DISCLAIMER

This publication/presentation is only intended to provide educational information about the subject matter covered. It is not intended to, nor does it, constitute legal advice.

More specifically, it is provided with the understanding that the authors/presenters do not render legal or other professional advice/services.

If legal advice or other expert assistance is required, seek the services of a competent professional. Persons using this publication/attending the presentation, who are dealing with specific legal matters should exercise their own independent judgment and research original sources of authority and local court rules. The authors/presenters make no representations concerning the contents of this publication/presentation and disclaim any warranties of merchantability or fitness.

THIS PRESENTATION MAY NOT BE RECORDED, COPIED, OR DISTRIBUTED WITHOUT THE EXPRESS PERMISSION OF FLOYD SKEREN MANUKIAN LANGEVIN, LLP or FISHER & PHILLIPS LLP.

The Mad Hatter's Tea Party:

California Legislature's View of Employers as We Move Toward 2020

Presented by:
Todd Scherwin
Regional Managing Partner, Fisher Phillips
Phone: (213) 330-4450 | Email: tscherwin@fisherphillips.com

2019 Legislative Year in Review

- **2,576** bills were introduced in 2019.
- Likely over **1,000** bills will make it to the Governor's desk.
- **TODAY (September 13**)is the last day for the Legislature to pass bills.
- **October 13** is the last day for the Governor to sign/veto bills.

First Year for New Governor Gavin Newsome

- ***What will he sign?***
- ***What will he veto?***
- ***How will he compare with former Governor Brown?***

- ***The California employer community waits with bated breath…***

NEW LAWS ALREADY SIGNED INTO LAW IN 2019

Race Discrimination Based on Hairstyles
SB 188 (Mitchell)

- Amends FEHA to define "race" to include "traits historically associated with race, such as hair texture and protective hair styles."
- Includes braids, locks and twists.
- ***Signed into law already – effective 1/1/20.***
- Similar legislation enacted in New York.

SB 778 – Sexual Harassment Prevention Training

- SB 1343 from last year expanded required sexual harassment prevention training to **smaller employers** and requires training for **all employees** (not just supervisors).

SB 1343 (from last year)
Sexual Harassment Prevention Training

Smaller Employers Now Covered:

- Training now required for employers with **five or more** employees.

Training Required for *All* Employees:

- By January 1, 2020, an employer with five or more employees must provide at least **two hours** of training to all **supervisory** employees in California within six months of their assumption of a position.
- By January 1, 2020, an employer with five or more employees must provide at least **one hour** of training to all **non-supervisory** employees in California within six months of their assumption of a position.
- Thereafter, once every two years.

SB 778 Makes Important Changes and Clarifications

Delayed Implementation:

- Delays implementation of SB 1343 to ***January 1, 2021***.

Clarifications:

- New nonsupervisory employees must be trained within six months of hire.
- New supervisory employees must be trained within six months of the assumption of a supervisory position.
- Specifies an employer who has provided training in 2019 is not required to provide refresher training until two years thereafter.

Cal/OSHA Emergency Wildfire Smoke Regulation

- Emergency regulation effective July 29, 2019.
- Rulemaking brought in response to the devastating wildfires last year.
- Cal/OSHA is developing permanent rulemaking – which will be even more stringent.

Cal/OSHA Emergency Wildfire Smoke Regulation

Employers must:

- Monitor AQI at workplaces for fine particulate matter (PM 2.5).
- If the AQI for PM 2.5 is **greater than 150** and you "reasonably anticipate" that employees will be exposed to wildfire smoke, you must reduce exposure to the smoke.
- If feasible, you may reduce exposure by relocating employees to enclosed buildings with filtered air or to another outdoor location with lower AQI.
- If it is not feasible to reduce smoke exposure by relocation, you must provide respirators (such as N95s) for voluntary use, and encourage their use.
- If AQI **exceeds 500**, respirator use is **mandatory**, and employees must be fit tested and medically evaluated.

Cal/OSHA Emergency Wildfire Smoke Regulation

- Additional communication and training requirements.
- **Exempt:** enclosed buildings or vehicles that have air filter systems, firefighters engaged in firefighting, or employees with short-term exposure to the smoke (less than 1 hour).
- **Employer Tips:**
  - Develop system for monitoring AQI for PM 2.5 (government websites may be useful).
  - Get your N95 respirators now (before there is a shortage!)

PENDING LEGISLATION ON THE GOVERNOR'S DESK

AB 5 and Dynamex

- By far, the biggest employment issue facing the Legislature in 2019.
- Labor's attempt to codify and expand the *Dynamex* "ABC Test."
- Business community's attempt to seek exemptions to *Dynamex*.
- Lots of drama!

