

# NEW CALIFORNIA EMPLOYMENT LAWS AFFECT THE CONSTRUCTION INDUSTRY FOR 2019

The California Legislature introduced more than 2637 bills in the second half of the 2017-2018 session that became law effective January 1, 2019, many of which address employment issues facing California employers in the construction industry. Below we have summarized some of the more important laws (the summary titles are live links to the text of the new law), and employers are urged to protect their companies by updating contracts, policies, and/or practices for compliance. The following is for general knowledge, and we recommend you consult with your attorney for specific legal advice.

AB 1565 – Contractor Wage Liability: AB 1565 repeals the provision that relieved direct contractors for liability for anything other than unpaid wages and fringe or other benefit payments or contributions, including interest owed. In the past, a direct contractor could withhold "disputed" sums owed to a subcontractor if the subcontractor failed to provide "information" about their and lower-tier subcontractors' payroll records.

For contracts entered into on or after January 1, 2019, the direct contractor must now specify in the subcontract what documents and information the subcontractor must provide. If the subcontractor fails to provide such materials, or if the information provided shows noncompliance, only then is the direct contractor authorized to withhold a disputed payment. Direct contractors should consider requiring submission of payroll records/statements, fringe benefit and subsistence statements, and employee time cards, among other types of records to substantiate payroll.

AB 3018 – Skilled and Trained Workforce: AB 3018 imposes penalties on contractors and subcontractors who fail to comply with "skilled and trained workforce" requirements. It also requires the awarding body to forward a monthly report to the California Labor Commissioner for issuance of a civil wage and penalty assessment, if a contractor or subcontractor has failed to comply with skilled and trained workforce requirements.

Those failing to comply with skilled and trained workforce requirements can by penalized by the Labor Commissioner up to $5,000 per month (first violation) and up to $10,000 per month (additional violations). The awarding body may withhold any progress payment from a direct contractor for failure by the contractor or its subcontractor(s) to be substantially compliant.

To protect themselves, Contractors should at a minimum (1) recite the skilled and trained workforce requirements within the body of subcontracts; (2) attach full copies of Labor Code sections 2601-2603 to subcontract agreements; (3) monitor each subcontractor's use of a skilled and trained workforce; (4) take corrective action once aware of a subcontractor's failure to use a skilled and trained workforce; (5) and require each subcontractor to provide with each payment application a declaration from the subcontractor, signed under penalty of perjury, that the subcontractor has met the skilled and trained workforce requirements.

AB 1654 – PAGA Relief for Unionized Construction Employers: AB 1654 clarifies that unionized workers in the construction industry are not covered by PAGA (they cannot assert PAGA claims), if their Collective Bargaining Agreement: (1) is entered into before January 1, 2025; (2) provides for the wages, hours of work, and working conditions of employees, premium wage rates for all overtime hours worked, and for the employee to receive a regular hourly pay rate of not less than 30 percent more than the state minimum wage rate; (3) prohibits all of the violations of the Labor Code that could be addressed under PAGA; (4) provides a grievance and binding arbitration procedure for alleged violations and authorizes the arbi-

trator to award all remedies potentially available under the Labor Code (except PAGA remedies); and (5) waives PAGA rights.

### SB 1300, 1343, 820, and 3109 – Prevention of Sexual Harassment, Training on Prevention, Sexual Harassment Standards, and Prohibition on Confidentiality/Preclusion of Disclosure:

SB 1300 adds a section to the Government Code that declares the purpose of harassment laws is to provide all Californians with equal opportunity to succeed in the workplace. Employers will need to update and revise their handbooks, policies, and training to comply with this new law.

SB 1300 approves a standard that in a workplace harassment suit:

[T]he 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.

SB 1300 also:

- Rejects the "stray remarks doctrine" from *Reid v. Google* because the "existence of a hostile work environment depends on the totality of the circumstances and a discriminatory remark, even if made not directly in the context of an employment decision or uttered by a non-decision-maker, may be relevant, circumstantial evidence of discrimination."
- Disapproves of use of *Kelly v. Conco* to support different standards for hostile work environment harassment depending on the type of workplace.
- Affirms *Nazir v. United Airlines* in that "hostile working environment cases involve issues 'not determinable on paper.' " This in turn makes it difficult to dismiss case before trial.
- Expands an employer's potential FEHA liability for acts of nonemployees to all forms of unlawful harassment (removing the "sexual" limitation).
- Prohibits employers from requiring an employee to sign: (1) a release of FEHA claims or rights or (2) a document prohibiting disclosure of information about unlawful acts in the workplace, including non-disparagement agreements. This provision does not apply to negotiated settlement agreements to resolve FEHA claims filed in court, before administrative agencies, alternative dispute resolution, or through the employer's internal complaint process.
- Prevents prevailing defendants from being awarded attorney's fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or that the plaintiff continued to litigate after it clearly became so.
- Authorizes employers to provide (non-mandatory) bystander intervention training to its employees.

SB 1343 requires an employer of five or more employees—including seasonal and temporary employees—to provide certain sexual harassment training by January 1, 2020. Within six months of their 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. SB 1343 also requires DFEH to make available a one-hour and a two-hour online training course and to make the training videos, existing informational posters, fact sheets, and online training courses available in multiple languages.

SB 820 prohibits and makes void any provision in a settlement agreement on or after January 1, 2019, that prevents disclosure of information related to civil or administrative complaints of sexual assault, sexual harassment, and workplace harassment or discrimination based on sex.

SB 820 authorizes provisions that (1) preclude the disclosure of the amount paid and (2) protect the claimant's identity, if the claimant has requested anonymity and the other party is not a government agency or public official.

SB 3109 makes void and unenforceable any provision that waives a party's right to testify in a legal proceeding regarding criminal conduct or sexual harassment on the part of the other contracting party, or the other party's agents or employees.

**SB 1252 – Employee Right to Receive Copy of Pay Statement:** SB 1252 provides employees the right to receive a copy of their pay statements. (Labor Code section 226.)

**AB 1976 – Lactation Location Requirement:** AB 1976 requires employers to make reasonable efforts to provide a room or location. Bathrooms are not allowed. The bill provides a narrow undue hardship exemption and allows for a temporary location under certain circumstances.

**SB 1412 Limitation on Use of Criminal Convictions:** Under SB 1412 employers may only consider convictions "for specific criminal conduct or a category of criminal offenses prescribed by any federal law, federal regulation, or state law that contains requirements, exclusions, or both, expressly based on that specific criminal conduct or category of criminal offenses" relevant to the job when screening applicants using a criminal background check. (Amends Labor Code section 432.7)

**SB 826 Women on Corporate Boards:** SB 826 requires California-based publicly held corporations to have on their board of directors at least one female—defined as people who self-identify as women, regardless of their designated sex at birth. The deadline for compliance is December 31, 2019.

A corporation may need to increase its authorized number of directors to comply. The bill imposes minimum seat requirements that must be filled by women that are proportional to the total number of seats by December 31, 2021.

For each director's seat that should have been held by a female, but was not, a corporation may be subject to a $100,000 fine (first violation) and a $300,000 fine (additional violations). Corporations that fail to file board member information with the Secretary of State timely will also be subject to a $100,000 fine. ▪

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