kent Hospital) and Jeanette Geary* (2019) NLRB Case No. 01-CB-011135, the Trump NLRB ruled that private sector unions cannot charge non-members for lobbying and that union compliance must be independently verified. Historically, unions have been allowed to charge so-called "agency fees" to non-members who are benefited by the union's bargaining. (See *Communications Workers v. Beck* (1988) 487 U.S. 735.) This decision represents another Trump effort to undermine unions and workers.

California's pro-worker efforts

In sharp contrast to the Trump administration, the California State Legislature passed, and Governor Brown signed, more than twenty pro-employee laws; the most important of these new laws are briefly summarized below.

In 2018, California, inspired by the #MeToo and Time's Up Movements, enacted a raft of new laws to address sexual harassment and gender equality including SB 1300, SB 820, AB 3109, SB 826, SB 224, AB 1976, AB 1619, SB 1343, AB 2770, AB 2338, and SB 970.

The most important of these new laws is Senate Bill 1300, which contains a potpourri of terrific pro-employee goodies.

First and foremost, SB 1300 significantly expands liability under the Fair Employment and Housing Act for all forms of hostile work environment harassment cases. In this regard, SB 1300 adds section 12923 to the Government Code, clarifying the standard that a plaintiff must satisfy in order to prevail on a harassment claim. All that must be shown under this elucidated standard is that the harassing conduct sufficiently offended, humiliated, distressed, or intruded upon its victim, so as to disrupt the victim's emotional tranquility in the workplace or affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being. (See Gov. Code, § 12923(a).)

In making this clarification, the Legislature explicitly affirmed its approval of the standard set forth by Justice Ruth Bader Ginsburg in her concurrence in *Harris v. Forklift Systems* (1993) 510 U.S. 17, 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, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job." (*Id.* at p. 26.)

Single incident of harassment sufficient for triable issue

The Legislature also made clear by SB 1300 that 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. (See Gov. Code, § 12923(b).) In so clarifying, the Legislature explicitly rejected the Ninth Circuit's opinion in *Brooks v. City of San Mateo* (2000) 229 F.3d 917 and stated that that opinion should not be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a violation of FEHA.

In *Brooks*, Judge Alex Kozinski (who retired from the bench after multiple women accused him of sexual harassment) authored the opinion holding that the following "single incident" did not rise to the level necessary to constitute hostile-work-environment sexual harassment: "Our story begins when Patricia Brooks, a telephone dispatcher for the City of San Mateo, California, and her coworker, senior dispatcher Steven Selvaggio, manned the city's Communications Center, taking 911 calls on the evening shift. At some point during the evening, Selvaggio approached Brooks as she was taking a call. He placed his hand on her stomach and commented on its softness and sexiness. Brooks told Selvaggio to stop touching her and then forcefully pushed him away. Perhaps taking this as encouragement, Selvaggio later positioned himself behind Brooks's chair, boxing her in against the communications console as she was taking another 911 call. He forced his hand underneath her sweater and bra to fondle her bare breast. After terminating the call, Brooks removed Selvaggio's hand again and told him that he had 'crossed the line.' To this, Selvaggio responded 'you don't have to worry about cheating [on your husband], I'll do everything.' Selvaggio then approached Brooks as if he would fondle her breasts again. Fortunately, another dispatcher arrived at this time, and Selvaggio ceased his behavior." (*Id.* at p. 921.)

The Legislature also clarified that, because the existence of a hostile work environment depends upon the totality of the circumstances, harassment cases are rarely appropriate for disposition on summary judgment. (See Gov. Code, § 12923(c).) In this regard, the Legislature specifically rejected the so-called stray-remarks doctrine, which allowed courts to disregard discriminatory comments made by co-workers and non-decisionmakers, or comments unrelated to the employment decision. (*Ibid.*) Moreover, the Legislature also specifically affirmed the decision in *Nazir v. United*

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Airlines, Inc. (2009) 178 Cal.App.4th 243 and its observation that hostile-working-environment cases involve issues "not determinable on paper." (Gov. Code, § 12923(e).)

The Legislature also confirmed in SB 1300 that the "legal standard for sexual harassment should not vary by type of workplace" and that it "is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past." (Gov. Code, § 12923(d).) Rather, "[i]n 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." (*Ibid.*) In this regard, SB 1300 explicitly repudiated the reasoning to the contrary stated in *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191.

