

Employers Beware: Seventeen New California Laws Will Affect Employers with Operations in the State

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The California legislative term that just ended has produced more new employment-related laws than in any recent year. The California Legislature, with a super majority of Democrats, and Governor Jerry Brown have enacted seventeen new laws that impose additional burdens on employers and continue the trend of expanding employee rights that has existed for several years. Except where otherwise specified in the alert, all of the new laws take effect on January 1, 2014.

Whistleblower Protection

Senate Bill 496 (Expansion of Whistleblower Retaliation Protections)

Current Labor Code section 1102.5(a), (b) prohibits actions to prevent employees from reporting violations of law to a government agency, and prohibits retaliation against employees who have made such external reports. In addition, case law holds that an employee whose duties include disclosure of legal compliance information is not a “whistleblower.”

SB 496 expands the protections of Labor Code section 1102.5(a), (b) to *internal* whistleblowers. It also legislatively overturns case law exempting employees who have legal compliance duties.

SB 496 prohibits an employer from adopting any rule, regulation, or policy preventing an employee from disclosing reasonably-believed violations of law or regulations to a person with authority over the employee or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, regardless of whether disclosing the information is part of the employee’s job duties.

SB 496 also prevents retaliation against an employee because the employer *believes* that the employee disclosed or may disclose information, to a government or law enforcement agency, or to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, if the employee has reasonable cause to believe that the information discloses a violation of law or regulations, regardless of whether disclosing the information is part of the employee’s job duties.

In addition, SB 496 makes it illegal to take specified actions designed to prevent an employee from providing information to, or testifying before, any public body conducting an investigation, hearing, or

inquiry where the employee reasonably believes the information or testimony discloses a violation of law or a regulation, and prohibits retaliation against an employee who provides such information or testimony.

Undocumented Workers

Assembly Bill 263 (Prohibition of Retaliation Against Suspected Undocumented Workers)

The Legislature's declaration of purpose in connection AB 263 is noteworthy: "Low-wage, often immigrant, workers are the most frequent victims of wage theft and are also exposed to the greatest hazards at work Far too often, when workers come forward to expose unfair, unsafe, or illegal conditions, they face retaliation from the employer Where there are immigrant workers involved, employer retaliation often involves threats to contact law enforcement agencies, including immigration enforcement agencies, if a worker engages in protected conduct."

AB 263 significantly expands the prohibitions against retaliation in the Labor Code. It creates new Labor Code section 1019, which makes it unlawful for an employer or any other person to engage in, or direct another person to engage in, an "unfair immigration-related" practice against a worker in retaliation for exercising a legal right.

An "unfair immigration-related practice" is defined as any of the following practices when taken for retaliatory purposes: (1) requesting more or different documents than are required under federal immigration law, or a refusal to honor documents tendered pursuant to federal law that, on their face, reasonably appear to be genuine; (2) using the federal E-Verify system to check the employment authorization status of a person at a time or in a manner not required under federal law or not authorized under any memorandum of understanding governing the use of the federal E-Verify system; (3) threatening to file or the filing of a false police report; or (4) threatening to contact or contacting immigration authorities.

Under the new law, protected activity includes the following: filing a complaint or informing any person of an employer's or other party's alleged violation of the Labor Code or a local ordinance, if the complaint or disclosure is made in good faith; seeking information regarding whether an employer or other party is in compliance with the Labor Code or a local ordinance; informing a person of his or her potential rights and remedies under the Labor Code or a local ordinance; and assisting another in asserting their rights.

The law creates a rebuttable presumption that an adverse action taken within 90 days of the employee exercising a protected right is retaliatory.

AB 263 authorizes a civil action for equitable relief and damages or penalties for an unfair immigration-related practice. In addition, the new law authorizes a court to order the suspension of certain business licenses held by the employer for prescribed periods based on the number of violations.

