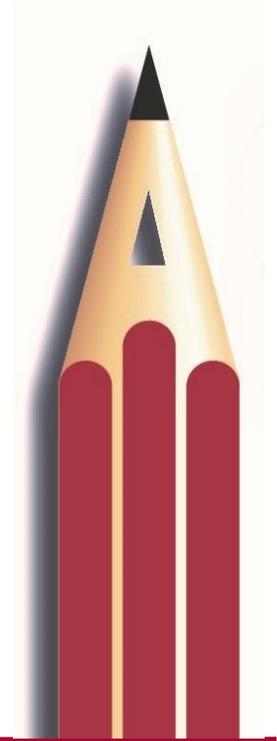


LEGAL UPDATE 2020



ALLIANCE OF
SCHOOLS FOR
COOPERATIVE
INSURANCE
PROGRAMS



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NEW LAWS

- New Statutes
- Public Records Act
- First Amendment
- Establishment Clause
- Whistleblower
- New Test for Independent Contractors

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EXPANDED SEXUAL HARASSMENT TRAINING (SB 1343)

- AB 1825 – supervisors and 50 or more employees
- AB 1343
 - By January 1, 2020
 - Employers with 5 or more employees
 - 1 hour harassment training for all employees
 - Within 6 months of hire
 - Every 2 years
 - For seasonal and temporary employees
 - Train within 30 days or within 100 hours of work



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OMNIBUS SEXUAL HARASSMENT (SB 1300)

- Adds Govt. Code 12964.5 – Prohibits employers from requiring “release of a claim or a right” in exchange for a raise, bonus, or as a condition of employment or continued employment
 - Includes requiring employee to sign statement that he/she does not have any claim or injury against the employer
- Precludes employers from requiring employee to sign non- disparagement agreement or other document stopping employee from disclosing information about unlawful acts in the workplace, including sexual harassment

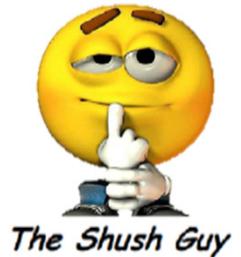
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EXPANDED SEXUAL HARASSMENT LIABILITY FOR ELECTED OFFICIALS (SB 224)

- New Civil Code 51.9
- Prohibits sexual harassment in various sectors
- Elected Officials
- Lobbyists
- Investors
- Producers
- Imposes liability for sexual harassment upon individuals who hold themselves out as being able to help someone establish a business with someone
- Allows DFEH to handle these types of sexual harassment complaints

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CONFIDENTIALITY LIMITS FOR SEXUAL HARASSMENT SETTLEMENT AGREEMENTS (SB 820)



- Law in response to Non-Disclosure provisions in Settlement Agreements
- Implements CCP Section 1001
- Prohibits settlement agreements provisions that prevent disclosure of:
 - “factual information related to a claim filed in a civil action ...” regarding sexual assault or sexual harassment, sex discrimination or retaliation for reporting sexual harassment
 - Provisions that violate this section will be deemed void

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CONFIDENTIALITY LIMITS FOR SEXUAL HARASSMENT SETTLEMENT AGREEMENTS

- Prohibition does not apply to provisions regarding the identity of the claimant unless a government agency or public official is party to the agreement
- Prohibition does not prohibit provisions precluding disclosure of the amount paid



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TARGETING PROVISIONS PRECLUDING SEXUAL HARASSMENT-RELATED TESTIMONY (AB 3109)

- New Civil Code Section 1670.11
- New law seeks to limit non disclosure provisions in settlement agreements that prevent sexual harassment victim from talking when compelled by law
- Law voids any provision entered after January 1, 2019 that waives party's right to testify in any proceeding regarding sexual harassment or criminal conduct
 - Requested by court order, subpoena, by state agency

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NEW DEFAMATION PROTECTIONS FOR SEXUAL HARASSMENT, COMPLAINTS, INVESTIGATIONS, REFERENCES

- AB 2770 – amends Civil Code 47(c)
- The “common interest” privilege
 - Includes statements made relating to complaint of sexual harassment by an employee based on credible evidence
- Also applies to subsequent communications by employer to other “interested persons” during sexual harassment investigation
- Allows employers to respond to reference checks
 - May disclose history of sexual harassment
- Must be done “without malice”