Second, SB 1300 prohibits employers from requiring employees to sign a release or non-disparagement clause or agreement in exchange for a raise or bonus or as a condition of employment or continued employment. (See Gov. Code, § 12964.5(a).) However, this prohibition does not apply to a negotiated settlement agreement to resolve an underlying FEHA claim that has been filed in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process. (Gov. Code, § 12964.5(c).)

Third, SB 1300 amends FEHA to bar prevailing defendants from being awarded attorney's fees and costs (pursuant to Code Civ. Proc., § 998 or otherwise) unless the court finds the action was frivolous, unreasonable, or groundless.

Fourth, SB 1300 amends FEHA to provide that employers may be liable for sexual harassment or other unlawful harassment perpetrated by non-employees against the employer's employees, applicants, unpaid interns, volunteers, or contractors, if the employer or its agents or supervisors knew or should have known of the conduct by the non-employees and failed to take immediate and appropriate corrective action. (See Gov. Code, § 12940(j)(1).) Similarly, FEHA also provides that it is unlawful for employers to harass non-employees "providing services pursuant to a contract." (Gov. Code, § 12940(j)(1).) A "person providing services pursuant to a contract" means a person who meets all of the following criteria: (a) the person has the right to control the performance of the contract for services and discretion as to the manner of performance; (b) the person is customarily engaged in an independently established business; and (c) the person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work. (Gov. Code, § 12940(j)(5).)

Sexual harassment training

Senate Bill 1343 amends sections 12950 and 12950.1 of the Government Code to mandate that employers of five or more employees (inclusive of seasonal and temporary employees) satisfy certain sexual harassment training requirements by January 1, 2020. Within six months of assuming their position (and once every two years thereafter), all supervisors must receive at least two hours of training, and all nonsupervisory employees must receive at least one hour.

Assembly Bill 2338 requires talent agencies to provide adult artists, parents, or legal guardians of minors aged 14-17, and age-eligible minors, within 90 days of retention, educational materials on sexual harassment prevention, retaliation, and reporting resources.

Senate Bill 820 adds section 1001 to the Code of Civil Procedure. This new provision prohibits non-disclosure provisions in settlement agreements related to civil or administrative complaints of sexual assault, sexual harassment, and workplace harassment or discrimination based on sex. SB 820 does not, however, prohibit confidentiality of the settlement amount and it allows, at the claimant's request, for the settlement agreement to limit disclosure of the claimant's identity and facts that could lead to discovery of claimant's identity. This new law will, hopefully, mark the beginning of the end of the widespread corporate practice of settling with and gagging victims of sexual harassment while they allow harassers to continue harassing. SB 820 will create a strong incentive for employers to resolve sexual harassment cases pre-litigation because they will still be able to bind victims to silence.

Assembly Bill 3109 adds section 1670.11 to the Civil Code. This new law voids and renders unenforceable any provision in a contract or settlement agreement entered into on or after January 1, 2019, that waives a party's right to testify regarding criminal conduct or sexual harassment on the part of the other party to the contract or settlement agreement, or on the part of the agents or employees of the other party. AB 3109 applies to testimony in an administrative, legislative, or judicial proceeding, so long as the person's testimony was required or requested by the court, administrative agency, or legislative body.

Senate Bill 826 adds Sections 301.3 and 2115.5 to the Corporations Code and requires boards of directors of California-based public reporting corporations to have a minimum number of female directors. New section 301.3 of the Corporations Code provides that by no later than the close of the 2019 calendar year, a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation's SEC 10-K form, are located in California shall have a minimum of one female director on its board. By the close of the 2021 calendar year, a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation's SEC 10-K form, are located in California shall comply with the following: (1) if its number of directors is six or more, the corporation shall have a minimum of three female directors; (2) if its number of directors is five, the corporation shall have a minimum of two female directors; and (3) if its number of directors is four or fewer, the corporation shall have a minimum of one female director. SB 826 expressly allows

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covered corporations to increase the number of seats on their boards in order to accommodate additional female directors that are elected. Thus, the law does not require any male board members to be removed in order to comply with its mandate. Second, the law ties the definition of "female" to a director's self-identified gender, regardless of the director's designated sex at birth.

