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Problematic Provisions in Employee Agreements

Presented By:

Separation Agreements – Confidentiality

- **New requirements for separation agreements:**
  - SB 331: may include a non-disparagement or non-disclosure clause that restricts an employee's ability to disclose information related to workplace conditions, but must include statutory disclaimer statutory disclaimer protecting the right to report unlawful acts in the workplace.
  - SB 331: requires California employers to (i) inform employees of their right to consult with an attorney regarding any separation agreement, and (ii) provide at least five business days for employees to do so.
- **Note: negotiated settlement agreements that that resolve a claim filed by an employee in court, before an administrative agency, in an alternate dispute resolution forum, or through an employer's internal complaint process are not affected by the Act.**
  - "Negotiated" means that the agreement is voluntary, deliberate, and informed; the agreement provides consideration of value to the employee; and the employee is given notice and an opportunity to retain an attorney or is represented by an attorney.

Separation Agreements – No-Rehire Clauses

- **California prohibits "no rehire" clause in an agreement settling an employment-related dispute unless:**
  - The settlement agreement is with an employee whom the employer, in good faith, has determined engaged in sexual harassment or sexual assault.
    - the employer's good faith determination must be documented and made before employee filed a claim
    - "dispute" requires a claim filed in "good faith": in court, before an administrative agency, in an alternative dispute forum or through employer's internal complaint procedure.
- **AB 2143 expands the exceptions to the no rehire provision to include an exception when the employer makes a good-faith determination that the former employee-complainant has engaged in any criminal conduct.**
  - To be eligible, the employer must make and document a good faith determination of sexual harassment/sexual assault/criminal conduct before the complaint against the employer is filed by the former employee.

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Releases - OWBPA

Older Workers Benefit Protection Act

21-day (45 day for a RIF) period to consider agreement plus 7 days to revoke

In a multi-claim release that includes release of an age claim, can employer carve out age claim (with its 21-day waiting period and revocation rules), so that remainder of release/released claims is effective on the date of signing?

Syverson v. International Business Machines Corp. 472 F.3d 1072 (9th Cir. 2007)

Carve-out for ADEA attorney's fees recovery was not written "in a manner calculated to be understood"

Releases – When Not Permitted

- **Prohibits an employer from requiring an employee, in exchange for a raise or bonus, or as a condition of continued employment, to:**
  1) sign a release of FEHA claims or rights, or
  2) sign a document prohibiting disclosure of information about unlawful acts in the workplace, including non-disparagement agreements.
- **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.**

Confidential Settlements…And Taxes

- **Federal tax law prevents deductions for certain sexual harassment or abuse settlements**
- **Section 162(q) of the tax code:**
  - PAYMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL ABUSE –
  - No deduction shall be allowed under this chapter for – (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment.

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The Silenced No More Act (SB 331)

- **FEHA makes it unlawful for an employer to require 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 in the workplace," including, but not limited to, sexual harassment or discrimination**
- **SB 331: Effective January 1, 2022, the term "unlawful acts" was expanded to include not only sexual harassment, but any harassment or discrimination in the workplace**
- **If an employer requires employees to sign a non-disclosure agreement during employment, the agreement must contain the following language:**

  "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."

- **SB 331 also expands existing law by (i) making it unlawful for an employer to include in any separation/severance agreement a provision that prohibits the disclosure of information about unlawful acts in the workplace, and (ii) requiring employers to provide employees with a reasonable time period of not less than five business days to consider the agreement and to consult with an attorney**

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The Speak Out Act (SB 4524)

NLRA – Concerted Activity

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Arbitration Agreements

Prohibitions on Arbitration [AB 51]

- **Went into effect in California on January 1, 2020.**
- **Reversed case law that allows employers to unilaterally impose pre-dispute arbitration agreements on employees as a condition of hire or continued employment.**
- **Prohibits employers:**
  - From requiring applicants or employees "as a condition of employment, continued employment, or the receipt of any employment-related benefit" to waive any right, forum or procedure for a violation of any provision under the Fair Employment and Housing Act" or the California Labor Code, "including the right to file and pursue a civil action or complaint with … any court."
  - From "threatening, retaliating or discriminating against employees who refuse to enter into such mandatory arbitration agreements."
  - Prohibits arbitration agreements that are not entered into voluntarily – no coercion.

