

To: Our Clients and Friends

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Get Ready for New California Employment Laws

The California State Legislature had a busy year amending existing employment laws or adding new laws in a wide variety of areas, including wage and hour, anti-discrimination and social media. Employers should review these changes to see if their policies or record-keeping practices need updating before the new year. Except as noted below, these new laws go into effect on January 1, 2013.

Social Media Passwords (AB 1844) AB 1844 restricts employer access to the personal “social media” of employees and job applicants by adding new Labor Code section 980. Section 980 prohibits employers from requiring or requesting an employee or job applicant to do any of the following: (i) disclose a username or password for the purpose of accessing personal social media; (ii) access personal social media in the presence of the employer; or (iii) divulge any personal social media. In addition, employers cannot fire, discipline or retaliate against an employee or job applicant who refuses to divulge social media information. The new law defines “social media” as “an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations.” The new restrictions do not apply to employer-issued electronic devices. In addition, an employer may request that an employee “divulge personal social media 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.”

Breastfeeding Protected Under FEHA (AB 2386) AB 2386 amends the definition of “sex” under the Fair Employment and Housing Act (“FEHA”) to include “breastfeeding or medical conditions related to breastfeeding.” Existing law defines “sex” to include pregnancy, childbirth, or medical conditions related to pregnancy or childbirth.” Existing law prohibits employers from terminating women for pumping at work after returning from pregnancy disability leave and protects breastfeeding mothers against discrimination or retaliation for requesting breastfeeding accommodations. In addition, the amendment extends FEHA’s sexual harassment provisions to breastfeeding mothers. The amendment may also affect an employee’s right to extend pregnancy leave for a reasonable period of time if the employee can show that her child is affected with medical conditions, such as a cleft pallet or difficulty weaning, that require the mother’s presence for the feeding of the child. Although the amendment is effective January 1, 2013, AB 2386 states that its changes are declaratory of existing law. Thus, employers should treat these changes as effective immediately.

Religious Dress and Grooming Practices (AB 1964) AB 1964 expands the scope of the protections against religious discrimination under FEHA and raises the bar for accommodating religious beliefs or religious observances. FEHA requires employers to reasonably accommodate an individual's religious belief or observance unless the accommodation would be an undue hardship on the conduct of the business of the employer. AB 1964 expands the definition of religious belief or religious observance to include religious dress or grooming practices. "Religious dress practice" is broadly defined to include wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts and other items that are part of an individual's religious observance or creed. "Religious grooming practice" is broadly construed to include all forms of head, facial and body hair that are part of an individual's religious observance or creed. AB 1964 expressly provides that an accommodation that would require an individual to be segregated from the public or other employees would not be considered reasonable. AB 1964 raises the "undue hardship" standard from "de minimis" to "significant difficulty or expense."

Inspection of Personnel Records (AB 2674) AB 2674 amends Labor Code section 1198.5, which allows an employee to review his/her personnel file, in several important ways. First, AB 2674 clarifies that the right to inspect one's personnel file applies to both current and former employees (or the employee's representative). Second, it requires employers to maintain personnel records for at least three years after termination of employment. Third, the law requires that the employer must allow inspection of the personnel file within 30 days of the request. Fourth, the law requires employers to provide employees with copies of all personnel records relating to the employee, rather than just documents that the employee had signed. The new law also contains a damages provision which provides that if an employer fails to produce the personnel file within 30 days, the employee is entitled to a penalty of \$750. The law also specifies the location where the inspection must take place and provides that an employer-provided form shall be given to the employee or the employee's representative once the employer knows the employee would like to inspect his/her file. This law does not apply if there is a pending lawsuit regarding the employee or if there is a collective bargaining agreement in place that contains a procedure for the inspection and copying of personnel records.