Senate Bill 224 amends section 51.9 of the Civil Code and sections 12930 and 12948 of the Government Code to expand the types of relationships that can be subject to a claim for sexual harassment. Previously, section 51.9 of the Civil Code established liability for sexual harassment when the plaintiff was able to prove certain specified elements, including, among other things, that there is a business, service, or professional relationship between the plaintiff and defendant and there is an inability by the plaintiff to easily terminate the relationship. Section 51.9 provided the following examples of where such relationships existed: physician, psychotherapist, dentist, attorney, holder of a master's degree in social work, real estate agent, real estate appraiser, accountant, banker, trust officer, financial planner loan officer, collection service, building contractor, or escrow loan officer, executor, trustee, or administrator, landlord or property manager, and teacher. SB 224 adds to this list: investors, elected officials, lobbyists, directors, and producers. And, SB 224 deletes the requirement that there is an inability by the plaintiff to easily terminate the relationship. SB 224 was passed, in part, to address accounts of sexual harassment by well-known and influential figures (mostly men) that, during 2017, cascaded across industries, capturing headlines, and dominating policy discussions (e.g., the Harvey Weinstein phenomenon).

Assembly Bill 1619 significantly enlarges the statute of limitations for filing a civil action for damages for sexual assault to 10 years after the alleged assault or three years after the plaintiff discovered or reasonably should have discovered injury as a result of the assault, whichever is later.

Assembly Bill 1976 amends section 1031 of the Labor Code to mandate that employers make reasonable efforts to provide a location for expressing breast milk other than in a bathroom. The bill clarifies that the location provided by the employer for this purpose can be the place where the employee normally works.

Assembly Bill 2770 amends section 47 of the Civil Code to provide a qualified privilege against defamation for: (1) victims of harassment by an employee, without malice, to an employer based on credible evidence; and (2) communications between an employer and interested persons regarding a complaint of sexual harassment. The new law also authorizes an employer to answer, without malice, whether the employer would rehire an employee and whether or not a decision to not rehire is based on the employer's determination that the former employee engaged in sexual harassment.

Senate Bill 970 adds section 12950.3 to the Government Code and amends the Fair Employment and Housing Act to require hotel and motel employers to provide at least 20 minutes of prescribed training and education regarding human trafficking awareness to employees who are likely to interact or come into contact with victims of human trafficking. Employees "likely to interact or come into contact with victims of human trafficking" include, for example, employees who have reoccurring interactions with the public such as employees who work in a reception area, perform housekeeping duties, help customers in moving their possessions, and/or driving customers.

In addition to the foregoing #MeToo laws, the Legislature enacted several other laws of interest to the employment practitioner including SB 1252 and SB 954.

SB 1252 clarifies that Labor Code section 226's right to inspect wage records also means that the employee has a right to "receive" a copy of those records from the employer and can't be charged more than the actual cost of reproduction.

New client disclosures required for mediation

Senate Bill 954 is a critical new piece of legislation about which all litigators must be aware. SB 954 amends section 1122 of the Evidence Code and adds section 1129 mandating that attorneys provide their clients with a written disclosure describing the confidentiality restrictions applicable to mediation. If an attorney currently represents a client, the attorney must provide the disclosures before the client agrees to participate in mediation. If the attorney is retained after the client has agreed to mediation, the attorney must provide the disclosures immediately. SB 954 contains the language that should be reproduced verbatim in the mediation disclosure and it also mandates the following: (1) the printed disclosure should be printed on a single detached page in the client's preferred language and at least 12-point font; and (2) the names of the attorney and the client must be on the page, and be signed and dated by the attorney and the client. While an attorney's failure to comply with these disclosure requirements will not serve as a basis to set aside an agreement reached as a result of the mediation (see Evid. Code, § 1129(e)), such a failure can result in discipline from the State Bar. And, an amendment to Evidence Code section 1122(a)(3) provides an exception to mediation confidentiality such that communications, documents, or writings related to compliance with section 1129 are "fair game" and can be used in a disciplinary proceeding against an attorney who is alleged to have not complied with the disclosure requirement.

Finally, in mid-2018, the California Fair Employment and Housing Council promulgated new regulations on national origin and ancestry discrimination. (2 CCR § 11027.1 & 2 CCR § 11028.) These new regulations are remarkably helpful for the victims of workplace national origin discrimination addressing issues such as language restrictions, discrimination based on accent and/or English proficiency, and unlawful immigration-related practices.

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