

CALIFORNIA EMPLOYMENT LAW UPDATE 2019

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OUTLINE

- SETTING UP YOUR BUSINESS: EE HANDBOOK
- LIMITATIONS IN THE HIRING PROCESSES: past salary considerations & criminal history
- THE HIGH COST OF MISCLASSIFICATION
- EE LEAVES OF ABSENCES
- SEXUAL HARASSMENT
- FEMALE MEMBERSHIP in CORPORATE BOARDS
- LACTATION REQUIREMENTS
- WAGE AND HOUR OVERVIEW

SETTING UP YOUR BUSINESS

Up to Date Employee Handbook

- **Benefits to Employer**
 - Audit Handbook / Staying Current on Law
 - Statement of Policies
 - Mitigation of Risk and Damages
- **Benefits to Employee**
 - Employee expectations & workplace policies are clear
 - Processes for raising complaints / concerns
 - Helpful recitations of law: at will employment

LIMITATIONS IN HIRING: PRIOR SALARY HISTORY

- California law (AB 168) prohibits employers from asking job applicants for "salary history information." Under this legislation, California employers must provide "**applicants**" with the "**pay scale**" for a position upon "**reasonable request**." The law was rather unclear, however, about what each of these three terms meant.

Clarification to Salary History Law

A.B. 2282 amends Sections 432.3 and 1197.5 of the Labor Code

- What does "applicant" mean?
- What information does an employer have to supply when a reasonable request is made for the "pay scale" of a position?
- What is a "reasonable request" for pay scale information?
- A.B. 2282 clarifies that although A.B. 168 prohibits employers from asking for the applicant's salary history information, employers may ask about an applicant's salary expectations for the position.

LIMITATIONS IN HIRING : CRIMINAL HISTORY

S.B. 1412 amends Section 432.7 of the Labor Code

Under California and San Francisco law, consideration of an applicant's criminal history will be permissible only after the employer has made a conditional offer of employment.

- Applies to employers with 5 employees or more

THE HIGH COST OF MISCLASSIFICATION

- *DYNAMEX (April 2018)*
 - ER MUST MEET EACH FACTOR : ABC TEST
 - The worker is free from the control and direction of the hirer in relation to the performance of the work, both under the contract and in fact;
 - The worker performs work that is outside the usual course of the hirer's business (in a nut shell, if you hire a worker to do anything that is central to your business's offerings, you must classify them as an employee); AND
 - The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hirer

Staying ahead of Misclassification Liability

- Conducting Proactive Audit:
 - what positions does employer have at its business: IC vs. EE?
- Handout:
 - combatting misclassification claims in employment handbook
 - combatting misclassification in Independent Contractor Agreements

LEAVES OF ABSENCE

PARENTAL LEAVE

- Defining Primary v. Secondary
 - ER must provide gender neutral policy
- Pregnant Woman v. Bonding Time

FAMILY & MEDICAL LEAVE ACT (FMLA):

- eligible ee does not have to be a primary caregiver.
- eligible ee can take up to 12 workweeks of unpaid leave during any 12 mo period to care for a spouse, son, daughter or parent w/a serious health condition.

Disability Leaves

BROAD definition of Disability:

- conditions that limit a major life activity

Major Life Activity:

- caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(incls. physical and mental disabilities).

REASONABLE ACCOMMODATION

- LAW REQUIRES: Fair Employment & Housing Act (FEHA) and Americans with Disabilities Act (ADA) THAT ERS...
 - ENGAGE IN AN INTERACTIVE, GOOD FAITH PROCESS;
 - PROVIDE A REASONABLE ACCOMMODATION for QUALIFIED INDIVIDUALS WITH DISABILITIES, PROVIDED NO UNDUE HARDSHIP

EXAMPLES of REASONABLE ACCOMMODATIONS?

- Changing job duties;
- Allowing EE to work on PT basis;
- Providing leave for medical care;
- Changing work schedules;
- Relocating the work area;
- Providing mechanical or electrical aids.

Is Allowing Marijuana Use in the Workplace a Reasonable Accommodation?

- Illegal Under Federal Law
- Do not need to offer reasonable accommodation even if used for a medical condition.
- Proposed Legislation - Medical Marijuana Users as Protected Class

TYPICAL MISTAKES ERS MAKE:

- 1) REQUIRING EE TO DISCLOSE DIAGNOSIS;
- 2) INAPPROPRIATELY SHARING DIAGNOSIS WITH OTHERS;
- 3) FAILING TO DOCUMENT THE INTERACTIVE PROCESS & ACCOMMODATION DECISION
- 4) DENYING AN ACCOMMODATION BC NO OTHER AVAILABLE POSITION.
 - a) STILL MUST ENGAGE IN INTERACTIVE PROCESS

EFFECTS OF THE #METOO MOVEMENT: Sexual Harassment - NEW Training Requirements

- **PRIOR LAW**: AB 1825: 'ERs with 50 or more EES and all public 'ERs provide 2 hrs. of sexual harassment training to supervisory ERs within 6 months of assuming a supervisory position & again at least every 2 yrs.
- **CURRENT LAW**: applies to ERs w/ 5 or more EES (including temporary or seasonal ees to provide at least TWO HOURS of sexual harassment training to all supervisors and ONE hour of such training to nonsupervisory employees **before January 1, 2020**.
 - Thereafter, training is required once every two years and within six months of hire or promotion.

