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Inside

Annual California Roundup: Much Ado on the Legislative Front – Plus Employment Law in President Elect Obama's Administration

By Felicia Medina

INTRODUCTION

This year was a busy one for the California legislature. In spite of the state budget crisis and a worsening economy, some noteworthy employment bills became law. On the national level, it is safe to assume that President elect Obama is likely to try and make good on many of the pro-employee legislative reforms that he supported during his campaign. Many believe that some form of the Employee Free Choice Act – which as currently drafted would permit employees to form unions through check cards, thus eliminating secret ballot elections – will be signed into law. Overall, the election of President elect Obama could well result in marked changes to the employment law landscape. Stay tuned.

LEGISLATIVE LOOKBACK

Governor Schwarzenegger vetoed the majority of the labor and employment bills that crossed his desk this year. However, some interesting bills were signed into law concerning disability access, wage agreements/timesheets, and temporary workers' wage regulations, to name a few.

Also, faced with an $11.2 billion budget shortfall, the Governor called a special legislative session in September and October and announced an employment stimulus package designed to generate jobs, keep existing jobs and businesses in California, and lure others back to the state. Among the Governor's proposals are calls to amend overtime exemptions, ease overtime requirements, clarify existing meal and rest period law, and keep television and film production in California. Whether any of these proposals will become law remains to be seen.

AYE: BILLS SIGNED INTO LAW

Disability Access Reform (S.B. 1608)

In October, *S.B. 1608* was signed into law. The bill was a California Chamber of Commerce–backed "job creator" that was heralded as a bipartisan effort aimed at increasing public access for individuals with disabilities while reducing unwarranted litigation. Key reform provisions include:

- A new disability commission which will be tasked with evaluating and providing recommendations on further

disability issues having an impact on the disability community and businesses.

- Improvements in continuing education in disability access laws for building inspectors and architects.
- Incentives to building owners to use state-certified access specialists to ensure compliance.
- A new court procedure to encourage early resolution of disability access lawsuits.

Moreover, one of the most important reforms in *S.B. 1608* is a provision clarifying that plaintiffs may recover damages *only* for a violation they personally encountered or that deterred access on a particular occasion, rather than for alleged violations that may exist at a place of business but did not cause a denial of access.

Additionally, *S.B. 1608* clarifies that a court can consider reasonable written settlement offers made and rejected in determining the amount of attorneys' fees to be awarded at the end of a case.

Overtime Compensation – Computer Software Professionals (A.B. 10)

A.B. 10 amended existing overtime exemptions to California Labor Code Section 515.5 for computer professionals regarding employee duties and compensation. Under existing law, computer professionals were exempt if they engaged in "systems analysis, programming *and* software engineering." *A.B.10* modified this language from a conjunctive requirement to disjunctive requirement ("systems analysis, programming *or* software engineering"), thereby, arguably increasing the number of computer professionals eligible for overtime exemption. Last year the legislature rolled back the minimum pay requirement from $49/hour to $36/hour for this exemption. *A.B. 10* now adds an annual income level for exempt computer software professionals. The bill provides that overtime exemption now applies to computer professionals paid an annual salary of $75,000 or greater, or at a rate of at least $6,250/month.

Employers will be required to report injuries and illnesses on the form, and the insurer (or self-insured employer) will then have to report the information electronically to the DWC.

Workers' Compensation (A.B. 2181)

A.B. 2181 requires the administrative director of the Division of Workers' Compensation (DWC), in consultation with the Department of Fair Employment and Housing (DFEH) and the Commission on Health and Safety and Workers' Compensation, to develop and publish guides for employers and employees covering the "return-to-work" process, with the primary purpose of providing practical information for employers on how to comply with the anti-discriminatory laws and "return-to-work" provisions governing workers' compensation and disability after an employee experiences an industrial illness or injury. Once the guides are published by the Department of Industrial Relations, employers must refer employees on disability to this "return-to-work" information.

A.B. 2181 further changes the way that reports of occupational injury or illness are filed. The DWC is mandated to publish a new reporting form. Employers will be required to report injuries and illnesses on the form, and the insurer (or self-insured employer) will then have to report

the information electronically to the DWC.

Wage Agreements and Timesheets (A.B. 2075)

Governor Schwarzenegger signed into law *A.B. 2075*, which amends California Labor Code Section 206.5 and makes it a misdemeanor for an employer to require an employee, as a condition of payment of wages, to sign a statement of hours worked that the employer knows is false.