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Current Status of AB 51

- **Chamber of Commerce of the United States, et al. v. Becerra, et al., No. 2:19-cv-2456 (E.D. Cal. 2019): On 1/31/2020, the U.S. District Court for the Eastern District Court of California issued a preliminary injunction enjoining the state from enforcing AB 51 agreements covered by the FAA.**
  - The state of California appealed the decision to the Ninth Circuit.
- **Chamber of Commerce v. Bonta, No. 20-15291 (9/15/2021): The Ninth Circuit in a 2-1 decision reversed in part the District Court's decision and held that the FAA does not fully preempt AB 51.**
  - Concluded that because AB 51 was focused on the conduct of the employer prior to entering into an arbitration agreement, the statute did not conflict with the FAA.
- **Chamber of Commerce v. Bonta, No. 20-15291 (9th Cir. 2/14/2022): Ninth Circuit defers decision on Chamber's petition for en banc review until the Supreme Court decides Viking River Cruises, Inc. v. Moriana.**
- **Viking River Cruises, Inc. v. Moriana, 2022 WL 2135491 (U.S. June 15, 2022): "Individual" PAGA claims can be arbitrated.**
- **Chamber of Commerce v. Bonta, No. 20-15291 (9th Cir. 2/15/2023): AB51 is preempted by the FAA.**

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Strategies if AB 51 TRO is lifted

- **"Voluntary" agreements only**
- **Offer as an option to employees.**
- **"Sell" the advantages – paid for by company; stream-lined process; less formal; quicker result; etc.**
- **Offer additional consideration?**
  - BUT: Is additional consideration "receipt of an employment-related benefit".
- **Mandatory Arbitration Agreement**
- **Carve Out for FEHA and Labor Code claims**
  - What happens when claims include covered and uncovered claims?
- **A combination of voluntary as well as mandatory arbitration provisions**

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Viking River Cruises, Inc. v. Moriana 56 U.S. ____ (2022)

- **The Court examined two key questions relating to the application of the FAA to arbitration agreements seeking to limit PAGA claims:**
  - whether the FAA preempts language in the PAGA itself which would prohibit pre-dispute waivers of PAGA claims, and
  - whether PAGA actions may be split via an arbitration agreement between claims brought on behalf of the individual representative plaintiff and the claims of those allegedly "aggrieved employees" that plaintiff would seek to represent.
- **Takeaways:**
  - Wholesale pre-dispute waivers of an employee's right to bring PAGA claims will not be enforced.
  - A pre-dispute agreement between an employee and an employer stating that all disputes between them are to be decided on an individual basis in binding arbitration may now compel a representative plaintiff's PAGA claim to arbitration and claims of other absent employees will not be joined into that arbitration proceeding.
  - It is unclear whether the PAGA representative's claims proceeding in arbitration on an individual basis would preclude non-individual claims alleged by that representative from proceeding in court.
  - Practical pointer: Many existing arbitration agreements have PAGA carve outs…….

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

What it does:

- **Amends Federal Arbitration Act (FAA) to permit an employee alleging sexual assault or sexual harassment to invalidate a pre-dispute arbitration agreement or collective action waiver.**
  - "Sexual assault" is defined as a nonconsensual sexual act or sexual contact, as such terms are defined in Section 2246 of Title 18 (the U.S. criminal code) or similar applicable tribal or state law, including when the victim lacks capacity to consent.
  - "Sexual harassment" is defined as "conduct that is alleged to constitute sexual harassment under applicable federal, tribal, or state law"—meaning that it covers anything that would qualify as sexual harassment under Title VII or FEHA.
- **Requires courts, rather than arbitrators, to determine whether the Act applies to a claim regardless of whether the underlying agreement delegates the authority to an arbitrator**

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Sexual Harassment Claims – Unanswered Questions

- **Does not apply retroactively, it only applies to "any dispute or claim that arises or accrues on or after the date of enactment."**
  - What does this mean?
  - The law may still invalidate pre-dispute agreements entered into prior to its enactment.
- **Only applies to a claim that "relates to" sexual assault and sexual harassment.**
  - What about other claims alleged in the same complaint?
  - Litigation on 2 fronts?
- **What changes are required in arbitration agreements?**
  - Existing agreements?
  - Future agreements?
    - Labor Code Section 432.5
      - PAGA

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Arbitration Agreement – Fees Must be Paid on Time

BUT, We Have An Agreement….

