

2016 RECAP: A BUSY YEAR FOR EMPLOYMENT LAW

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In case you missed it, 2016 was a banner year for the California Legislature in enacting new employment laws. Here are the highlights:

1. AB 2337 Requires Written Notice to Employees on Hire (and Existing Employees upon Request) of Rights of Victims of Domestic Violence, Sexual Assault, or Stalking

California law already prohibits employers with 25 or more employees from discriminating or retaliating against employees who take time off work for specified purposes related domestic violence, sexual assault, or stalking. Assembly Bill 2337 amends Labor Code section 230.1 to require that employers provide written notice of these rights to all new hires and, upon request, to current employees. The bill also requires the Labor Commissioner to develop a form that an employer can elect to use to comply with this requirement, and when developed, to post it online. The notice obligation will be triggered when the Labor Commissioner posts a notice form, which is required to take place by July 1, 2017. Employers are also free to develop their own form of notice which provides the same information.

2. SB 1167 Expands California's Heat Illness Regulations to Include Indoor Employees

Existing regulations establish heat illness prevention standards for outdoor workers. These regulations include requirements for providing sufficient drinking water at no charge to the employee, allowing for recovery or "cool down" periods, providing shade when the temperature exceeds 80 degrees Fahrenheit, and creating written safety standards. Senate Bill 1167 expands California's heat illness regulations to protect indoor employees. The bill requires the Division of Occupational Safety and Health to propose by July 1, 2019, a heat illness and injury prevention standard applicable to indoor workers that minimizes heat-related illness and injury among such persons.

3. Assembly Bill 1843 Prohibits Employers from Inquiring about Juvenile Convictions or Using Juvenile Proceedings In Employment

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Effective January 1, 2017, Assembly Bill 1843 prohibits hiring-related inquiries concerning juvenile convictions or from using information regarding juvenile court actions or custodial detentions as a factor in determining any condition of employment. The new law expands upon recent legislation that restricted the use of expunged, sealed or dismissed juvenile convictions, and is representative of a nationwide trend of restricting inquiries regarding prior convictions.

4. New Laws Expand California's Equal Pay Act to Include Race and Limit Use of Prior Salary Information

The Wage Equality Act of 2016 (Senate Bill 1063) expands California's Equal Pay Act to target race and ethnicity-related wage differentials. This bill picks up where last year's Equal Pay Act (which bolstered prohibitions on gender-based pay differentials) left off by adding a new Labor Code provision precluding wage differentials based on race or ethnicity. Under the Wage Equality Act, employers will be required to demonstrate that a reasonably-applied factor accounts for any pay differential between employees of different races or ethnicities for doing substantially similar work as employees of another race or ethnicity and that the factor is: (1) not derived from a race or ethnicity-based differential in compensation; (2) job-related to the position at issue; and (3) consistent with a business necessity. In addition, pay differences can be based on merit, seniority or quantity or quality of production systems. The Wage Equality Act is connected with Assembly Bill 1676 as both bills had to be passed to become effective. As originally drafted, AB 1676 would have prohibited hiring-related inquiries about salary history and required private employers to provide an applicant with the pay scale for a position upon request. Since Governor Brown vetoed a similar bill last year, AB 1676 was revised and, as signed by the Governor, simply provides that prior salary cannot by itself justify a disparity in compensation. The Wage Equality Act of 2016 and AB 1676 became effective on January 1, 2017.

