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Social Media and Beyond: California Ushers in New Employment Laws for 2013

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The California legislature was particularly busy this past session in enacting new laws that directly affect employers in 2013. The new laws address a wide variety of topics, including social media protections for employees; new rights for employees to obtain copies of their personnel file; added requirements regarding itemized wage statements; new protections regarding religious dress and grooming practices; expansion of the definition of "sex" for discrimination purposes to include breastfeeding and related medical conditions; limitations on paying non-exempt employees a fixed salary; provisions relating to written commission agreements; expanded whistleblower coverage and protection relating to government contractors; and workers' compensation system reform. While the information below provides a general summary of these new laws, employers may desire to consult directly with their employment counsel to determine how these new laws may apply to their particular workplace.

Social Media

AB 1844 creates Labor Code Section 980, which prohibits employers from requesting or requiring applicants or employees to disclose their usernames and passwords to personal social media. It 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 law specifically forbids employers from requesting or requiring applicants or employees to (1) provide their usernames and passwords for the purposes of accessing personal social media, (2) access personal social media in the employer's presence, or (3) divulge any personal social media. It also prohibits employers from discharging, disciplining, threatening to discharge or discipline, or otherwise retaliating against an applicant or employee who fails to comply with an employer's request or demand that violates this law. The law permits employers to request usernames and passwords for the purpose of accessing an employer-issued electronic device. Additionally, the new law does not affect an employer's existing rights and obligations to request an employee to divulge personal social media reasonably believed to be relevant to an investigation of employee misconduct or violation of law, provided that the social media is used solely for purposes of that investigation or a related proceeding.

Requests for Personnel File

AB 2674 amends Labor Code Section 1198.5 to require employers to respond within 30 days to written requests from employees and former employees, or their representatives, to inspect and/or receive a copy of their personnel records relating to the employee's performance or to any grievance concerning the employee. Previously, employees only had the right to "inspect" their personnel files but not obtain copies, except for documents they signed relating to the obtaining or holding of employment. The amendment also requires employers to maintain a copy of each employee's personnel records for a period of not less than three years after termination of employment.

With respect to requests for either inspection or copies, the parties can agree in writing to a date beyond 30 days for compliance, but not later than 35 calendar days from when the employer received the original request. The employer can charge for the copy, but not to exceed the actual cost of reproduction. With respect to current employees, the employer shall make the records available for inspection at reasonable intervals and at reasonable times, but is not required to make them available at a time when the employee is actually required to render service to the employer. With respect to a former employee, the employer is required to comply with only one request per year. Additionally, where the former employee making the request was terminated due to violation of law or due to violation of an employer policy concerning workplace harassment or violence, the employer may either make the records available at a location outside the workplace but at a reasonable distance from the former employee's home, or mail the former employee a copy of the records. The amendment also provides that an employer need not comply with more than 50 such requests from a representative of the employees in a single month, and also provides several alternative arrangements for the place of inspection. Additionally, the rights of an employee or former employee (or representative) to inspect and obtain a copy of the personnel file are suspended while a lawsuit against the employer involving a personnel matter is pending in the trial court.

Employers who fail to comply with the law are now subject to a penalty of $750. In addition, aggrieved employees or former employees may obtain injunctive relief directing compliance with the law, and may recover their costs and attorneys' fees in such action.

Itemized Wage Statements (Pay Stubs)

AB 2674, discussed above, also amends Labor Code Section 226, which already afforded current and former employees the right to inspect and obtain copies of the itemized wage statements required to be provided by the employer each pay day pursuant to Section 226(a), by defining "copy" to include a duplicate of the itemized statement provided to an employee, or a computer-generated record that accurately shows all of the information required by Section 226(a). (The required information includes gross wages earned, total hours worked for non-exempt employees, all deductions from wages, net wages earned, the inclusive dates of the pay period, the name of the employee and last four digits of their S.S. number (or other ID #), the name and address of the legal entity that is the employer, and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.)

SB 1255 also amends Labor Code Section 226, by making it easier for an employee "suffering injury" to recover the penalties under Section 226 as a result of a knowing and intentional failure by an employer to comply. The amendment provides that an employee is deemed to "suffer injury" if the employer fails to provide a wage statement, or if the employer fails to provide accurate and complete information as required by any one or more of the required items of Section 226(a) and the employee cannot "promptly and easily determine" from the wage statement alone the missing information, meaning that a reasonable person would be able to readily ascertain the information without reference to other documents or information. Additionally, the amendment also provides that a "knowing and intentional failure" by the employer does not include an isolated and unintentional payroll error due to a clerical or inadvertent mistake, and that in reviewing for compliance, the factfinder may consider as a relevant factor whether the employer, prior to an alleged violation, has adopted and is in compliance with a set of policies, procedures, and practices that fully comply with Section 226.

