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June 2013

# Reporter

## Employment Law

by Kelly O. Scott, Esq.

### Summer Storm: Employment Laws Being Considered By The California Legislature This Summer

The skies are clear, but there is a storm coming for California employers. The California Legislature has a full agenda of employment laws to consider over the summer months that will have a substantial impact on employers. Indeed, the laws listed below have already been approved by one branch of the legislature and must now be considered and passed by the other branch by no later than September 13, 2013. Thereafter, the Governor will have until October 13, 2013 within which to sign or veto any legislation passed by the Legislature.

**Senate Bill 655** seeks to codify the holding in *Harris v. City of Santa Monica*, the recent California Supreme Court case that clarified the application of a mixed motive defense in discrimination cases. The new law would limit the available remedies where an employer can prove that the same adverse employment action would have occurred for a lawful reason even if the employee proves that a protected characteristic was a substantial factor in the employer's decision. (See our March, 2013, *Employment Law Reporter*.) SB 655 has already been passed by the Senate and is currently pending in the Assembly.

**Senate Bill 648** would extend use and advertising restrictions on smoking to electronic cigarettes. These include significant restrictions on smoking in places of employment. This bill has been passed by the Senate and is pending in the Assembly.

**Senate Bill 292** would amend the Fair Employment and Housing Act (FEHA) in response to the case of *Kelley v. Conco Companies*, a 2011 California Court of Appeal decision that created some confusion regarding a plaintiff's evidentiary requirement for proving a hostile work environment sexual harassment claim by implying that a plaintiff is required to show sexual desire to prevail on such a claim. Senate Bill 292 would amend FEHA to specifically state that sexual harassing conduct need not be motivated by sexual desire. This bill has been passed by the Senate and has already been referred to the Judiciary and Labor and Employment Committees in the Assembly.

**Assembly Bill 10** would amend *Labor Code* Section 1182.12 to increase the minimum wage in California. Specifically, minimum wage would be increased to \$8.25 on January 1, 2014, \$8.75 on January 1, 2015, \$9.25 on January 1, 2016, and would thereafter be subject to an annual adjustment based on the California Consumer Price Index. The bill also includes a prohibition against any future downward adjustment. AB 10 has been passed by the Assembly and is pending in the Senate.

**Assembly Bill 729** seeks to create a new evidentiary privilege. Specifically, the relationship of the union agent-represented worker will be added to existing privileges which generally protect certain confidential communications from being disclosed or admitted

### Upcoming 2013 Seminars at ECJ

**Thursday, August 29, 2013 - 8:30 a.m.-10:00 a.m.**

Start the Countdown: Compliance with the Affordable Health Care for America Act  
by Kelly O. Scott, Esq. and Karina B. Serman, Esq.

**Thursday, August 29, 2013 - 10:30 a.m.-12:00 p.m.**

Effective Performance Reviews and Disciplinary Actions  
by Kelly O. Scott, Esq. and Karina B. Serman, Esq.

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as evidence in legal actions. These include the attorney-client, physician-patient, husband-wife, and psychotherapist-patient privileges, among others. The privilege may be waived under certain circumstances and does not apply when a confidential communication is made to enable or aid a person in committing, or planning to commit, a crime or fraud. Assembly Bill 729 has been passed by the Assembly and is pending in the Senate.

**Senate Bill 435** would amend *Labor Code* Section 226.7 to provide for paid rest breaks to piece-rate workers. Such pay will be based on the average piece-rate wage. The bill authorizes any piece-rate worker to file a civil action or a claim with the Department of Labor Standards Enforcement (DLSE) to recover any unpaid piece-rate wage for each rest period which an employer failed to provide consistent with existing law. The bill excludes workers whose rest periods are expressly covered by a collective bargaining agreement. SB 435 has been passed by the Senate and is currently being considered by the Assembly Committee on Labor and Employment.