5. Senate Bill 1001 Amends the California Labor Code to Expand Protection from Unfair Immigration-Related Practices

Continuing a recent legislative trend, Senate Bill 1001 expands existing prohibitions regarding unfair immigration-related practices. Specifically, this bill amends the California Labor Code to provide a civil remedy for an applicant or employee against any unfair immigration-related practice as defined by Labor Code section 1019. Such "unfair immigration-related practices" include an employer requesting more or different documents than required under federal law for verification purposes, using the federal E-Verify system to check the status of a person at a time or in a manner not required, threatening to file or filing a false police report or a false report with a state or federal agency, threatening to contact or contacting immigration authorities, or refusing to honor documents that appear reasonably genuine. In addition, the following practices would also be prohibited: discriminating against an immigrant with authorization to work based on having the status of immigrant, or attempting to reinvestigate or re-verify an incumbent employee's authorization to work where not legally required to do so. SB 1001 permits an applicant or employee suffering an unfair immigration-related practice prohibited to bring a civil action for equitable relief and any applicable damages or penalties, and would allow recovery of reasonable attorneys' fees and expert witness costs if the employee or applicant is the prevailing party in the action. SB 1001 became effective on January 1, 2017.

6. SB 1342 Combats Wage Theft by Granting Local Governments Subpoena Power

In response to the increasing number of cities and counties that have enacted minimum wage ordinances setting wage rates at levels higher than state and federal requirements, last year Assembly Bill 970 was added to the Labor Code allowing the California Labor Commissioner the right to enforce local minimum wage and overtime provisions. This year the California Legislature looked to enforcement at the local level and passed Senate Bill 1342. Specifically, SB 1342 increases local enforcement to combat wage theft by authorizing cities and counties to issue subpoenas in cases of suspected wage problems, including failure to pay minimum wage and failure to pay overtime. The law became effective on July 25, 2016.

7. AB 1245 Establishes Online Unemployment Insurance and Electronic Reporting Requirements

Beginning January 1, 2017, Assembly Bill 1245 requires that employers with 10 or more employees must file all unemployment insurance reports and returns using the e-file system. Also, these employers must remit contributions for unemployment insurance premiums by electronic funds transfer. The law will extend to all employers on January 1, 2018. Businesses without the necessary technology may be exempted, but must request a waiver.

8. SB 501 May Reduce Amount Subject to Wage Garnishment

Senate Bill 501, a law which became effective on July 1, 2016, may reduce the prohibited amount of weekly disposable earnings that may be garnished depending on where the employee works. Specifically, SB 501 adjusts the existing statutory scheme, which limits the amount of an individual judgment debtor's weekly disposable income subject to garnishment to the lesser of 25% of the disposable earnings or the amount by which the individual's disposal earnings exceed 40 times the state minimum wage, to now include the possibility of a higher local minimum wage. "Disposal earnings" is still defined as earnings after required withholdings. So employees who work in areas with a minimum wage higher than the current California rate of \$10.50 per hour (for employers with 26 or more employees, \$10 per hour for those with fewer employees), such as in Santa Monica, San Francisco or Los Angeles, may have fewer wages available for garnishment.

9. SB 269 Provides a Safe Harbor for Violations of Disability Access Under the Unruh Act

Senate Bill 269 provides a "safe harbor" period for some businesses to correct certain violations related to construction-related disability access under the Unruh Act. The bill reduces fines for certain technical violations corrected within 15 days of notice or service of the complaint, whichever is earlier, and where a business has had a Certified Access Specialist (CAsp) inspect the property. In addition, lower fines apply to smaller businesses which employed 25 or fewer employees on average over past 3 years, and which have averaged gross receipts of less than \$3,500,00 over previous 3 years. SB 269 took effect on May 10, 2016.

10. AB 1732 Requires Gender Neutral Restrooms

Existing law requires a businesses that serve the public or are open to the public and maintain toilet facilities to make those facilities available to the public free of charge. Existing law also states that publicly and privately owned establishments where the public congregates must maintain a sufficient number of temporary or

permanent toilet facilities to meet the needs of the public at peak hours. These laws also require that each business establishment provide, within reasonable access, a sufficient number of toilet facilities for the use of the employees. Effective March 1, 2017, Assembly Bill 1732 requires all single-user toilet facilities in any business establishment, place of public accommodation, or government agency to be identified as all-gender toilet facilities. The law authorizes inspectors, building officials, or other local officials responsible for code enforcement to inspect for compliance with these provisions during any inspection. The law defines “single-user toilet facility” as a toilet facility with no more than one water closet and one urinal with a locking mechanism controlled by the user.