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LACTATION AREA CANNOT BE A BATHROOM (AB 1976)

- Labor Code Section 1031
- Former law - Employers must provide a room “other than a toilet stall” to express milk
 - Language implies employer may provide a bathroom
- New law
 - Law makes clear that employer must provide employee with a room, *other* than a bathroom
 - If employer can establish undue hardship, must still provide a location other than a toilet stall in close proximity to employee’s work area

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INSPECTION OF PAYROLL RECORDS (SB 1252)

- Labor Code 226
- Employers were requiring employees to make their own copies
- New Law –
 - Employee has right to inspect or “receive a copy” of payroll related records
 - Employer must make a copy if the employee makes a request
 - Employer must impose actual charge for the production
 - \$750 penalty if not produced within 21 days

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WORKERS COMPENSATION FOR PEACE OFFICERS RESPONDING TO MASS SHOOTING (AB 1749)

- Amends Labor Code 3600.2
- Potentially extends WC coverage to peace officers response to mass shooting in Las Vegas on October 1, 2017
- ER must determine that providing WC serves it public purposes
- Employer not prevented from accepting liability for injury sustained from events outside of California on 10/1/17:
 - Attempted apprehension of law violators or suspected violators
 - Protection or preservation of life and property
 - Preservation of peace
 - Accepting liability will not determine whether peace officer was acting within the course and scope of employment

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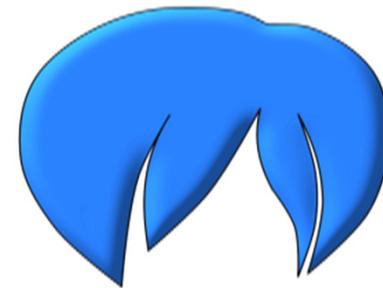
PROPOSED AB 346 EXTENDING 4850 TIME TO SCHOOL POLICE

- Proposed legislation would allow police officers employed by school district, community college district and county office of education to LC 4850
- What is LC 4850?
 - Law allows firefighters, police officers to receive full salary for up to one year rather than receiving temporary disability benefits as a result of work related injuries

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NEW BAN ON RACIAL DISCRIMINATION BASED ON HAIRSTYLES

- Creating a Respectful and Open Workplace for Natural hair Act (CROWN) – SB 188
- Amends FEHA and Education Code
- Prohibits employers and schools from enforcing “race neutral” grooming policies that impact people of color
- Definition of “race” now includes:
 - Protective hair styles, includes:
 - braids, twists and locks



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INDEPENDENT CONTRACTORS – NEW TEST

- Dynamex v. Superior Court (2018)
- Delivery drivers for delivery service
- Drivers were classified as independent contractors
- ABC test for Independent Contractors
 - A. The worker is free from the control and direction of hiring entity re the performance of the work
 - B. The worker performs work that is outside the usual course of the hiring entity's business; and
 - C. Worker is customarily engaged in an independently established trade of the same nature as the work performed

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INDEPENDENT CONTRACTOR – ABC TEST

- Under the ABC Test, the worker is presumed to be an employee unless the hiring entity can establish every element of the ABC test
- Newson signed AB 5, codifying ABC test, effective Jan 1, 2020
 - Unemployment coverage
 - Workers compensation coverage



EMPLOYER MAY BE LIABLE FOR ACCIDENT CAUSED BY ON-CALL EMPLOYEE

- Moreno v. Visser Ranch, 30 Cal.App. 5th 568 (2019)
- Ray Moreno was passenger in father's truck (Ernesto)
- Ray injured when truck hit embankment and rolled over
 - Ernesto was driving from a family event
- Ernesto was on-call 24/7, driving company truck
- Ray sued father's employer under theory of vicarious liability
- Trial court ruled in favor of employer but appeal court reversed
- Held:
 - Ernesto's use of company truck for personal travel after was required by employer
 - Ernesto's driving of truck benefited employer because he could promptly respond to calls

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EMPLOYEES WHO VOLUNTARILY USE COMPANY VEHICLES ARE NOT ENTITLED TO TRAVEL TIME