AB 263 also adds new Labor Code section 1024.6, which prohibits an employer from discharging or discriminating, retaliating or taking any adverse action against an employee because the employee updates or attempts to update his or her "personal information," unless the changes are directly related to the skill set, qualifications, or knowledge required for the job. This change would appear to prohibit the discharge of an employee who had provided a false Social Security number or other

information relied upon by the employer to verify identity and legal authorization to work in the United States. However, the law does not address whether a discharge can be based on the falsification of a company document where an employee has falsely certified the accuracy of prior information and the employer has an established practice of discharging employees who have falsified their employment application or other company documents.

AB 263 also: (1) amends Labor Code section 98.6, making it illegal to retaliate against an employee who has complained to the employer, orally or in writing, that the employee is owed unpaid wages, and creating a civil penalty of up to \$10,000 per violation; and (2) amends Labor Code section 98.7, providing that it is not necessary to exhaust administrative remedies through the Labor Commissioner in order to file a lawsuit against an employer for violation of any law over which the Labor Commissioner has jurisdiction.

Senate Bill 666 (Elimination of Requirement to Exhaust Administrative Remedies and Prohibition of Reporting Suspected Illegal Status Retaliation)

SB 666 creates a new Labor Code section 244. This new section provides that it is not necessary for an employee to exhaust administrative remedies in order to bring a civil action for violation of any provision of the Labor Code unless the section under which the action is brought expressly requires exhaustion of an administrative remedy. This will make it easier for lawsuits to be filed against employers.

SB 666 also makes it an “adverse action” for purposes of establishing discrimination or retaliation to report or threaten to report to a government agency the suspected citizenship or immigration status of an employee, a former employee or a prospective employee, or a member of their family, because the person has exercised a right under the Labor Code or other laws.

Further, the new law authorizes suspension or revocation of business licenses if the licensee has been determined by the Labor Commissioner or a court to have violated new Labor Code section 244.

In addition, SB 666 makes it a cause for suspension, disbarment, or other discipline for any California licensed attorney to report or threaten to report the suspected immigration status of a witness or party to a civil or administrative action, or the person’s family member, because the person exercises or has exercised a right related to employment.

Protection for Employees Who Are Crime Victims or Good Samaritans

Senate Bill 400 (Expansion of Employment Protections for Domestic Violence, Sex Assault and Stalking Victims, and New Reasonable Workplace Safety Measure Accommodation Obligations)

Labor Code sections 230 and 230.1 currently prohibit an employer from discharging, discriminating or retaliating against an employee who is a victim of domestic violence or sexual assault for taking time off from work in connection with court proceedings or to seek medical attention and other specified services as a result of these crimes against them.

SB 400 extends these time-off protections to employees who are victims of “stalking” (as defined in the Penal Code and the Civil Code). In addition, the new law prohibits discharge, discrimination and retaliation against employees because of their “status” as a victim of domestic violence, sexual assault or stalking if the employee/victim provides notice to the employer or the employer has actual knowledge of this status.

In addition, SB 400 requires employers to provide reasonable accommodations to employees who are victims of domestic violence, sexual assault or stalking and request an accommodation for their safety while at work. The law states that reasonable accommodations may include the implementation of safety measures, including:

- job transfer;
- job reassignment;
- modified schedule;
- changed work telephone;
- changed work station;
- lock installation;
- assistance in documenting domestic violence, sexual assault, or stalking that occurs in the workplace;
- implementation of safety procedures;
- adjustment to job structure, the workplace facility, or work requirements in response to domestic violence, sexual assault, or stalking; and
- referral to a victim assistance organization.

SB 400 mirrors the reasonable accommodation procedures under disability discrimination laws by requiring the employer to engage in a timely, good faith interactive process with the employee to determine effective reasonable accommodations and does not require the employer to undertake any action that would constitute “undue hardship.” An undue hardship is defined as including “an action that would violate an employer’s duty to furnish and maintain a place of employment that is safe and helpful for all employees” A factor in determining whether a requested accommodation is reasonable is whether there are exigent circumstances or danger facing the employee.