11. AB 2535 Expands Exceptions to Tracking Hours Requirements on Itemized Wage Statements

Prompted, in part, by a 2015 federal court decision which held that employers must state the total hours worked by outside sales persons, Assembly Bill 2535 amends Labor Code section 226 to further clarify the categories of workers whose wage statements need not show total hours worked. The amendment specifies that salaried persons exempt from overtime under statute (Labor Code section 515) or an order of the Industrial Welfare Commission need not have hours included on wage statements. In addition, the amendment lists the following categories of workers for which employers do not have to report hours worked: exempt executive, administrative, or professional employees; exempt outside sales employees; salaried computer professionals under Labor Code section 515.5; parents, spouses, children, or legally-adopted children of the employer provided in applicable IWC orders; directors, staff, and participants of a live-in alternative to an incarceration rehabilitation program for substance abuse; exempt crew members of licensed commercial passenger fishing boats as specified by the IWC; and participants in national service programs as set for in any applicable IWC order. AB 2535 took effect on January 1, 2017.

12. SB 667 Extends Claim Period Under State Disability Insurance Program

Effective July 1, 2016, Senate Bill 667 extends from 2 weeks to 60 days the period of time that an employee can reopen a disability insurance claim without having a new 7 day consecutive day waiting period of wage loss. This legislation is intended to assist employees returning to work after a 2 week or longer period of disability, who then suffer a recurrence of the same or related condition, and would have had to undergo a second 7 day waiting period before receiving benefits under current law.

13. SB 5 and AB 7 Amends Workplace Smoking Prohibitions to Include E-Cigarettes

So you think vaping is the key to reducing workplace stress? Think again. Senate Bill 5 expands no smoking prohibitions to include e-cigarettes (vaping) and expands the definition of “tobacco products” to include all forms of tobacco or nicotine, except for approved cessation products, such as nicotine gum. Assembly Bill 7 expands the prohibition on smoking in the workplace to include owner-operated business, including a business where the owner is the only employee. AB 7 also eliminates most of the specified exemptions that permit smoking in certain work environments, such as hotel lobbies, bars and taverns, banquet rooms, warehouse facilities, and employee break rooms. Both bills became effective on January 1, 2017.

14. Private Attorney General Act Amendment Permits More Government Oversight of Claims

Buried in an appropriations bill designed to address no fewer than 42 separate issues is a small, but important item for California employers. In response to requests for legislative restrictions on the Private Attorneys General Act of 2004 (PAGA), the legislature passed State Bill 836, the Governor's budget bill. SB 836 includes an amendment to PAGA which provides the Labor Workforce Development Agency (LWDA) with increased oversight of PAGA actions by allowing the LWDA additional time to review and investigate PAGA claims. There are new requirements for online filing, payment of a filing fee, and submission of all complaints, court orders that award or deny penalties, judgments and settlement proposals to the LWDA. The resulting amendments to the PAGA are expected to delay PAGA litigation and possibly eliminate some frivolous claims. Increased LWDA oversight could also complicate any settlement process. The bill applies to all PAGA claims filed or pending after July 1, 2016.