Prior to the amendment, the Labor Code prohibited employers from requiring an employee to sign a release of wage claims, unless payment of the wages had been made. The amendment extends this protection by defining "execution of a release" to expressly include requiring an employee to execute a statement of hours worked during a pay period which the employer knows to be false. Proponents of the legislation reasoned that the new law was needed because some employers were attempting to guard against wage and hour litigation by requiring their employees to certify records of hours worked that inaccurately reflect overtime.

Anti-Discrimination Legislation (A.B. 2654)

A.B. 2654 harmonizes anti-discrimination provisions in a range of state laws, including laws dealing with discrimination in contracting, insurance, and workers' compensation, to ensure that the anti-bias protections mirror those in the Unruh Civil Rights Act and the Fair Employment and Housing Act. The Unruh Act currently protects the following categories: sex, including gender identity; race; color; religion; ancestry; national origin; disability; medical condition; marital status; and sexual orientation.

Temporary Employees: Wages (S.B. 940)

Employers who use temporary agencies should ensure their vendors comply with the new California Labor Code Section 201.3, since some employees have been able to assert "joint employer" wage claims against the client (employer) and the agency. *S.B. 940* defines what a "temporary services employer" is and establishes a number of provisions governing when wages are due to various types of temporary workers. For example, temporary services employers must, unless an exception applies, pay covered temporary workers weekly; pay temporary workers assigned to work "day-to-day" at the end of each day, unless certain exceptions apply; and pay temporary workers used as strike replacements by the end of each day.

Unemployment Insurance – Motion Picture Industry (S.B. 1173)

In the aftermath of an explosive situation involving tax code violations by certain professional employee service organizations or payroll service companies in the entertainment industry, Governor Schwarzenegger signed *S.B. 1173* into law. The bill provides that payroll service companies that quit the business must notify the motion picture production companies and the allied motion picture service within 45 days of their intent. The bill also allows a motion picture payroll service company that has elected to be treated as an employer to apply to the Director of the Employment Development Department to extend an existing voluntary plan for the payment of disability benefits to motion picture production workers of the company's affiliated entities.

Public Work Projects – Prevailing Wage Violations (S.B. 1352)

Existing law requires the Labor Commissioner to issue a civil wage and penalty assessment to a contractor, subcontractor, or both, if the Commissioner determines that the contractor violated the laws regulating public works contracts, including payment of prevailing wages. Recently signed *S.B. 1352* continues to require

Additionally, in an attempt to shore up the state's failing unemployment insurance fund, which is on the brink of bankruptcy, the Governor has requested an increase in employer contributions to the fund by increasing the taxable wage ceiling from $7,000 to $10,500 and the maximum tax rate from 6.2% to 8.2%.

a hearing officer, as specified, to hold the hearings pursuant to existing law; however, the recent amendment would not require that an administrative law judge hold these hearings after January 1, 2009. The bill also allows a contractor, subcontractor, or surety to deposit the full amount of the assessment for the Department of Industrial Relations to hold in escrow pending review. If so deposited, there would be no liability for liquidated damages. The bill also gives the Director the ability to waive payment of liquidated damages on appeal if there were substantial grounds for the appeal.

Cell Phone Usage (S.B. 28)

S.B. 28 expanded existing prohibitions on using cell phones while driving to bar text messaging, emailing, and instant messaging.

Minimum Wage Reminder

There is no change to the state minimum wage for 2009. The $8.00/hour rate, effective January 1, 2008, will remain in place throughout 2009.

On July 24, 2009, the federal minimum wage will increase from $6.55/hour to $7.25/hour. Employers need to post the federal minimum wage at their place of business.

Governor Schwarzenegger's Employment Stimulus Plan

As previewed above, Governor Schwarzenegger has released an employment stimulus plan for California that contains significant employment law reforms. Among the proposals is the Governor's proposal to adopt legislation that would exempt employees in executive, sales, administrative, and professional jobs who earn more than $100,000 annually from overtime pay. There are also plans to allow employees to work more flexible hours upon request, such as 10–hour work days for a 40–hour work week without being paid overtime. Also included in the stimulus plan is a proposal to clarify existing law regarding meal and rest periods to provide employers and employees with a clear understanding of meal breaks, as well as extending more compliance flexibility to both businesses and workers. The Governor further proposed a tax credit from 20-25% for the film and television industry to help keep film production in the state.

Additionally, in an attempt to shore up the state's failing unemployment insurance fund, which is on the brink of bankruptcy, the Governor has requested an increase in employer contributions to the fund by increasing the taxable wage ceiling from $7,000 to $10,500 and the maximum tax rate from 6.2% to 8.2%. The increased contributions would range from $56 to $427 per employee.