An employer may request an employee to provide a written certification that the employee is a victim of domestic violence, sexual assault or stalking, and that the requested accommodation is for the safety of the victim while at work. The employer may request recertification every six months. Any documentation provided to an employer identifying an employee as a victim of domestic violence, sexual assault or stalking must be kept confidential and not disclosed by the employer except as required by law or necessary for the safety of employees in the workplace. The employer must give the employee notice before any disclosure of the information is made.

The employee may request a new accommodation based on changed circumstances, and in such a case, the employer must repeat the interactive process with the employee.

Employees are required to notify their employer when an accommodation is no longer needed.

Employers are prohibited from retaliating against an employee who has requested a reasonable accommodation, whether the request was granted or not. SB 400 authorizes reinstatement, back pay and injunctive relief for violations of the law.

Senate Bill 288 (Expansion of Crime Victim Leave Time-Off)

SB 288 (codified as Labor Code section 230.5) allows an expanded list of employee/crime victims to take time off, to appear in court to be heard at any proceeding, including any delinquency proceeding, a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue, in connection with any of the following offenses:

- vehicular manslaughter while intoxicated;
- felony child abuse likely to produce great bodily harm or a death;
- assault resulting in the death of a child under eight years of age;
- felony domestic violence;
- felony physical abuse of an elder or dependent adult;
- felony stalking;
- solicitation for murder;
- a serious felony, as defined in the Penal Code;
- hit-and-run causing death or injury;
- felony driving under the influence causing injury; and
- sexual assault.

The law defines "victim" broadly to include any person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act. The term "victim" also includes the employee's spouse, parent, child, sibling, or guardian.

The employee is required to provide reasonable advance notice to the employer "unless the advance notice is not feasible." The employer is prohibited from taking any action against an employee as a result of an unscheduled absence related to the specified court proceedings if the employee provides certification of the court-related absence within a reasonable period of time after the absence. Time off for attendance at one of the specified court proceedings is unpaid, but an employee has the right to use accrued vacation or other paid time off to cover the absence.

SB 288 prohibits an employer from discharging or in any other manner discriminating or retaliating against an employee for taking time off in connection with one of the specified court proceedings, and authorizes reinstatement of employment and back pay as remedies for a violation of the law.

Assembly Bill 633 (Protection for Employees Who Aid Injured Persons)

AB 633 prevents an employer from prohibiting an employee from providing voluntary emergency medical services, including cardiopulmonary resuscitation, in response to a medical emergency. However, an employer may adopt and enforce a policy prohibiting an employee from performing emergency medical services on a person who has expressed the desire to forgo resuscitation or other medical interventions through legally recognized means. The new law does not impose any express or

implied duty on an employer to train its employees regarding emergency medical services or cardiopulmonary resuscitation.

Employment Discrimination and Harassment

Assembly Bill 556 (Discrimination Based on Military or Veteran Status)

Existing federal law prohibits discrimination against certain military veterans. AB 556 adds “military and veteran status” to the categories of persons protected from employment discrimination under California’s FEHA. The new law defines “military and veteran status” more broadly than under federal anti-discrimination law to include members *or* veterans of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, and the California National Guard. AB 556 clarifies that the prohibition against sex discrimination under the FEHA does not affect the right of employers to use veteran status as a factor in employee selection or to give special consideration to Vietnam-era veterans as provided under federal law.

Senate Bill 292 (Sexually Harassing Conduct Need Not Be Motivated by Sexual Desire)

California’s Fair Employment and Housing Act (“FEHA”) currently provides that, “harassment” because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. It does not address whether sexually harassing conduct must be motivated by sexual desire. In *Kelley v. Conco Companies*, 196 Cal. App. 4th 191 (2011), the California Court of Appeal held that a plaintiff in a same-sex harassment case must prove that the harasser harbored a sexual desire for the plaintiff in order to survive summary judgment. This decision contradicted an earlier court ruling in *Singleton v. United States Gypsum Co.*, 140 Cal. App. 4th 1547 (2006), which held that no sexual desire is necessary to prove sexual harassment. SB 292 legislatively overturns *Kelley*, and provides that sexually harassing conduct need not be motivated by sexual desire.