The *Dynamex* "ABC Test" - Classifying Independent Contractors

- Under the new "ABC" test, a worker is considered an employee under the Wage Orders unless the hiring entity establishes all three of these prongs:

The *Dynamex* "ABC Test"

A. The worker is **free from the control and direction** of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; AND

B. the worker performs work that is **outside the usual course** of the hiring entity's business; AND

C. the worker is **customarily engaged in an independently established trade, occupation, or business** of the same nature as the work performed for the hiring entity.

What Does AB 5 Do?

- Codifies the "ABC test" for purposes of the Labor Code, the IWC Wage Orders, and the Unemployment Insurance Code.
- Applies the "ABC test" for workers' compensation purposes effective July 1, 2020.
- ***Therefore, AB 5 not only codifies Dynamex (which was limited to IWC Wage Order claims) but it extends it to other areas of the law.***
- **AB 5 also creates a number of *exemptions* to *Dynamex* for certain industries.**

AB 5 Exemptions
(generally revert back to the *Borello* test)

- Licensed insurance agents.
- Physicians, dentists, podiatrists, psychologists, veterinarians.
- Lawyers, architects, engineers, private investigators, accountants.
- Securities brokers and investment advisors.
- Direct sales salespersons.
- Commercial fishermen.
- Newspaper delivery (one year exemption).

AB 5 Exemptions
(generally revert back to the *Borello* test)

- "Professional services" – marketing, human resources, travel agents, graphic design, grant writers, fine artists, enrolled agents, payment processing agents, photographers, freelance writers (all of whom must meet specified criteria).
- Licensed estheticians, electrologists, barbers, cosmetologists and manicurists (all of whom must meet specified criteria).
- Real estate agents.
- Repossessors.
- General contractors and subcontractors in construction.

AB 5 Exemptions
(generally revert back to the *Borello* test)

- Limited exemption for subcontractors providing construction trucking services (that meet specified criteria).
- The relationship between a motor club (AAA) and an individual providing motor club services through a third party.
- The relationship between a "referral agency" and a "service provider." (Graphic design, photography, tutoring, event planning, minor home repair, moving, home cleaning, errands, furniture assembly, animal services, dog walking, dog grooming, web design, picture hanging, pool cleaning or yard cleanup).

- **Exemptions contained in AB 5 are generally retroactive.**

AB 5 – The "Business-To-Business" Exemption

- *Dynamex* does not apply to a bona fide business-to-business contracting relationship between a business and a service provider where:
  - Service provider is free from direction and control.
  - Service provider provides services directly to the business rather than to customers of the business.
  - Contract in writing.
  - Service provider has a business license or business tax registration where required.
  - Service provider has a separate business location.
  - Service provider customarily engaged in an independent business.

AB 5 – The "Business-To-Business" Exemption

- Service provider actually contracts with other businesses to provide same services.
- Service provider advertises and holds itself out to public to provide same services.
- Service provider provides its own tools, vehicles and equipment..
- Service provider can negotiate own rates.
- Consistent with the nature of the work, the service provider can set its own hours and location of work.
- Service provider not performing work for which a CSLB license is required.

- ***Business community not very happy with this exemption – some of these factors will be difficult to satisfy!***

AB 5 – New Enforcement Mechanism

- In addition to private lawsuits and PAGA, recent amendments provide for **injunctive relief** claims by AG, DAs, or city attorneys.
- Similar to injunctive relief language in UCL claims under Section 17204 of the Business and Professions Code.
- Likely to see high-profile, politicized enforcement actions.

Statute of Limitations for FEHA Claims

AB 9 (Reyes)

- Extends the statute of limitations for filing claims with DFEH (for all claims, not just sexual harassment) from one year to **three years**.
- Witness memory? Stale evidence?
- Part of the *#MeToo* movement.
- Similar legislation (AB 1870) was vetoed by Governor Brown last year.

Joint Liability for Harassment
AB 170 (Gonzalez)

- Makes an employer automatically jointly liable for the acts of a "contracted supervisor" regarding harassment
- Applies to *all* harassment, not just sexual harassment.
- Doesn't matter if you did not have direction or control or knowledge.
- Vet your contractors!!!!