NAY: BILLS VETOED

Equal Pay Reform (A.B. 437)

Two bills that would have expanded the scope of employer liability and resulted in increased litigation costs were vetoed. Among them, *A.B. 437*, sponsored by Dave Jones, the Chair of the Assembly's Judiciary Committee, would have legislatively rejected, for purposes of any California statutes of limitation,

the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, which provided limits on statutes of limitation for lawsuits relating to employer decisions (complaint must be filed within 180 days of the first discriminatory pay decision). Post-*Ledbetter*, various employee advocates sponsored federal legislation entitled the Ledbetter Fair Pay Act, in order to counter the U.S. Supreme Court's recent holding.

FEHA Damages Cap (A.B. 2874)

A.B. 2874 would have abolished the current $150,000 cap on damages that the Fair Employment Housing Commission could award in administrative hearings.

Employer Access to Credit Reports (A.B. 2918)

A.B. 2918 would have narrowed the circumstances under which employers could procure consumer credit reports on applicants and employees.

Unauthorized Practice of Law – Worker Classifications (S.B. 1583)

This bill would have imposed penalties on non-lawyer consultants who knowingly gave erroneous advice on classifying workers as independent contractors in order to avoid employee status.

Family Medical Leave (S.B. 1661)

Governor Schwarzenegger vetoed legislation that would have characterized an individual who quit or was discharged as a result of taking baby-bonding leave under California's paid family leave law as separation with "good cause," for purposes of qualifying for unemployment benefits.

FEDERAL UPDATE

Employment Law Reform in the Obama Administration

Though the weak economy may stifle immediate and sweeping employment law reforms, employers should obviously be aware that pro-employee policies will take shape during President Obama's administration on both the legislative and the regulatory fronts. Of the current bills pending in Congress, the Employee Free Choice Act, which Senator Obama supported, is perhaps the most contentious and in some form may well pass. The current version of the bill would permit employees to form unions through check cards, thus eliminating secret ballot elections, and it would tighten penalties for interfering with union efforts. Currently, unions win about 50 to 55 percent of supervised secret ballot elections. The use of card checks is likely to result in a significant boost to the U.S. labor movement.

For additional information on the Employee Free Choice Act, *see* the article on page 6.

Another bill that could become law is the RESPECT Act, which is currently pending before Congress. The RESPECT Act would overturn the National Labor Relations Board's "Kentucky River" decisions and give certain exempt supervisors the ability to be included in a collective bargaining unit. Senator Obama also co-sponsored two bills, the Fair Pay Act and the Equal Remedies Act, which would effectively reverse the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co. See supra* discussion Nay: Bills Vetoed – *Equal Pay Reform,*

President elect Obama has also expressed support for expanding the Family Medical Leave Act to include companies with 25 or more employees (existing law covers employers with 50 or more employees), raising the minimum wage to $9.50 per hour by 2011, and granting employees at least seven days of mandatory paid sick leave.

CONCLUSION

2009 promises to be an eventful year in employment law. Employers will need to keep abreast of the changes in order to avoid the potential for liability. ■

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The Looming Employee Free Choice Act

By Kathryn M. Davis, David J. Murphy, and Timothy F. Ryan

While the convergence of a Democratic majority in the Senate and President elect Obama's administration is expected to bring many changes in the next four years, one immediate change may be the passage of the Employee Free Choice Act (EFCA). Originally introduced in the House in February 2007, the EFCA proposed to amend the National Labor Relations Act (NLRA), which governs employer/union relations, so as to facilitate union organizing and speed up collective bargaining negotiations, among other things. While the bill failed to garner enough votes to survive a filibuster in the Senate in June 2007, it is virtually certain that the bill—or something very similar to it—will be reintroduced shortly after the new Congress is sworn in in January 2009. This article discusses the EFCA as it was proposed in 2007 and its likely impact should it be passed and signed into law in 2009.

Existing Law. Under current law, generally, unions looking to organize an employer's workplace can seek representation by presenting evidence that a majority of the employer's employees in *an appropriate bargaining unit* (which can be a much smaller group than all the employees in the facility) support having the union as their exclusive bargaining representative. The employer can then either recognize the union voluntarily or refuse to do so. If it refuses, the union typically must file a petition with the National Labor Relations Board (NLRB or the Board), the federal agency that administers the NLRA, to conduct a secret ballot election to confirm that a majority of the employees truly support the union as their bargaining representative.