Senate Bill 655 – Vetoed (Attempt to Legislatively Overturn California Supreme Court’s Ruling on Burden of Proof in Mixed-Motive Discrimination Cases)

Earlier this year, the California Supreme Court issued its decision in *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013). The decision involved a so-called “mixed-motive” case, in which the plaintiff proves that the reason for the adverse employment action was unlawful discrimination or retaliation and the employer contends that it would have made the same decision for non-discriminatory/non-retaliatory reasons. The Court held that in such a case under the FEHA, if the employer proves by a preponderance of the evidence that it would have made the same decision for lawful reasons, then the plaintiff cannot be awarded any damages. Paul Hastings partner Paul Cane was the chief author of the “friend of the court” brief submitted by the California Employment Law Council (CELC), and was instrumental in securing this victory for employers.

Proposed SB 655 would have legislatively overturned the ruling in *Harris*. In one of the only pieces of positive news for employers in this legislative term, Governor Brown vetoed the bill, stating: “I think that Supreme Court Justice Goodwin Liu got it right in his well-reasoned opinion in that case, and I see no reason for further legislative intervention.”

Wage and Hour

Assembly Bill 10 (Minimum Wage Increases)

AB 10 amends Labor Code section 1182.12 and raises California's minimum wage to \$9.00 per hour starting on July 1, 2014, and to \$10.00 per hour starting on January 1, 2016. As a result of this change, to meet the salary requirement for exempt status in California, an employee's annual salary must be at least \$37,440 starting on July 1, 2014, and at least \$41,600 starting on January 1, 2016.

Assembly Bill 241 (Domestic Worker Bill of Rights)

AB 241 adds a new Labor Code section 1540, prohibiting a "domestic work employee" who is a "personal attendant" from being employed for more than 9 hours in any workday or more than 45 hours in any workweek unless the employee receives one and one-half times the employee's regular rate of pay for all hours worked over 9 hours in any workday or 45 hours in the workweek.

"Domestic work" is broadly defined to include care of persons in private households or maintenance of private households or premises, and includes such occupations as childcare providers; caregivers of people with disabilities, sick, convalescing, or elder persons; house cleaners; housekeepers; maids; and "other household occupations." The law does *not* apply to care of persons in facilities providing board or lodging in addition to medical, nursing, convalescent, aged, or child care, including residential care facilities for the elderly.

The law does not apply to individuals who perform services through specified In-Home Supportive Services programs; the parent, grandparent, spouse, sibling, child or legal adopted child of the domestic work employer; individuals under age 18 employed as a babysitter for the minor child of a domestic work employer in the employer's home; a "casual babysitter" for a minor child in a domestic employer's home; a person employed by a licensed health facility; a person who is employed pursuant to a contract with the State Department of Developmental Services; and persons who provides child care who are exempt from licensing requirements under specified laws.

A "domestic work employer" is broadly defined as a person who employs or exercises control over the wages, hours or working conditions of domestic work employee, whether directly or indirectly through a third-party or staffing agency.

A "personal attendant" is defined as any person "employed by a private householder or by any third party employer recognized in the healthcare industry to work in a private household, to supervisor, feed, or dress a child, or a person who by reason of advanced age, physical disability, or medical deficiency needs supervision." The law will expire on January 1, 2017, unless it is replaced or extended by then.

Senate Bill 435 (Penalty for Missed Heat Illness Prevention Recovery Periods)

Labor Code section 226.7 provides a penalty of one hour's pay for each day that an employee is required to work during any required meal or rest period. Cal-OSHA regulations require employers of certain outdoor workers to encourage and allow the workers to take a cool-down rest in the shade for a period of no less than five minutes at a time when they feel the need to do so to prevent overheating. SB 435 expands Labor Code section 226.7, making it applicable to missed "recovery periods," unless the employee is exempt from the recovery period rules. The law defines a "recovery period" as "cool down period afforded an employee to prevent heat illness."

Assembly Bill 442 (Liquidated Damages Awards for Underpaid Wages)

In an action for payment of less than the minimum wage, Labor Code section 1194.2 currently allows a court and the Labor Commissioner to award “liquidated damages” in an amount equal to the underpaid wages.

