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PERSPECTIVE

A holiday wish list of potential employment changes for 2019

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Governor-elect Gavin Newsom speaks at a news conference in San Francisco, Nov. 8. Predictions abound regarding whether Newsom and Democrat supermajorities in both legislative chambers will mean even more substantive employment-related changes.

The 2019 California legislative session has begun, and predictions abound regarding whether Gov.-elect Gavin Newsom and Democrat supermajorities in both legislative chambers will mean even more substantive employment-related changes. While the California Supreme Court's *Dynamex* decision and a potential ban on mandatory employment arbitration agreements will dominate the headlines, this article will suggest some less dramatic legislative changes to provide additional workplace flexibility or clarify California employment law, while preserving workplace protections.

Increased Workweek Flexibility

Employees increasingly request scheduling flexibility, but California law is anything but flexible. A common request is the option to work something other than the standard five-day, 40-hour workweek, whether to avoid the daily commute, to reduce childcare costs, or to meet other family responsibilities. A major hurdle to providing non-exempt employees this flexibility is California's fairly unique requirement of daily overtime.

While Labor Code Section 511 authorizes so-called "alternative workweek schedules," it applies "upon the proposal of an employer" and there is no corresponding mechanism currently authorizing similar schedules upon an employee's request. The stringent requirements and the potentially sizable penalties threatened for any mistake in enacting even an employer-proposed alternative workweek schedule provides little incentive for employers to entertain an employee's request. It also makes little sense to require an employee seeking a flexible work arrangement to obtain the two-thirds approval of their co-workers required for employer-proposed alternative schedules.

The Legislature could preserve the general rule of daily overtime while providing scheduling flexibility by allowing individual employees the option to request alternative workweek schedules. Potential concerns about "employer coercion" could be addressed by requiring written requests and that approvals be filed with the Labor Commissioner. This approach, which the other two states requiring daily overtime (Nevada and Alaska) use, would provide non-union hourly employees the same flexibility as exempt or unionized employees, while ensuring the requests were employee-initiated and occurring within an agreed-upon framework and with some measure of agency oversight.

Expanded Compensatory Time-off

Employees also often request compensatory time off (CTO) — that is, extra time-off after working a long day instead of overtime pay. This allows employees to build and access a compensatory time-off bank instead of depleting vacation time or taking unpaid leave. While CTO has been available for federal public sector employees for decades, its use is very restricted under California law, and there is also the potential conflict with federal law. While there are presently federal efforts to expand CTO usage to private sector workers, California should also consider expanding CTO usage to private sector employees covered by additional wage orders.

Telecommuting Flexibility

Employees are also increasingly seeking flexibility regarding where work is performed. Unfortunately, the law often trails behind technology, and California currently has no statutes or regulations addressing telecommuting for private employers. One issue is complying with California's numerous "poster" requirements, and while these laws do not expressly require posting in a telecommuting employee's home, they also do not provide an express exemption. Clarifying that employers need only provide telecommuters with a link to electronic versions of required workplace posters would be helpful.

Another telecommuting issue is complying with municipal-level ordinances where the employee resides that vary from the statewide version or perhaps still-another municipal version governing the office where the work would otherwise be performed if not telecommuting. While complying with a municipal law certainly makes sense when the office is located within the same municipality or where there are numerous other similarly-situated telecommuting employees, subjecting an employer to an entirely new law to accommodate a single employee dissuades telecommuting. Thus, the Legislature might consider language clarifying that in some circumstances, the telecommuting employee will be governed by the municipal law where the work would otherwise be performed if not telecommuting.

Student Loan Repayment Assistance

An often-cited impediment to employee recruitment is staggering student loan debt, particularly for millennials. Recognizing this, there are bi-partisan legislative efforts at the federal level (H.R. 795) and in California (last year's Assembly Bill 2478) that would enable employers to provide annual tax-free student loan repayment assistance to employees. Indeed, in 2018, AB 2478 unanimously passed a key substantive committee vote and seemingly had no reported opposition, but stalled in the Appropriations Committee. Hopefully the California Legislature will re-visit similar legislation in 2019.

Human Resource Consultant Investigators

Human resources professionals increasingly provide consulting services for multiple employers rather than serve as an employee for a single employer. One impediment to such consulting is Business and Professions Code Section 7253 limiting who can perform internal workplace investigations. Enacted without fanfare in the mid-1990s, this section has been interpreted as precluding workplace investigations by external consultants unless they are a state-licensed private investigator or a state-licensed attorney.

Yet there is no evidence the Legislature intended to preclude external human resource consultants from conducting workplace investigations, nor is there a compelling public policy reason to exclude human resource consultants from doing so. Indeed, these consultants may be more knowledgeable regarding workplace issues than outside licensed private investigators, and considerably less expensive than practicing attorneys.

Additional Employment Reintegration Changes

The so-called "ban the box" movement continues to spread, including with California's 2018 statewide enactment of AB 1008, setting forth broad new limits on when employers can request and consider conviction history regarding applicants. While the particulars of each state or city's laws vary, they share the common goals of avoiding the disproportionate impact upon certain groups from relying upon conviction data, and reintegrating individuals who have paid their debt to society.

Many employers share these goals but are understandably concerned about potential liability if the person hired commits a crime or injury. There is also research suggesting the "ban the box" approach of limiting or delaying potentially relevant information has encouraged employers to simply avoid individuals they assume might have such conviction histories.

To incentivize employers to hire individuals with conviction histories, some jurisdictions have utilized state-issued certificates of employability, thus providing some assurances the employee is reformed and protections if the employer faces a negligent hiring claim. Some states have gone further and provided express protections against negligent hiring claims where certificates are issued, while others have enacted laws precluding plaintiffs from later arguing an employer should have known about an applicant's conviction history the law said they could not obtain.

Preemption Provisions for Municipal Level Developments

The already difficult job of navigating between California and federal law becomes nearly impossible when trying to navigate numerous differences between various municipal laws within California on the same subject matter. For example, in addition to the statewide version, California's cites have enacted two dozen minimum wage statutes, nearly a dozen paid sick leave statutes, and at least four "ban the box" laws.

While municipalities serving as the "laboratories of democracy" arguably makes sense in the minimum wage context, or if the state has declined to act, these considerations are absent where the state has enacted detailed substantive laws whose core provisions are less tethered to geographic nuances. The fact that various so-called "blue states" have included preemption language within statewide employee protections (e.g., New Jersey and Minnesota for ban the box laws, and Oregon regarding predictive scheduling) reflects bipartisan recognition such language will not undercut statewide employee protections but will provide valuable administrative benefits.

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