SEXUAL HARASSMENT SB 1300 EXPANDED EMPLOYER LIABILITY

- **Employer Responsibility for Nonemployees:** SB 1300 mandates that an employer may be responsible for the acts of nonemployees with respect to any type of harassment (not just sexual harassment) against employees and other nonemployees working as interns or volunteers and service contractors.
- **Single Incident of harassment** is sufficient to create a triable issue 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.
- **Legal standard for sexual harassment should not vary by type of workplace.** It is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past. Rejects the view that workplaces can be held to different standards regarding sexual harassment.

#MeToo Movement

Confidentiality Agreements: Employers cannot use a confidentiality agreement to guard “**factual information**” about a claim of sexual harassment, sexual discrimination or retaliation for reporting sexual harassment or discrimination. However, the law still permits employers to require confidentiality of the amount of a settlement, as opposed to the underlying allegations of harassment.

A claimant may request a provision in the agreement that conceals all of his or her identifying information. The accused, however, has no such protection.

Releases: Employers cannot force a current employee to either:

- Release claims of discrimination, harassment, or retaliation in exchange for a raise, a bonus, or as a condition of continued employment; or
- Enter into a non-disparagement agreement that would forbid an employee from disclosing information about such a claim.

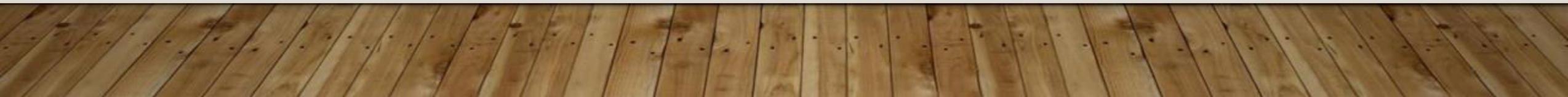
Female Membership on Corporate Boards

S.B. 826 adds Sections 301.3 and 2115.5 to the Corporations Code.

The new law is aimed at publicly held domestic or foreign corporations whose principal executive offices are located in California.

By the end of the 2019, these corporations must have a **minimum of 1 female director** on their boards.

By the end of the 2021, based on a corporation's board size, the requirements are as follows:

- If it has 6 or more directors, the corporation must have at least three female directors.
 - If it has 5 or more directors, the corporation must have at least two female directors.
 - If it has 4 or fewer directors, the corporation must have at least one female director.
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Lactation Requirements

A.B. 1976 amends Section 1031 of the Labor Code.

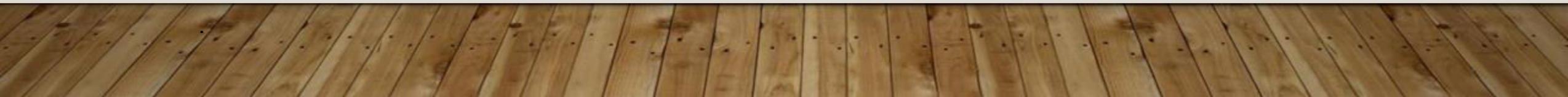
Requires ERs to make reasonable efforts to provide an EE w/a private room or location, other than a bathroom, to express breast milk. (SF's Ordinance effective 8/25/18)

What can an ER do if it does not have the space?

A temporary location meets the requirement if all of the following conditions exist:

- ER is unable to provide a permanent lactation location because of operational, financial, or space limitations.

The temporary lactation location:

- is private & free from intrusion while an EE expresses milk;
 - is used ONLY for lactation purposes while an EE expresses milk; and
 - otherwise meets the requirements of state law concerning lactation accommodation.
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WAGE AND HOUR OVERVIEW

- **De Minimis Time:** The California' Supreme Court's rejection of the federal *de minimis* rule thus imposing an obligation on employers to compensate employees for small amounts of regularly occurring work time.
- **State and Local Minimum Wage Hikes:** Review of the 2019 schedule of increases to California's state minimum wage, and recent/future increases in minimum wage requirements in California cities and/or counties, as well as special minimum pay requirements for exempt software professionals. - Currently : SF : \$15/hour

RESOURCES

- Handouts
- Department of Fair Employment & Housing
 - Employer Posting Requirements:
 - <https://www.dfeh.ca.gov/resources-for-employers/>

Training:

California Chamber of Commerce

- general information :
 - <https://www.calchamber.com/pages/default.aspx>

CONTACT INFO

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