If the union wins the secret ballot election, the parties then begin to negotiate their first collective bargaining agreement. While both parties are required to negotiate in good faith, neither side is required to agree to any particular term. Rather, the negotiation process is left to the parties, who are free to use the full range of traditional economic weapons, such as strikes and lockouts. While the traditional election process is generally expeditious (94% within 8 weeks of filing the election petition), in some instances challenges to the election results and disagreements at the bargaining table can delay a first contract for several years.

EFCA. Focusing on the delay that sometimes accompanies the existing election and contract negotiation process, the EFCA proposes to alter current law in several significant respects.

First, under the EFCA, if a union files a petition accompanied by evidence of majority status in the form of authorization cards signed by the employees, the NLRB would certify the union as the employees' exclusive representative, without conducting a secret ballot election. This drastically changes the current statutory landscape, which has long favored protecting the employees' statutory right of free choice through Board– supervised elections. *See, e.g., Dana Corp.*, 351 NLRB No. 28 (2007) (acknowledging the court- and Board-recognized statutory preference for resolving questions concerning representation through a Board secret-ballot election). Unlike

a secret ballot election, where no one will ever know if a particular employee does or does not support the union, the authorization card process creates the danger that an employee may feel obligated or coerced into supporting the union by being asked to sign the authorization card in public.

Additionally, if certification based on authorization cards alone is permitted, the employer would be largely deprived of an opportunity to make its case against unionizing directly to its employees. In many instances, an employer may not be aware that a union has targeted its employees until after the union has obtained the signed authorization cards. By circumventing the election process, the EFCA would eliminate the employer's opportunity to make its case to its employees and the employees' ability to make their choice known after having received information from both sides of the issue.

The EFCA also would in large part eliminate the negotiation process with respect to the first collective bargaining agreement. The EFCA would require that: (1) negotiations for an initial contract commence within 10 days after a request for bargaining is made; (2) mediation by the Federal Mediation and Conciliation Service (FMCS) occur if after 90 days the employer and the union are unable to reach an agreement; and (3) if after 30 days of mediation the parties remain unable to agree, the terms of the initial contract would be determined by an arbitration board established by the FMCS, and any resulting agreement would be binding for two years, unless the parties mutually agree to alter the contract before then.

By circumventing the election process, the EFCA would eliminate the employer's opportunity to make its case to its employees and the employees' ability to make their choice known after having received information from both sides of the issue.

This, again, drastically alters the existing negotiation landscape in which neither party is required to agree to any particular term, provided they negotiate in good faith. Under the EFCA, the employer (and possibly even the union) would be forced to accept terms either to avoid an arbitrated agreement or as a result of an arbitrated agreement, regardless of how those terms affect its business operations or profitability. This additionally handicaps the employer in subsequent negotiations because it will be in the position of negotiating the removal of a contract provision to which the union is not obligated to agree, as opposed to refusing a proposed contract provision which it is not obligated to accept.

Finally, the EFCA would create civil penalties, up to $20,000 per infraction, for employers, *but not unions*, who engage in unfair labor practices during the union organizing campaign through the completion of the first collective bargaining contract. Additionally, the Board would be authorized to award back pay and liquidated damages in the amount of two times the back pay award for *employer* violations during the organizing campaign through the completion of the first collective bargaining contract.

Preparing for the EFCA. President elect Obama has made it clear that his new administration

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fully supports the EFCA and all of its provisions. Union advocates have committed to pushing for its enactment in the first 100 days of the new Obama administration. While the exact timetable on which EFCA will be addressed is subject to much political speculation, its pendency places the prospect of greatly heightened levels of union organizing activity at the forefront of human resources issues under the new Obama administration.

Employers in both union and non-union industries, and even companies which previously had not considered themselves as likely targets of union organizing, would be well-advised to at least assess the possibilities for its occurrence at their company in 2009 and thereafter. Among other steps, employers should consider union awareness training and other employee communication steps to anticipate these unionization issues being raised with their employees.

Morrison & Foerster has organized a task force of its most experienced labor law attorneys to help develop the nuts and bolts of what should be involved for the full range of these potential steps.

Employers who fail to prepare in advance for unionizing activity are likely to find themselves unaware that the organizing is occurring until after the union presents the signed authorization cards: at that point, it may well be too late. Under the future EFCA, the union very possibly would be entitled to certification, and bargaining would commence immediately! ■

Employers in both union and non-union industries, and even companies which previously had not considered themselves as likely targets of union organizing, would be well-advised to at least assess the possibilities for its occurrence at their company in 2009 and thereafter.

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