- Hernandez v Pacific Bell, 29 Cal. App.5th 131
- ER had voluntary Home Dispatch Program (HDP)
 - HDP allowed employees to drive company vehicle from home to customers' homes
- Class of drivers sued for unpaid travel time
- Pac Bell argued that use of company vehicle was voluntary
- Trial Court agreed with Pac Bell
 - Travel time is compensable only if mandated



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FORMER ACCOUNTANT CAN PROCEED WITH WHISTLE LAWSUIT

- Siri v. Sutter Home Winery, 31 Cal. App.5th 598 (2019)
- Siri, an accountant, wrote letter to State Board of Equalization that Sutter was out of compliance with its sales and use tax
- Sutter filed summary judgment, arguing that Siri could not prove the claim with tax returns, which are privileged
- Trial court granted in favor of Sutter
- Court of appeal reversed:
 - Held: Siri's right to recover turns only on whether she was discharged for communicating her *reasonable belief* that Sutter was not reporting its use tax obligation



EMPLOYEE CAN RELY ON FORMER SUPERVISOR'S STATEMENT ABOUT DISCRIMINATION

- Well v. Citizens Telecom Services, 2019 WL 1891796 (9th Cir, April 29, 2019)
- David Weill sued employer for wrongful termination and discrimination
- Weill testified that his supervisor told him he did not get promoted because “You’re not white” and “You’re not female”
- Supervisor was working for employer when statement was made
- Lower court excluded statement based on hearsay
- Ninth Circuit reversed:
 - HELD: Supervisor’s statement was made at the time still employed with employer

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AGENCY ALLOWED TO RECOVER COSTS OF REDACTING ELECTRONIC PUBLIC RECORDS (PUBLIC RECORDS ACT)

- Nat'l Lawyers Guild v City of Hayward, 27 Cal. App.5th 937 (2018)
- NLG requested from City of Hayward electronic records from Police Dept's security demonstration
 - City spent 170 hours redacting videos exempt from CPRA.
 - City sought reimbursement from NLG for \$2,939.58 in costs
- NLG sued for the costs of the reimbursement
- HELD: City may charge for costs of creating and redacting versions of the electronic public record

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ESTABLISHMENT CLAUSE: SCHOOL BOARD'S PRAYERS VIOLATE ESTABLISHMENT CLAUSE

- Freedom from Religion v China Valley USD, 896 F.3d 1132(9th Cir. 2018)
- Board policy permitted clergy and volunteers to give invocation before Board meetings
 - School kids were present
 - Board members commented on Christian religion
 - Board members gave Bible readings



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SCHOOL BOARD'S PRAYERS VIOLATES ESTABLISHMENT CLAUSE

- Ninth Circuit applied Lemon 3- part test. Government Action must:
 - Have secular legislative purpose
 - Must have a principal or primary effect that neither advances nor inhibits religion; and
 - Must not foster excessive “entanglement” between government action and religion
- Ninth Circuit HELD:
 - Prayer policy did not have secular purpose
 - Court held the prayer policy had a religious purpose because took place in front of large numbers of children who were not present voluntarily and did not have equal relationship with the Board

SCHOOL BOARD'S PRAYER VIOLATES ESTABLISHMENT CLAUSE

- Court found the Board's meetings functioned as extension of the educational experience of the public schools
- Board's prayer highlighted only Christian religion
- Policy failed the second and third part of test because the prayers advanced the Christian religion
 - Policy was excessive entanglement between the Board and religion

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LAST CHANCE AGREEMENT VIOLATED FREE SPEECH RIGHTS

- B sued for retaliation for exercising Free Speech rights
- Ninth Circuit held:
 - B's speech was not protected because she was on duty at the time
 - B was not acting as a private citizen when comment made
 - LCC provision violates free speech rights
 - LCC prohibited B from speaking about non-work duties



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LAST CHANCE AGREEMENT VIOLATED FREE SPEECH RIGHTS

- Barone v City of Springfield, Oregon, 902 F.3d 1091 (9th Cir. 2018)
- Barone was Community Service Officer for Police Dept (PD)
- At a community meet and greet, Barone appeared in uniform and told an audience member she had heard about racial profiling
- PD suspended Barone for dishonesty and offered her a Last Chance Agreement
- LCA prohibited Barone from saying negative things about the PD except for relaying discrimination complaint
- Barone refused to sign and was terminated for refusing the sign

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