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CLIENT ALERT

California Employment Law Developments for 2013

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The start of the new year spurs resolutions, a spirit of bipartisanship, and other hopes and dreams. Alas, certainty regarding such matters is elusive. Some degree of certainty does exist, however, regarding new obligations that California employers will face this year.

In 2012, the California state legislature was busy passing new employment-related laws that take effect at various times during 2013. The Fair Employment and Housing Commission finalized amended regulations, effective December 30, 2012, regarding pregnancy and disability obligations in the employment setting. Also, the California Supreme Court is anticipated to issue decisions in 2013 on topics of great significance to employers that operate in the State. A summary of these developments follows.

New Statutes

Social Media

AB 1844 adds Section 980 to the Labor Code on the subject of social media. Section 980 prohibits employers from requesting that employees or applicants (a) supply their personal social media usernames or passwords, (b) access those sites in the employer's presence, or (c) divulge any personal social media. Employers may, however, request such information if it is "reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding." Employers are prohibited from retaliating against employees who refuse to comply with unlawful requests for such social media information.

Discrimination

AB 1964 amends the Fair Employment and Housing Act (FEHA) to expand protections against religious discrimination. Specifically, the new law prohibits discrimination based upon a "religious dress practice" (*e.g.* wearing head or face coverings) or a "religious grooming practice" (*e.g.* facial hair), which phrases are to be construed broadly, according to the statute. The new law also provides that segregating an individual from other employees or the public because of that person's religious dress practice or religious grooming practice is not an acceptable reasonable accommodation. No religious accommodation will be required if it would violate any other law that prohibits discrimination or protects civil rights.

AB 2386 also amends the FEHA. The amendment codifies existing case law and affirms that the definition of "sex" in the FEHA includes breastfeeding and related medical conditions. As a result, employers may not discriminate on such bases and must provide reasonable accommodations.

Wage and Hour

AB 1744, effective July 1, 2013, and SB 1255 amend Labor Code Section 226 regarding itemized wage statements. These amendments address an employee's right to recover damages or penalties in the event the employer knowingly and intentionally fails to abide by its obligation to provide accurate and complete wage statements. Specifically, an employee will be able to establish the requisite injury if the employer fails to provide a wage statement or if an inaccurate or incomplete wage statement caused the employee to be unable to determine promptly and easily (*i.e.,* without reference to other documents or information) certain items required to be included on the statements. The amendments clarify further (a) that an employer's "knowing and intentional failure" to comply with the wage statement requirements does not include isolated and unintentional clerical errors, and (b) that policies and practices designed to ensure compliance with these wage statement requirements will be a factor in the determination of whether the employer violated this standard. The new bills also require temporary services employers (not including certain security services companies, as provided in newly created Labor Code Section 226.1) to include on employees' itemized wage statements the rate of pay and the total hours worked for each assignment. This amendment was included to provide clarity to the growing number of temporary employees, who may have multiple assignments at different pay rates within a single pay period. Labor Code Section 2810.5, pertaining to the written notice that must be provided to new hires, also is amended to add requirements applicable to temporary services employers.

AB 2675 amends Labor Code Section 2751, which requires commission compensation agreements to be in writing effective January 1, 2013. The amendment adds an exclusion to the definition of the term "commission" for "[t]emporary, variable incentive payments that increase, but do not decrease, payment under the written contract."

AB 2103 amends Labor Code Section 515 pertaining to overtime exemptions. It adds the following provision: "Payment of a fixed salary to a nonexempt employee shall be deemed to provide compensation only for the employee's regular, nonovertime hours, notwithstanding any private agreement to the contrary." This amendment is intended to overturn the decision in *Arechiga v. Dolores Press,* 192 Cal. App. 4th 567 (2011), in which the court held that overtime for work performed in excess of eight hours in a day need not be paid under certain private wage agreements.

AB 1775 amends California Code of Civil Procedure Sections 706.011 and 706.050 and, effective July 1, 2013, alters the calculation of the amount of earnings exempt from wage garnishment.

AB 2677 amends Labor Code Section 1773.1 and adds Labor Code Section 1773.8 with regard to prevailing wages. According to the new law, increased employer payment contributions that result in lower wages are not violations of the applicable prevailing wage determinations under specified conditions.