AB 1744 amends Labor Code Sections 226 and 2810.5 and adds Section 226.1 to impose additional requirements on employers who are temporary services employers. The amendment to Section 226 becomes effective July 1, 2013 and requires temporary service agency employers to provide, on the

paystub, the rate of pay and total hours worked in each assignment during the pay period. The amendment to Section 2810.5 requires temporary services employers to include the name, physical address of the main office, and mailing address of the main office (if different from the physical address) of the legal employing entity. Section 226.1 provides an exemption for licensed security services companies.

Religious Dress and Grooming Practices under FEHA

AB 1964 amends the California Fair Employment and Housing Act ("FEHA"), Government Code Sections 12926 and 12940, to broaden the definition of "religion" to include religious dress and grooming practices. FEHA requires employers to accommodate employees' religious practices, unless doing so would create an undue hardship. The amendments define religious dress practices to include religious clothing, jewelry, artifacts, face and head coverings, and any other item that is part of religious observance. "Grooming practices" is defined to include "all forms of head, facial, and body hair," which are part of religious observance. Under the amendments, an accommodation is not reasonable if it segregates an employee from the public or other employees.

Breastfeeding Protection under FEHA

AB 2386 amends FEHA, Government Code Section 12926, to add "breastfeeding" and medical conditions related to breastfeeding to the definition of "sex." FEHA prohibits, among other things, discrimination on the basis of sex. The amendment states that it is a declaration of current law. Consequently, this amendment is effective immediately and may be applied retroactively.

Non-exempt Employee Salary Requirements

AB 2103 amends Labor Code Section 515 to clarify that a fixed weekly salary paid to a non-exempt employee covers *only* the regular, non-overtime hours of work in a workweek, regardless of any wage agreement to the contrary. This amendment expressly overrules *Arichega v. Delores Press, Inc.*, 192 Cal.App.4th 567 (2011). In *Arichega*, the court upheld an express agreement between the employer and employee that paid the employee a fixed weekly salary to work 66 hours per week, in which the weekly salary was determined based on a wage rate that paid the employee 40 straight time hours at the regular rate and 26 overtime hours at 1.5 times that rate. AB 2103 amends Section 515 by adding a provision stating that 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, thus declaring unlawful explicit mutual wage agreements that purport to pay a fixed weekly salary to non-exempt employees to cover the overtime hours worked. For purposes of computing overtime under existing provisions of Section 515, a nonexempt full-time salaried employee's regular hourly rate shall be $1/40^{th}$ of the employee's weekly salary, with overtime to be paid at the applicable 1.5 times or double-time premium rates.

Written Commission Agreements

Last year, the legislature enacted AB 1396, which amended Labor Code Section 2751, and imposed a requirement on employers that by January 1, 2013, whenever an employer enters into a contract of employment with an employee for services to be rendered within California and the contemplated method of payment involves commissions, the contract shall be in writing and shall set forth the method by which the commissions shall be computed and paid. Section 2751 further provides that the employer shall give a signed copy of the contract to the employee and shall obtain a signed receipt for the contract from the employee. (In the event the agreement expires but the employment continues,

the expired terms are presumed to remain in place until a new agreement is entered into or the employment relationship ends.)

AB 2675, enacted this year, further amends Labor Code Section 2751 by clarifying that "commissions" do not include temporary variable incentive payments that increase, but do not decrease, payment under the written contract. Section 2751 had already previously excluded from commissions short term productivity bonuses (such as those paid to retail clerks), and bonus and profit sharing plans, unless the employer offers to pay a fixed percentage of sales or profits as compensation for work to be performed.

Whistleblowers

AB 2492 amends California's False Claims Act ("CFCA"), Government Code Sections 12650, 12651, 12652, and 12654 and adds Section 12654.5, to expand protection for whistleblowers with respect to government contractors who provide goods or services to the state or a political subdivision. The CFCA protects and provides incentives for employees who oppose or report their employers for making false claims for money, property, or services to the state, or its subdivisions. The amendment allows contractors and agents, as well as employees, to bring claims under the statute and share in any recovery. The amendment also expands anti-retaliation protection to include anyone who tries to stop violations. It also broadens the definition of a "false claim," increases civil penalties, alters the statute of limitations, and expands the courts' authority to award attorneys' fees and costs on CFCA cases. As a result, government contractors may expect to see an increase in claims being brought under the CFCA.

Workers' Compensation

SB 863 amends, creates, and repeals numerous sections of the Government Code and Labor Code that relate to California's workers' compensation system. The main topics of reform include changes to the method for calculating benefits, establishment of an independent medical review process, alteration of requirements for self-insured employers, revisions to liens and related procedures, and implementation of return to work rules. The reforms seek to lower costs and increase efficiency.

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