

Employment Law Commentary

California Legislative Update—The Bills Are Signed and the Fun Begins

By **Colette LeBon**



In the second year of his second stint as governor, Jerry Brown has again signed many bills that are important to California's employers. Notable this year are the significant changes to the enforcement of the Fair Employment and Housing Act, and changes and clarifications regarding wage statements. This commentary will guide you through the new hoops and potential hurdles you will face in the coming year, give you tips on getting prepared to meet the new requirements going into effect on January 1, 2013, and, in case you missed last year's edition, remind you of some requirements you may have missed.

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Legislation Affecting All California Employers

a. Workplace Privacy

Employer Access to Employee Social Media (A.B. 1844)

This bill adds Section 980 to the California Labor Code to limit employer access to personal social media accounts of current and prospective employees. Beginning January 1, 2013, employers may not require applicants or employees to:

- Disclose a username or password for the purpose of accessing personal social media,¹
- Access personal social media in the employer's presence, or
- Divulge any personal social media, except in connection with the investigation of allegations of an employee's misconduct or violation of applicable laws.

Further, employers cannot retaliate against employees for refusing to comply with a request that is prohibited by this section.

This bill is similar to recently enacted laws in Delaware, Maryland, and Illinois. During this legislative season, at least 13 states have proposed legislation restricting employer access to employee social media accounts. The NLRB has also gotten into the act on social media by making clear that statements posted to an employee's Facebook account can constitute protected Section 7 concerted activity when employees are discussing or trying to improve their terms or conditions of employment. See, e.g., *Karl Knauz Motors, Inc.*, N.L.R.B. Case No. 13-CA-046452 (Sept. 28, 2012).

b. Changes to Wage Statement and Other Employee Record Requirements

Additional Itemized Wage Statement Requirements for Temporary Employees (A.B. 1744)

Starting July 1, 2013, this bill will require that the rate of pay and the total hours

worked for each assignment be included on the wage statements of temporary workers, in addition to the information required to be listed on the employee's wage statement under existing Section 226(a) of the Labor Code. The bill will also require that the notice provided to the temporary employee upon hire pursuant to Section 2810.5 of the Labor Code include the name, address, and telephone number of any legal entity for whom the employee performed work.² Companies that provide security services and are licensed by the Department of Consumer Affairs are exempted from meeting these requirements.

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Injury from Violation of Wage Statement Requirement (S.B. 1255)

Existing law provides for penalties, along with costs and attorneys' fees, for injury caused by a "knowing and intentional failure" to comply with the wage statement requirements of Section 226(a) of the Labor Code. Courts have given contradictory and inconsistent interpretations of what constitutes "suffering injury" for the purposes of receiving penalties pursuant to this section. Thus, the Legislature enacted this bill to clarify that an employee "suffers injury" from a violation of Section 226(a) when the employee is not provided with a wage statement or is provided with an inaccurate or incomplete one. The bill also clarifies that a clerical error or an inadvertent mistake that causes a wage statement to be inaccurate is not a "knowing and intentional failure" to provide an accurate wage statement.

Violations of the wage statement requirements are already often alleged in misclassification cases. This amendment to Section 226 virtually ensures that this will continue to be the case.

Right to Inspect Employee Files (A.B. 2674)

As of January 1, 2013, there are slight changes to the records that employers are required to provide to current or former employees who request them. First, employers must provide wage statements within 21 days of receipt of a request from an employee. This requirement is unchanged, but the bill clarifies that a "copy" of such wage statement can be a computer-generated printout, as long as it includes all the information that is required to be on the original wage statement. Second, employers must either allow an employee to inspect his or her personnel file or provide the employee a copy of the file within 30 days of a request.