Recordkeeping and Postings

AB 2674 amends Labor Code Section 1198.5 regarding employee personnel records. According to the amendments, not only the current or former employee, but also the employee's representatives (*e.g.* an attorney), has the right to inspect the employee's personnel records. The term "personnel records" continues to be defined broadly in the statute as records "that the employer maintains relating to the employee's performance or to any grievance concerning the employee," with certain exceptions that include letters of reference, records regarding the investigation of a possible criminal offense, records obtained prior to the employee's employment, records "[p]repared by identifiable examination committee members," and records "[o]btained in connection with a promotional examination." The records therefore need not be located in a specific file to be covered by this definition. Moreover, the amendments expand the employer's obligation to include not only the production of documents for inspection, but also the production of a copy of all such records (not merely records that the employee had signed, as under

Labor Code Section 432) upon written request, at a cost not to exceed the actual cost of reproduction. The employee or the employee's representative may submit such written requests on his or her own, or the employee may complete an employer-provided form, which form is to be provided to the employee upon verbal request. The personnel records must be made available and/or produced within 30 days of receipt of the written request for inspection, which period may be extended up to five days by written agreement. The amendments also authorize employers to redact the names of nonsupervisory employees from such personnel records before copying them or making them available for inspection. Employers are obligated to comply with only one request per year for each employee and up to 50 requests per month for all employees. Failure to provide the personnel records timely subjects the employer to a $750.00 penalty. Employees also may obtain injunctive relief in a civil action and may recover their reasonable attorneys' fees and costs. Personnel records of employees covered by a collective bargaining agreement are excluded under specified circumstances.

SB 1193 adds Section 52.6 to the Civil Code and requires certain businesses, including those holding alcohol beverage licenses, emergency rooms of general acute care hospitals, urgent care centers, and privately operated job recruitment centers, among others, to post an anti-human trafficking notice near the public entrance or in some other conspicuous location. The statute specifies the language of the notice and provides that the Department of Justice will make a model notice available online by April 1, 2013. The statute also provides that failure to post the notice after being given 30 days notice of noncompliance may result in a civil penalty of $500 for the first violation and $1,000 for each subsequent violation.

Whistleblowers

AB 2492 amends various provisions of the State's False Claims Act. The amendments increase the penalties against government contractors that violate the Act. They also eliminate certain limitations regarding employees' rights to seek civil remedies for alleged retaliation or harassment based on the furtherance of a false claims action.

Certain Contracts for Labor or Services

AB 1855 amends Labor Code Section 2810, which prohibits individuals or entities from entering into contracts for labor or services with certain contractors (*e.g.,* construction, garment, security guard) if such individuals or entities know or should know that the contract does not include funds sufficient to allow the contractor to comply with laws governing such services. The amendment adds warehouse contractors to the list of those subject to this prohibition.

Amended Regulations

The Fair Employment and Housing Commission has revised its disability regulations and its regulations regarding pregnancy, childbirth and related medical conditions, effective December 30, 2012. The amendments are detailed and substantive. Among the many changes are the following:

Disability

- The definition of the term "mental disability" has been revised and examples of such disabilities have been expanded to include "autism spectrum disorders, schizophrenia, and chronic or episodic conditions such as clinical depression, bipolar disorder, post-traumatic stress disorder, and obsessive compulsive disorder."
- Express exclusions to the term "disability" no longer include references to transvestism and transsexualism.

- Examples of "reasonable accommodations" have been expanded and now expressly include, among other accommodations, allowing assistive animals, permitting an alteration of when and/or how an essential function is performed (although elimination of the essential function is not required), modifying supervisory methods, permitting an employee to work from home, and providing paid or unpaid leave. The regulations also provide that employers may not require employees to accept an accommodation, although they may inform them that refusing the offered accommodation may render them unable to perform the essential functions of their jobs.
- Extensive provisions have been added regarding the interactive process obligations, as well as medical and psychological examinations and inquiries.

Pregnancy

- Under the pregnancy/childbirth regulations, lactation does not warrant a leave, unless there are medical complications. However, even without such complications, another reasonable accommodation, such as transfer to a less strenuous or hazardous position, may be required.
- "The time that an employer maintains and pays for group health coverage during pregnancy disability leave shall not be used to meet an employer's obligation to pay for 12 weeks of group health coverage during leave taken under CFRA," even when the pregnancy disability leave is designated as family and medical leave under FMLA. Thus, employers will be required to pay for group health coverage during both a CFRA leave and a pregnancy disability leave.
- An employee may be entitled to a reasonable accommodation even after her pregnancy disability leave ends. "At the end or depletion of an employee's pregnancy disability leave, an employee who has a physical or mental disability (which may or may not be due to pregnancy, childbirth, or related medical conditions) may be entitled to reasonable accommodation…."

Anticipated New California Supreme Court Decisions

The following cases are pending before the California Supreme Court. The Court's opinions are expected to be significant.

- Re the impact of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), on California arbitration agreements: *Sonic-Calabasas A, Inc. v. Moreno,* S174475; *Sanchez v. Valencia Holding Co.,* S199119; *Iskanian v. CLS Transportation of Los Angeles,* S204032
- Re the application of the mixed motive defense in discrimination actions: *Harris v. Santa Monica,* S181004
- Re class certification and the use of representative and statistical evidence in class actions: *Duran v. U.S. Bank National Assn.,* S200923

As always, employers should review their policies and practices to ensure compliance with these new statutes and regulations. Appropriate training will be needed to ensure that employees whose duties are impacted understand their new obligations. We will, of course, update you when the Supreme Court renders the opinions referenced above and when other new court decisions of significance are issued.

We wish you the best for 2013.

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