Overtime Rate for Non-Exempt Salaried Employees (AB 2103) AB 2103 amends Labor Code section 515 to preclude private agreements that attempt to modify the overtime regular rate calculation required for non-exempt full-time salaried employees. Under existing Section 515(d), to calculate overtime wages earned by a salaried non-exempt employee, the regular hourly rate used must be 1/40th of the employee's weekly salary. Overtime hours are compensated at one and one half times the regular hourly rate. This bill specifies that payment of a fixed salary to a non-exempt employee must be deemed compensation only for regular, non-overtime hours worked, notwithstanding any private agreement between the employer and employee that the salary covers both regular and overtime hours. The legislature enacted this bill with the intent to overturn *Arechiga v. Dolores Press* 192 Cal. App. 4th 567 (2011). In *Arechiga*, the employer entered into an agreement with a non-exempt employee that provided the employee would work 11 hours a day, six days a week, and would earn a weekly salary of \$880. The employer and employee agreed that the salary was intended to include base pay for the first 40 hours of work at a specified hourly rate, plus pay for regularly scheduled overtime hours at a higher hourly rate. The employee argued this agreement violated the regular rate requirement of Section 515(d), but the court of appeal enforced the agreement. The amendment makes it clear that agreements to pay a fixed salary that covers both regular and overtime hours are prohibited.

Hiring Notice and Itemized Wage Statements (AB 1744) AB 1744 amends Labor Code section 226 by requiring "temporary services employers" to include on itemized wage statements, the employee's rate of pay and total hours worked for each temporary assignment. This bill exempts security service companies licensed by the Department of Consumer Affairs that solely provide security services. The bill also amends Labor Code section 2810.5, which pursuant to Wage Theft Prevention Act (AB 469), requires employers to provide nonexempt

employees at the time of hire a written notice containing specified information, including the rate and basis of pay, and the employer's name, address and telephone number. AB 1744 requires temporary services employers to also ensure this notice includes the name, the physical address of the main office, the mailing office if different from the physical address of the main office, and the telephone number of the legal entity for whom the employee will perform work, and any other information the Labor Commissioner deems material and necessary. AB 1744 goes into effect on July 1, 2013.

Itemized Wage Statement Remedies (SB 1255) Labor Code section 226(a) requires employers to provide accurate itemized wage statements to employees showing nine categories of specified information, including, among other things, the name of the employee, an employee identification number or the last four digits of the social security number, the gross wages earned, all deductions, net wages earned, the total hours worked, the applicable hourly rates and the corresponding number of hours worked at each rate, the number of piece rate units earned and the applicable piece rates, the inclusive dates of the period for which the employee is paid, and the name and address of the legal entity that is the employer. Section 226 provides that employees who have suffered an injury as the result of a knowing and intentional failure to comply with these requirements can recover the greater of their actual damages or statutory penalties not to exceed \$4,000, plus costs and attorney's fees. SB 1255 amends Section 226 to provide that an employee is deemed to suffer an injury if (i) the employer fails to provide a wage statement; or (ii) the employer fails to provide accurate and complete information as required by Section 226(a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the required items of information.

Written Contracts for Commission Pay (AB 2675) Labor Code section 2751 requires employers of employees who are paid on a commissioned basis and performing services in California to have written employment contracts in place by January 1, 2013 setting forth the method by which the commissions will be computed and paid. Section 2751 requires employers to provide a signed contract to, and obtain a signed receipt from, each employee who is a party to the contract. Section 2571 currently excludes two types of compensation from its requirement: (i) short-term productivity bonuses such as those paid to retail clerks; and (ii) bonus and profit-sharing plans, unless the plan provides for payment of a fixed percentage of sales or profits as compensation for work to be performed. AB 2675 adds a third exception to the written contract requirement for "temporary, variable incentive payments that increase, but do not decrease, payment under the written contract."

Bryan Cave LLP has substantial experience advising employers regarding compliance with California employment laws. For information about this Labor and Employment Bulletin, please contact the following attorneys or your regular [Bryan Cave LLP](#) contact.

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