Employers are required to maintain wage statements for three years and personnel files for three years from termination. Considering that the statute of limitations on many employee lawsuits is four years, best practices may call for a longer retention period.

c. Legislation Relating to Prevention of Workplace Discrimination

Department of Fair Employment and Housing Reorganization (S.B. 1038)

Effective January 1, 2013, this bill—essentially a reorganization bill—eliminates the Fair Employment and Housing Commission and replaces it with the Fair Employment and Housing Council, a seven-member panel appointed by the governor and approved by the Legislature within the Department of Fair Employment and Housing ("DFEH"). The bill authorizes the DFEH to bring civil actions directly in court and collect attorneys' fees and costs when it is the prevailing party in Fair Employment and Housing Act ("FEHA") litigation.

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Religious Clothing Protected Under FEHA (A.B. 1964)

This bill provides that religious dress practices, including the “wearing or carrying of religious clothing, head or face coverings, jewelry, [or] artifacts,” and religious grooming practices, including “all forms of head, facial, [or] body hair,” are covered by protections of the FEHA as beliefs or observances. The bill further specifies that segregating workers from the public or other employees is not a reasonable accommodation of their religious dress or grooming practices.

Breastfeeding Protections (A.B. 2386)

This bill clarifies that, for purposes of the FEHA, the term “sex” also includes breastfeeding or medical conditions related to breastfeeding.

LGBTQ Bill of Rights (Assembly Joint Resolution 43)

With this resolution, the California State Legislature urges the federal government to include the rights of lesbian, gay, bisexual, transgender, and queer individuals in federal anti-discrimination laws alongside traits like race, color, sex, national origin, disability, age, and religion.

Vetoed: Regulation of Advertisements for Employment (A.B. 1450)

Governor Brown vetoed this bill that, in an effort to prevent discrimination against the unemployed, would have prohibited employers from stating in employment advertisements that applicants must be employed. Governor Brown stated in his veto message that “unfortunately, as this measure went through the legislative process it was changed in a way that could lead to unnecessary confusion.” The Connecticut Senate passed a similar bill that makes it illegal for employers to discriminate against unemployed job seekers in advertisements. A growing number of other states are also considering such measures banning bias against the jobless.

d. Legislation Relating to Retirement and Insurance Plans

Retirement Savings Plans (S.B. 1234 & S.B. 923)

These bills create the California Secure Choice Retirement Savings Trust to provide a statewide retirement savings plan for private workers who do not participate in any other type of employer-sponsored retirement savings plan. Contributions by employers and employees into the plan will be voluntary. For the program to go into effect, the bill requires a market analysis of the program to show that it would be self-sustaining, U.S. Department of Labor and IRS approval, and final approval from the California State Legislature. Stay tuned for more developments on this.

Workers’ Compensation Reform (S.B. 863)

This bill is the latest attempt to reform California’s workers’ compensation system. The bill strives to reduce costs to businesses, including costs from litigation and claims adjustments, while increasing benefits to disabled workers by eliminating waste and inefficiencies in the current system.

New Hire Information Reporting (A.B. 1794 & S.B. 691)

These bills allow the Employment Development Department (“EDD”) to provide specified new-employee information to the Joint Enforcement Strike Force on the Underground Economy, the Contractors’ State License Board, the Agricultural Labor Relations Board, and the State Compensation Insurance Fund. These agencies are expected to use the new-hire information the EDD collects to ensure that employers are paying adequate workers’ compensation insurance for their employees.

Multiple Employer Welfare Arrangements (S.B. 615)

This bill would, beginning on January 1, 2014, prohibit a self-funded or partially self-funded multiple employer welfare arrangement from offering, marketing, representing, or selling any product,

contract, or discount arrangement as minimum essential coverage or as compliant with the essential health benefits requirement under the federal Patient Protection and Affordable Care Act, unless it meets the applicable requirements under that act.

e. Miscellaneous Employment-Related Legislation

Amendment to Written Commission Plan Requirement (A.B. 2675)

Last year, legislation was enacted to require all employers paying their employees a commission as any part of a compensation package to provide the commission plan in writing, starting on January 1, 2013. Since the enactment of this legislation, the California New Car Dealers Association expressed concern about temporary incentives offered to employees of car dealers. The Association believed it would be burdensome for car dealers to have to issue a new written commission plan every time this special temporary incentive is offered. Thus, this bill exempts temporary and variable incentive payments that increase, but do not decrease, an employee’s pay from the writing requirement of Section 2751 of the Labor Code. Car dealers and other employers who offer temporary upward commission incentives will not have to issue a new written commission plan every time they do so.

