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1992-2012: 20 YEARS OF EMPLOYMENT LAW REPORTING

Reporter

Employment Law

by Kelly O. Scott, Esq.

When Social Media Becomes Anti-Social

In one of the first laws of its kind, California passed Assembly Bill 1844 regarding employer use of social media. AB 1844 prohibits employers from requiring employees or job applicants to disclose a user name or password for the purpose of accessing personal social media, to access personal social media in the presence of an employer or to divulge any personal social media. The law also prohibits employers from discharging, disciplining, threatening to discharge or discipline, or otherwise retaliating against an employee or applicant for not complying with a request or demand by the employer that violates these provisions. Interestingly, the legislation does not impact an employer's right to request an employee to 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 only for the purpose of the investigation. The law takes effect on January 1, 2013.

Upcoming 2012 Seminars at ECJ

West LegalEdcenter Webcast
Wednesday, November 28, 2012 - 11:00 a.m.-12:00 p.m.
SOCIAL PRESSURE: When Is Employee Speech on Social Media Too Much? *by Kelly O. Scott, Esq. and Karina B. Sterman, Esq.*
http://westlegaledcenter.com/program_guide/course_detail.jsf?courseId=100001547

Wednesday, December 5, 2012 - 8:30 a.m.-9:30 a.m.
New Laws for 2013: Just When You Thought it Was Safe to Go Back in the Water! *by Kelly O. Scott, Esq.*

Wednesday, December 5, 2012 - 10:00 a.m.-12:00 p.m.
Sexual Harassment Prevention Training *by Kelly O. Scott, Esq.*

Please contact Brandi Franzman at bfranzman@ecjlaw.com for registration information.

by Randall S. Leff, Esq.

SB1255: A New Law That Lacks Common Sense

In a time when all of the political candidates are talking about how they are trying to stimulate the economy, our California legislature just passed a new law which will definitely make it more difficult to do business in our state. Enacted in 1979, Section 226 of the *Labor Code* sets forth nine specific items that must be included in the check stub provided with each payment of wages in the State of California. It also provides that an employee who suffers an injury as the result of a knowing and intentional failure by an employer to comply with the check stub requirement is entitled to recover the greater of actual damages, or a sum set by statute, and an award of costs and attorneys' fees.

Labor Code Section 226 has already spawned a cottage industry for plaintiff's lawyers who troll for information about employers who may have failed to strictly adhere to the numerous pay stub requirements. California courts, however, have not made it easy; courts have adhered to the language of *Labor Code* Section 226 in holding that the employee-plaintiff must prove that he or she actually suffered injury as a result of the employer's failure to comply with the pay stub requirements in order to recover damages and attorneys' fees. This restriction on recovery makes good common sense as most violations of 226 are highly technical and do not injure an employee who has been fully paid for his or her work.

Unfortunately, common sense does not present much of an obstacle to state senators that must propose legislation to make a name for themselves. It should therefore come as no surprise that the California Legislature has passed Senate Bill 1255 which provides that as of January 1, 2013, an employee will be deemed to suffer injury and be able to recover damages and attorneys' fees merely if the employer fails to include each and every one of the nine items in the employee's paycheck stub. This means that large groups of employees will be recovering substantial damages and attorneys' fees even if no one ever actually suffered an injury. The new law is guaranteed to spawn hundreds, if not thousands, of individual and class action lawsuits against unsuspecting employers who failed to comply with the detailed requirements of *Labor Code* Section 226. Employers who do not want to be counted among the casualties of SB 1255 should contact employment counsel now to ensure that their payroll practices comply with California law.

by Kelly O. Scott, Esq.

Employees Given Greater Access to Personnel Records

Effective January 1, 2013, Assembly Bill 2674 will amend *Labor Code* Section 1198.5, which pertains to an employee's right to inspect certain personnel records. AB 2674 will also amend *Labor Code* Section 226 to require that a copy of the itemized wage statement actually provided to the employee be kept by the employer. Employers will also be required to maintain personnel records for at least three (3) years following termination of employment.