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Independent Contractors – Not As Easy As ABC

A. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact
B. The worker performs work that is outside the usual course of the hiring entity's business
C. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed

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Independent Contractors – Not As Easy As ABC…

- ***Dynamex v Superior Court*** **– under the Wage Orders, a worker is an independent contractor only if the hiring entity can establish ALL THREE factors of the ABC Test**
- **AB 5 adopted the ABC Test to apply in other contexts as well.**
  - Statutory requirements must be met in order for an "exception" to apply
    - Maintain separate business location; proper licenses if required; customarily engaged in that work
  - If exception applies, must pass the Borello test:
    - Common law factors plus economic realities
- ***Vasquez v. Jan-Pro Franchising International, Inc.*** **– The California Supreme Court held that the ABC test under the Dynamex decision is retroactive.**

Non-Competition Agreements

- ***Cal Bus. & Prof. Code Section 16600*: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void"**
- ***Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008) – No "narrow limitation" exception**
- **Practitioner's Note: can't require employees to sign unenforceable non-competes**
  - California case law – basis for wrongful termination claim
  - Labor Code Section 432.5
  - PAGA?
- ***Ixchel Pharma, LLC v. Biogen, Inc*., 9 Cal.5th 1130 (2020)**
  - A "rule of reason applies to determine the validity of a contractual provision by which a business is restrained from engaging in a lawful trade or business with another business."
    - "The Rule of Reason … asks whether an agreement harms competition more than it helps by considering the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption."

Non-Competition Agreements

- ***SB 699 (Adds B&P Section 1600.5)***
  - *Contract void under section 16600 is unenforceable regardless of where signed or place of employment*
  - *Constitutional challenge?*
  - *Application of CA choice of law rules*
  - *Private right of action for current, former and prospective employees*
    - *Injunctive relief, damages and attorneys' fees*
- ***AB 1076***
  - *Amends 16600*
    - *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008) holding to applies: no restrictions regardless of how narrowly tailored
    - Application is not limited to contracts in which the party restrained is a party to the contract
    - *Response to business to business agreements in Ixchel Pharma, LLC v. Biogen, Inc.*, 9 Cal.5th 1130 (2020)?
  - *Adds 16600.1*
    - *Employers must provide notice to current and former employees (employed as of 1/1/22) by 2/14/24 that contract is void*

Assignment of Inventions

- **"Work Made For Hire"**
  - Converts freelancers into employees:
    - Workers' compensation
    - Unemployment insurance
    - All other purposes?
- **California Labor Code §2870**
  - Limits assignment of inventions
    - Created during non-working time
    - Not using company's equipment
    - Unrelated to company's business

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Can We Avoid California Law?

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Choice of Forum and Law

Forum selection clause

- Identifies where a lawsuit must be filed
- "The parties agree to submit all disputes arising out of or in connection with this Agreement to the exclusive jurisdiction of the Courts of the State of California"

Choice of governing law clause

- Allows parties to agree that a particular state's laws will be used to interpret the employment agreement
- "The parties agree to submit all disputes arising out of or in connection with this Agreement to the exclusive jurisdiction of the Courts of the State of California"

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Forum and Choice of Law…and California

Employer cannot require employee to agree to a provision that would:

- Require the employee to adjudicate outside California a claim arising in California
- Deprive the employee of substantive protection of California law with respect to a controversy arising in California

Provision that violates the law is voidable by the employee

- Matter would be adjudicated in California and under California law
- Employee entitled to attorney's fees

Applies to contracts renewed or entered into on or after Jan. 1, 2017

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Forum and Choice of Law "Gotchas"

Forum selection may affect law applied by chosen jurisdiction, despite agreed upon selection of law

One clause might not work without the other

Be careful when using *both* a forum selection clause (representing the parties' agreement to resolve the dispute in court) and an arbitration clause

Exclusive or non-exclusive jurisdiction?

Avoid splitting issues between forums!

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Boilerplate Clauses – Avoid The "Landmines"

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Walter has more than 30 years of experience advising employers on challenging workplace issues and providing practical solutions that minimize legal exposure in a heavily regulated business environment. Walter is widely respected for his ability to assess problems, design smart legal strategies, and oversee cost-effective resolutions.