Payment of Fixed Salary to Non-Exempt Employees (A.B. 2103)

This bill provides 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. The bill overturns the California Court of Appeal decision in *Archiga v. Dolores Press, Inc.*, 192 Cal. App. 4th 567 (2011), in which the Court held that the employer and non-exempt employee could agree to a fixed salary that covered the employee’s overtime hours.

Criminal History Information (A.B. 2343)

This bill places an additional responsibility on California employers that require information about employees' criminal history and subsequent arrests. After the bill goes into effect on January 1, 2013, if an employer uses information about an employee's criminal history or subsequent arrest to make an adverse employment decision, the employer must furnish a copy of the information that is the basis for the adverse employment decision to the employee.

New Wage Garnishment Instructions (A.B. 1775)

This bill changes the formula used to compute the amount of an employee's earnings that may be garnished from his or her wages. The Judicial Council will revise the instructions in the forms provided to employers before the new formula goes into effect on July 1, 2013, to clarify the calculation required.

Legislation Affecting Employers of Agricultural or Domestic Workers**a. Legislation Relating to Agricultural Workers***Civil Penalties for Farm Labor Contractor Violations (A.B. 1675)*

This bill creates increasingly severe civil monetary penalties for each successive violation of the requirement that a farm labor contractor be licensed. This change brings the penalties for violation of the farm labor contractor licensing requirement in

line with those in other industries, such as the construction industry. The change is likely to increase enforcement of the farm labor contractor licensing requirement because the Labor Commissioner rarely pursued the misdemeanor prosecution penalty that is available under existing law.

Vetoed: Increase in Penalties for Violating Heat Safety Standards (A.B. 2346 & A.B. 2676)

Governor Brown vetoed these bills, which would have provided a private right of action for violation of heat illness prevention regulatory requirements and criminal penalties for anyone who directs or supervises farmworkers and fails to provide sufficient amounts of shade and cool, potable water, respectively. Governor Brown stated in his veto messages for these bills that he believed existing regulations for heat standards, implementing the most stringent standards in the nation with a vastly increased compliance record since 2006, were addressing the problem of heat safety. He stated that while these standards could be improved, neither of these bills was an effective way to do so.

b. Regulations for Domestic Workers*Vetoed: Wage and Hour Regulations for Domestic Workers (A.B. 889)*

This bill would have required the Department of Industrial Relations ("DIR") to adopt regulations governing the working conditions of domestic work employees,

including providing for overtime, meal, rest, and sleep breaks for these workers. Governor Brown vetoed the measure because he said he believed the numerous questions surrounding the impact of the bill required study before implementing any regulations. At a minimum, Governor Brown believes the DIR must study "the economic and human impact on the disabled or elderly person" receiving care; the additional costs to employers of domestic workers; whether increased care costs would force people out of their homes and into institutions; the impact on jobs for domestic workers; the interplay with new federal policies; and the capacity of the state to enforce the rules in people's homes.

Conclusion

Employers should review their policies, especially those related to wage statements, to ensure they are compliant with the new laws.

1. A.B. 1844 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." Cal. Lab. Code § 980(a).
2. As promised when the Wage Theft Prevention Act was signed last year, the Labor Commissioner has prepared a template notice that complies with the requirements of Section 2810.5 of the Labor Code. The notice is available at http://www.dir.ca.gov/dlse/Governor_signs_Wage_Theft_Protection_Act_of_2011.html. Check to make sure the notice that you are using is compliant.

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