AB 442 amends Labor Code sections 1194.2 and 1197.1, making it clear that the civil penalties available under Section 1197.1 are in addition to any awarded liquidated damages and that the Labor Commissioner can assess liquidated damages as part of a citation issued for underpaid wages.

Senate Bill 390 (Court Recovery of Unremitted Employee Wage Withholdings)

Labor Code section 227 makes it a crime for an employer to willfully or with the intent to defraud fail to remit agreed-upon payments to health and welfare funds, pension funds, or other various benefit plans. The crime is a felony where the amount the employer fails to remit exceeds \$500. All other violations are punishable as a misdemeanor. SB 390 amends this provision, making it a crime for an employer to fail to remit withholdings from an employee’s wages that were made pursuant to state, local, or federal law, *e.g.*, for taxes. The new law also provides for any recovery or restitution obtained in the criminal proceeding to be paid to the agency, entity or person to whom it is owed.

Senate Bill 462 (Limitation on Employer’s Right to Recover Attorneys’ Fees and Costs in Certain Wage and Benefit Lawsuits)

California Labor Code section 218.5 currently requires a court to award attorneys’ fees and costs to the prevailing party (whether an employee or employer) in an action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, if any party to the action requests attorneys’ fees and costs upon the initiation of the action. SB 462 changes this rule and allows an award of attorneys’ fees and costs to a prevailing employer *only if* the court finds that the employee brought the court action in bad faith. The new law does not define “bad faith.”

Assembly Bill 1386 (Liens on Real Property by Labor Commissioner)

Under current law, the California Labor Commissioner has the authority to hear employee complaints regarding the payment of wages and other employment-related issues. The Labor Commissioner is required to file an order, decision, or award within 15 days after the hearing on the employee complaint. Once the order is final, the Labor Commissioner is required to file the final order with the Clerk of the Superior Court. The Clerk of the Superior Court enters judgment in conformity with the final order, which has the same force and effect as a judgment entered in a civil action.

AB 1386 amends existing law to provide that as an alternative to obtaining a court judgment, upon the Labor Commissioner’s order becoming final, the Labor Commissioner may create a lien on the employer’s real property by recording a certificate of lien with the county recorder of any county in which the employer’s real property may be located. Unless the lien is satisfied or released, the lien will continue until 10 years from the date of its creation.

Employee Leaves

Senate Bill 770 (Expansion of Paid Family Leave Benefits)

In 2004, California created the Family Temporary Disability Insurance program. This program is commonly known as Paid Family Leave (“PFL”), and allows an employee to apply for up to six weeks of government-provided wage replacement benefits to cover unpaid time off from work to care for a

seriously ill child, spouse, domestic partner or parent, or to bond with a child within one year of birth or the placement of the child in connection with foster care or adoption.

SB 770 amends the law to provide PFL benefits to employees who are off work without pay to care for a seriously ill grandparent, grandchild, sibling, or parent-in-law. The law defines a "sibling" as a person related to another person by "blood, adoption or affinity through a common legal or biological parent." The new law takes effect on July 1, 2014.

SB 770 does *not* create any new family care leave entitlement or expand obligations of employers to grant family care leaves under the California Family Rights Act. This new law could create confusion because employees may not understand why they can receive PFL benefits but not be eligible for a family care leave under the employer's policy or the law.

Discovery in Civil Litigation

Assembly Bill 1183 (Timing of Motion to Compel Further Discovery Responses in Litigation)

Under current law, a motion to compel further responses to written discovery must be filed within 45-days of service of party's response or supplemental response. The right to make the motion is waived if it is not timely filed. The case law is unclear as to when the time to file such a motion begins to run if the required verification of the responses is not provided. AB 1183 amends the Civil Procedure Code to provide that the time to bring a motion to compel further discovery responses begins to run *after verified* responses have been served.

What Should Employers Do?

California-based employers and out-of-state-employers with employees in California should immediately review their policies, procedures and practices to ensure compliance with the new laws.

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