**Assembly Bill 442** would amend *Labor Code* Section 1194.2 and 1197.1 by expanding certain penalty and restitution provisions relating to the failure to pay minimum wages. The bill creates a liquidated damages provision that requires payment by the employer of an amount equal to the amount of unpaid wages, plus interest. As written, the law will apply to individual officers, agents, employees and employers who pay or cause to be paid to any employee a wage less than the minimum wage. AB 442 has passed the Assembly and is under consideration by the Senate Judiciary Committee and the Labor and Industrial Relations Committee.

**Senate Bill 400** would amend the FEHA by adding victims of stalking, sexual assault and domestic violence as protected categories. As amended, FEHA would prohibit any adverse actions by the employer because of the employee's status as a victim and will require the employer to provide reasonable accommodations for victims. The bill further creates a private right of action for any aggrieved employee. SB 400 was passed by the Senate and is currently being considered by the Assembly Judiciary Committee and Committee on Labor and Employment.

**Senate Bill 462** would amend *Labor Code* Section 218.5 to state that, in an action brought for the non-payment of wages, fringe benefits or health and welfare or pension fund contributions, a prevailing employer may only be awarded attorney's fees and costs if a court finds that the employee brought the action in bad faith. Previously, a court was required to award reasonable attorney's fees and costs in such an action to the prevailing party if any party requested attorney's fees and costs upon the initiation of the action. The bill has been passed by the Senate and is currently pending in the Assembly.

**Assembly Bill 263** seeks to amend the *Labor Code* to prohibit "unfair immigration-related practices." Specifically, the bill would

prohibit an employer from retaliating or taking adverse action, including engaging in an unfair immigration-related practice, against an employee or applicant for employment because the employee or applicant engaged in protected conduct. Such practices are defined as, among other things, requesting more or different documents than are required by the federal government, using the federal E-Verify system to check the employment authorization status of a person at a time or in a manner not required by the federal government, threatening to file or filing a false police report, and threatening to contact or contacting immigration authorities. Further, the bill will create a rebuttable presumption that an employer has engaged in an unfair immigration-related practice when such actions occur within ninety days of the employee's exercise of a right protected by the *Labor Code* or a local ordinance applicable to employees. The bill provides for civil penalties up to \$10,000 per employee, and requires the court to order the suspension or revocation of government licenses issued to the employer. AB 263 has been passed by the Assembly and is currently being considered by the Senate.

**Senate Bill 404** seeks to amend FEHA to add "familial status" as a protected category. Having "familial status" is defined as an individual who provides medical or supervisory care to a "family member," which persons are defined as a child, parent, spouse, domestic partner, parent-in-law, sibling, grandparent or grandchild of the care provider. SB 404 has been passed by the Senate and is pending before the Assembly.

**Senate Bill 390** would amend *Labor Code* Section 227 to allow the Labor Commissioner to pursue criminal prosecution and fines in connection with an employer's failure to remit payroll taxes to the proper agency. SB 390 has been passed by the Senate and is now pending before the Assembly Committee on Labor and Employment.

**Senate Bill 556** will amend the *Labor Code* to expand employer liability in connection with the use of independent contractors. Specifically, the bill will allow for employers to be liable for any damages caused by independent contractors to third parties, including wage and hour violations, penalties and fines, where the independent contractor utilized by the employer wore uniforms similar to the employer or used the employer's logo at the time the damage or injury occurred. The bill has been passed by the Senate and is now pending before the Assembly.

Since the California Legislature will take its summer recess from July 4 through August 4, 2013, this promises to be a busy summer for both the California Assembly and Senate. Regardless, concerned employers may wish to take political action now before the "storm" arrives; although it is difficult to predict what Governor Brown will sign into law, given that both the Assembly and Senate are controlled by a single political party, it is likely that a majority of these bills will become law by this October.

*If you have any questions regarding this bulletin, please contact Kelly O. Scott, Esq., Editor of this publication and Head of ECJ's Employment Law Department, at (310) 281-6348 or kscott@ecjlaw.com. If one of your colleagues would like to be a part of the Employment Law Reporter mailing list, or if you would like to receive copies electronically, please contact Brandi Franzman at (310) 281-6328 or bfranzman@ecjlaw.com.*