15. New State Minimum Wage Law

Senate Bill 3 increases California's minimum wage to \$15.00 per hour by 2022 for employers with 26 or more employees. The minimum wage increase schedule for employers with 26+ employees is as follows: January 1, 2017 - \$10.50 per hour January 1, 2018 - \$11 per hour January 1, 2019 - \$12 per hour January 1, 2020 - \$13 per hour January 1, 2021 - \$14 per hour January 1, 2022 - \$15 per hour Employers with fewer than 26 employees have an additional year to comply with each increase. Following January 1, 2022, increases will be determined by the California Director of Finance based on the adjusted Consumer Price Index for Urban Wage Earners and Clerical Workers. This increase will not only impact budgets for non-exempt employees, it will also impact employers with exempt employees because California exempt employees must make at least twice the state minimum wage on an annual basis. Thus, the current minimum salary for exempt employees who work for employers with more than 25 employees will increase from \$41,600 to \$43,680 effective January 1, 2017. It will then increase to \$45,760 effective January 1, 2018, \$49,920 effective January 1, 2019, \$54,080 effective January 1, 2020, \$58,240 effective January 1, 2021, and \$62,400 effective January 1, 2022. Employers with fewer employees will have to make the same adjustments one year later, commencing on January 1, 2018. Employers located in cities or counties with higher minimum wage requirements must meet those local requirements.

16. Assembly Bill 908 Expands Paid Family Leave

Approximately 15 years ago California became the first state to provide paid time off to workers to care for a new child or ailing family member. The law, which is funded by required worker contributions, provides for up to 6 weeks of wage replacement in connection with certain qualifying events, which events include the temporary disability of an individual worker, caring for certain family members, bonding with a minor child within one year of birth, or the placement of a child in connection with foster care or adoption. Governor Jerry Brown has expanded that law by signing Assembly Bill 908. At the same time, Governor Brown authorized increases in California's disability insurance program. Specifically, AB 908 will revise the formulas used under the paid family leave and state disability law for determining benefits in a manner designed to increase the benefits commencing on January 1, 2018. These increases are designed to raise the amount of wage replacement from the current of 55% of weekly wages to approximately 60% to 70% for most workers. A minimum weekly benefit of \$50 is guaranteed, and the wage replacement rate will increase for most low wage workers, not to exceed the

maximum workers' compensation temporary disability indemnity weekly benefit established by the Department of Industrial Relations. In addition, the bill will remove the 7-day waiting period to receive the benefits as of January 1, 2018.

17. SB 1015 Makes the Domestic Worker Bill of Rights Permanent

Senate Bill 1015 removes the 2017 sunset provision of 2013's Assembly Bill 241, the Domestic Worker Bill of Rights, which granted overtime protections to California's privately hired domestic workers who are personal attendants, which therefore makes the law permanent. Under the Domestic Worker Bill of Rights, daily overtime is required after 9 hours worked in one day and weekly overtime after 45 hours are worked in one week.

18. AB 2532 Eliminates the Requirement that Private Employers Contracting with State and Local Agencies Verify an Individual's Status Before Providing Services

Effective January 1, 2017, Assembly Bill 2532 eliminates the requirement that private employers contracting with state and local government agencies to provide specified employment services verify an individual's legal status or authorization to work prior to providing services to that individual, as required by federal procedures. AB 2532 also repeals posting requirements that notices be placed in prominent locations stating that only persons authorized to work in the United States be permitted to use the agency's or the organization's employment services. These laws are in addition to those which became effective at the local level, which include several items that are sure to keep employers on their toes. For example, on January 1, 2017, San Francisco became the first city in the United States to require fully paid parental leave for employers with 50 or more employees. Further, the cities of Los Angeles, San Diego, San Francisco, Oakland, Emeryville and Long Beach have sought to enhance California's Healthy Workplaces/Healthy Families Act of 2014 by adding additional paid sick leave benefits. Numerous cities, including Los Angeles, San Francisco, Oakland, Berkeley, Emeryville, Mountain View, Richmond, Santa Monica, San Diego, and San Jose, as well as the County of Los Angeles (unincorporated areas), have enacted minimum wage laws that exceed the state minimum wage. And, finally, effective January 22, 2017, the Los Angeles Fair Chance Initiative for Hiring will prohibit most employers in the City of Los Angeles from inquiring about a job applicant's possible criminal history until an initial job offer is made.

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