"No Rehire" Agreements
AB 749 (Stone)

- Prohibits settlement agreements that prohibit a person from obtaining future employment with the employer (including a parent, subsidiary, affiliate or contractor of the employer).
- Does not apply where the employer has made a good faith determination that the employee engaged in **sexual harassment** or **sexual assault**.
- Does not require an employer to continue to employ or rehire a person if there is a **"legitimate non-discriminatory or non-retaliatory reason."**

AB 51 – Ban on Arbitration

- Touted as a **sexual harassment** bill, but actually much broader.
- Prohibits mandatory arbitration for any violation of FEHA (employment discrimination) or the Labor Code.
  - No mandatory arbitration of wage and hour claims, etc.
  - Arbitration clauses are common to avoid class action lawsuits.
- Similar to AB 3081 from 2018, which was vetoed by Governor Brown on the grounds that it was likely **preempted** by the Federal Arbitration Act.
- No retaliation for failure to sign such an agreement.
- Likely will lead to years of litigation over whether preempted by federal law. Some employer groups likely to sue for injunctive relief if signed into law.

California Consumer Privacy Act

- Far-reaching measure enacted to stave off and even worse ballot measure.
- Goes into effect in 2020.
- Applies to businesses that:
  - Have annual gross revenue over $25 million.
  - Annually buys or shares personal information of 50,000 or more consumers.
  - Derive 50% or more of annual revenue from selling consumers' personal information.

California Consumer Privacy Act

Main Provisions:

- **Disclosure** – Up to twice a year, consumers may request disclosure of any personal information collected by a business.
- **Right to Delete Information**
- **Right to "Opt Out" of Sale of Personal Information**
- **No Discrimination Provisions**
- **Private Right of Action for Enforcement**
  - For data breaches.

California Consumer Privacy Act

Does the CCPA apply to employees and employment data?

- This was one of the main issues the business community sought to clarify this year.
- Employment data did not intend to be the intended target of the CCPA, but broad and vague terms left the issue in doubt.

The Compromise – AB 25 (Chau)

- CCPA does not apply to personal information collected about a person acting as a job applicant or employee.
- But this carve-out only lasts for one year – will have to negotiate an extension next year with labor (who wants legislation around "workplace privacy."
- The carve-out for employment data does not apply to the data breach provisions of the CCPA.
- ***IMPORTANT!*** Employers will still have to notify applicants and employees about the **categories** of personal information they collect, and the **purposes** for which they do so…**by January 1, 2020**.

Lactation Accommodation
SB 142 (Wiener)

- Based on San Francisco ordinance.
- Lactation room must: (1) be clean and free of toxic materials, (2) contain a surface to place a breast pump, (3) contain a place to sit, and (4) have access to electricity.
- A sink with running water and a refrigerator must be in close proximity.
- Denial of lactation breaks subject to Labor Code 226.7 (meal and rest period) penalty.
- Employer must develop and implement a lactation accommodation policy.
- All of this is Labor Code so subject to PAGA!!!!

Local Employment Discrimination Laws
SB 218 (Bradford)

- Allows local jurisdictions to come up with their own local employment discrimination laws.
- Allows local jurisdictions to accept and enforce FEHA claims.
- Recent amendments limit the bill to Los Angeles.

34

Unemployment Benefits for Strikers
AB 1066 (Gonzalez)

- Would allow striking workers to collect unemployment insurance benefits after three weeks.
- Would overturn 70 years of legal precedent that striking employees are not eligible for UI benefits.
- May impact the fiscal solvency of the UI Fund (especially if we face another recession).

35

DON'T FORGET THESE NEW LAWS THAT WENT INTO EFFECT IN JANUARY 2019

36

SB 820 – Stand Together Against Non-Disclosure (STAND) Act

- #MeToo movement has focused on non-disclosure agreements or **"secret settlements"** involving sexual harassment claims.
- Critics contend these clauses keep claims secret and allow perpetrators to continue harassing victims.

SB 820 – Stand Together Against Non-Disclosure (STAND) Act

- **Prohibits confidentiality or non-disclosure clauses in any settlement agreements involving:**
  - Sexual harassment
  - Sexual assault
  - Workplace discrimination based on sex, or failure to prevent an act of such harassment or discrimination, or retaliation.
- **Applies to more than just "sexual harassment" claims – covers any "workplace discrimination based on sex."**

SB 820 – Stand Together Against Non-Disclosure (STAND) Act

- **Does not cover "pre-litigation" settlement agreements:**
  - Law applies to covered claims "filed in a civil action or a complaint filed in an administrative action."
  - But appears to not apply to settlements reached in the "pre-litigation" phase – such as where a demand letter has been sent but no civil action or administrative claim filed yet.
  - There may be a narrow set of circumstances in which such clauses may still be utilized in sexual harassment and other similar cases.