In terms of inspection, the new law provides that the right of inspection applies to both current and former employees. Further, such persons will now be entitled to receive a copy of records pertaining to their performance and/or to any grievance

concerning the employee within thirty (30) days of making such a request. Requests for inspection must be made in writing and can also be made by a representative of the employee. Further, an employer form for making the request must be made available to an employee, or his or her representative, upon verbal request. Employers are permitted to redact the names of non-supervisory employees referenced in the records prior to making them available for inspection.

The employer may further charge the actual cost of reproduction if copies are requested. The employer is not required to provide documents during the pendency of a lawsuit against the employer brought by a former employee or current employee if the lawsuit relates to a personnel matter. Failure to comply with the request exposes the employer to injunctive relief, a penalty of $750 collectable by the Labor Commissioner, and attorneys' fees.

by Kelly O. Scott, Esq.

New Law Halts Explicit Mutual Wage Agreements

On the final days of the California Legislature's term, Governor Brown quietly signed into law Assembly Bill 2103, a bill which was specifically designed to overturn existing case law which allowed employers to have "explicit mutual wage agreements" with employees. The case was *Arechiga v. Dolores Press,* and it held that existing law did not prevent an employer and an employee who is not exempt from overtime from entering into an explicit mutual wage agreement that provided for the payment of base compensation and overtime in fixed salary. These agreements were designed to simplify and standardize payments to employees with irregular hours.

However, as taxpayers know all too well, "simplify" and "legislature" are two words that don't often mix. AB 2103 amends *Labor Code* Section 515 to provide that payment of a fixed salary to a non-exempt employee shall be deemed to provide compensation only for the employee's regular, non-overtime hours, notwithstanding any private agreement to the contrary. For the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee's regular hourly rate shall be $^{1}/_{40}$th of the employee's weekly salary. With certain exceptions, overtime is earned after an employee works 8 hours in a day and 40 hours in a workweek.

The new law takes effect on January 1, 2013.

by Kelly O. Scott, Esq.

Nursing Mothers Now Protected in the Workplace

California has enacted numerous laws in recent years to protect and promote breastfeeding. These include the right to breastfeed in public, as well as the duty of employers to accommodate an employee for the purposes of breastfeeding and to make efforts to provide a room for such purposes. Until now, however, California law has not enacted legislation to specifically protect nursing mothers from being reassigned to other work, requested to take additional leave, or from

other workplace actions that might be imposed as a consequence of breastfeeding.

Assembly Bill 2386 was passed to address these issues. Specifically, AB 2386 clarifies the existing statutory definition of "sex" under the Fair Employment and Housing Act by adding that the term includes breastfeeding and medical conditions relating to breastfeeding. Accordingly, effective January 1, 2013, any discriminatory acts based upon this activity will constitute discrimination based on sex. In addition to clarifying existing workplace protections for working mothers, it is hoped that AB 2386 will promote greater acceptance of mothers in the workplace.

by Kelly O. Scott, Esq.

AB 1744: Was This Really Necessary?

Adding to the plethora of employer obligations already associated with wage statements (see "New Law Lacks Common Sense" in this issue), Assembly Bill 1744 requires temporary services employers to disclose on the itemized payroll statement the main address of the legal entities that secured the services of the employer and the total hours worked for each legal entity. In addition, the rate of pay for each assignment must be disclosed. The bill specifies that the additional information may be furnished as an attachment to the wage statement. AB 1744 amends both *Labor Code* Sections 226 and 2810.5. The additional requirements become effective on July 1, 2013.

AB 1744 was purportedly designed to address abuses by temporary employers and, according to the bill's sponsor, "addresses the needs of workers who may visit several job sites and earn several hourly wages during the course of a single pay period." It is unclear, however, how the new requirements will address the problem more effectively than existing laws, the very laws that were enacted to directly prohibit the alleged underlying violations, whatever they may be. Further, *Labor Code* Section 226 already sets forth numerous requirements regarding the disclosure of wages, hours worked, deductions, etc. Put simply, it is hard to see any real need for this new legislation which only results in an additional burden for California employers.

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