SB 1300 (Jackson) – Sexual Harassment

- A **"smorgasbord"** sexual harassment bill.
- Had a little bit of this, and a little bit of that.
- Each item from a plaintiff attorney's "wish list."

SB 1300 (Jackson) – Sexual Harassment

Limitations on Releases and Non-Disparagement Clauses:

- Makes it unlawful for an employer, "in exchange for a raise or a bonus, or as a condition of employment or continued employment" to require an employee to sign a release of a claim or a right under FEHA. Not just sexual harassment claims.
- Also prohibits an employer (under the same conditions) from requiring an employee to sign a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts, including sexual harassment.
- Does not apply to bona fide negotiated settlement agreements.

SB 1300 (Jackson) – Sexual Harassment

Limitations on Prevailing Employer's Rights to Fees and Costs:

- A prevailing defendant in a FEHA action will only be entitled to attorneys' fees and costs if the court finds that the plaintiff's action was "frivolous, unreasonable, or totally without foundation when brought or the plaintiff continued to litigate after it clearly became so."
- Also applies to Section 998 offers of settlement.

SB 1300 (Jackson) – Sexual Harassment

Expanded Harassment Liability for Third Parties:

- Existing law provides employer may be held responsible for sexual harassment committed by non-employees – such as customers, vendors, and other third parties – if the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action.
- SB 1300 extends this potential liability to all forms of harassment, not just sexual harassment.

SB 1300 (Jackson) – Sexual Harassment

Optional "Bystander Intervention" Training:

- Employers **"may"** provide bystander intervention training.
- Meant to address **"bystander effect"** – the tendency for individuals to remain silent and refrain from providing assistance when they are in the presence of other people.

SB 1300 (Jackson) – Sexual Harassment

Legislative Guidance to the Courts?

- **Single Incident Sufficient** – A single incident of harassing conduct is sufficient for a hostile work environment claim.
- **Summary Judgment "Rarely Appropriate"** – Sexual harassment claims are "rarely appropriate" for summary judgment. More cases go to trial?
- **"Tangible Productivity"** – Plaintiff need not prove that their tangible productivity has declined – just that it is more difficult to do the job.
- **Rejection of "Stray Remarks" Doctrine** – Stray remarks (even by non-decision makers) may be relevant and circumstantial evidence of discrimination.
- **Single Legal Standard** – The standard for what constitutes a valid claim for sexual harassment does not vary by the type of workplace.

AB 1654 (Rubio) – PAGA Relief for Unionized Construction Employers

PAGA does not apply to employees in the construction industry covered by a CBA that:

- Prohibits all violations that would be covered by PAGA, and a grievance procedure.
- Expressly waives the requirements of PAGA in clear and unambiguous terms.
- Authorizes the arbitrator to award any and all remedies otherwise available under the Labor Code.

Reminder – Minimum Wage Increase

Effective Date	Minimum Wage for Employers With 25 or Less Employees	Minimum Wage for Employers With 26 or More Employees
January 1, 2019	$11.00/hour $13.25 for LA 7/1	$12.00/hour $14.25 for LA 7/1
January 1, 2020	$12.00/hour	$13.00/hour
January 1, 2021	$13.00/hour	$14.00/hour
January 1, 2022	$14.00/hour	$15.00/hour
January 1, 2023	$15.00/hour	$15.00/hour

AND WHAT ABOUT THESE NEW CASES?

Troester v. Starbucks Corporation

- **Facts**
  - Douglas Troester was an hourly shift supervisor
  - Required to clock out on closing shifts before the "close store procedure"
  - Averaged four to ten minutes in off-the-clock work
  - 12 hours and 50 minutes over 17 months of employment → $102.67 unpaid time

Ward v. Tilly's (2019)

- Facts:
  - Tilly's utilized "on-call" scheduling. Employees are assigned on-call shifts
  - Must call in two hours before the shifts to find out whether they need to actually come to work.
  - If they come in, they receive pay for all hours worked. If they don't need to come in, then they are not paid.

Resources

Fisher Phillips "California Employers Blog"
- https://www.fisherphillips.com/california-employers-blog

California Legislative Information (bill language, bill status, committee analyses, etc.):
- http://leginfo.legislature.ca.gov/
- Remember to view "Today's Law As Amended"

Final Questions?

Presented by:
Todd Scherwin
Regional Managing Partner, Fisher Phillips
Phone: (213) 330-4450 | Email: tscherwin@fisherphillips.com