

EMPLOYMENT LAW COMMENTARY

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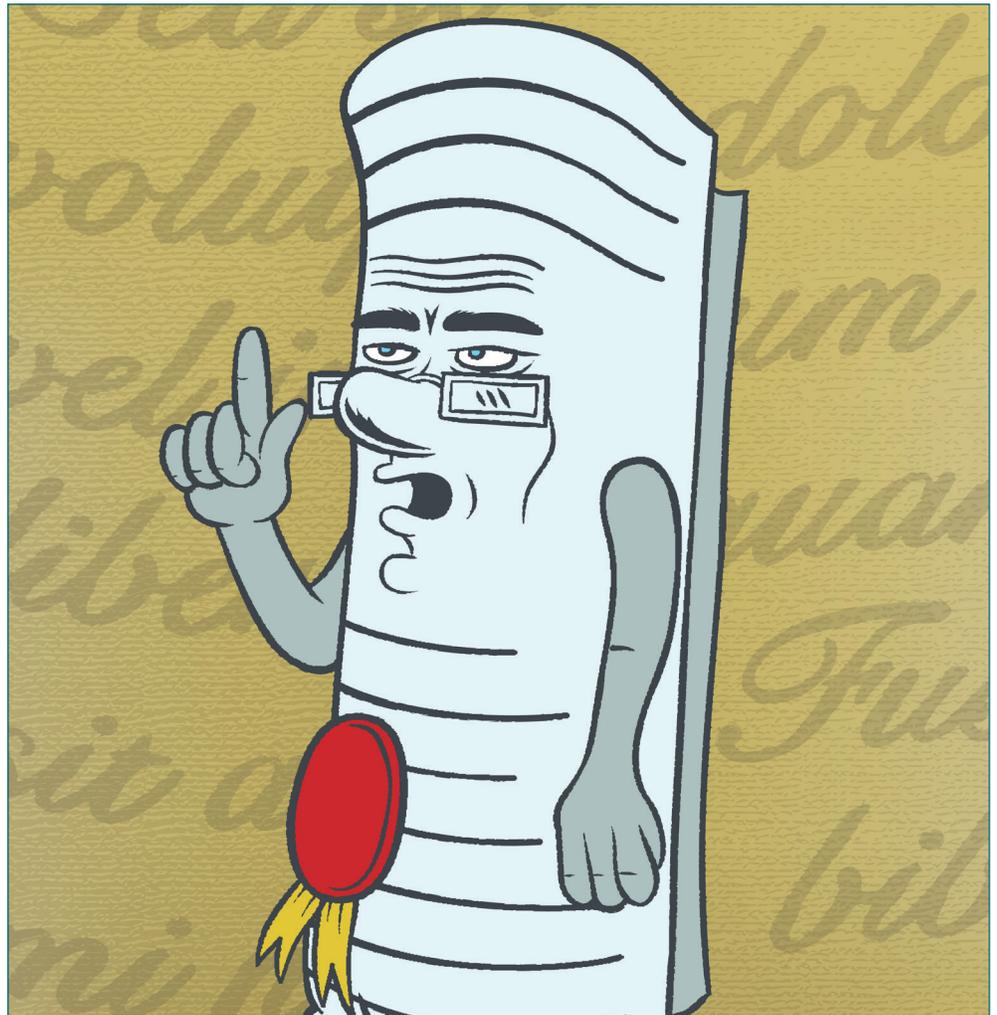
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CALIFORNIA LEGISLATIVE UPDATE – IT'S THAT TIME OF YEAR AGAIN

By Anna Ferrari

While the federal government ground to a halt, the California Governor and Legislature have been busy voting on and signing a flurry of new legislation at the end of this year's legislative session. The following is a survey of new laws of interest to California employers, as well as some notable bills that were not signed into law. Unless otherwise noted, the following pieces of legislation are effective January 1, 2014.

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Bills Signed Into Law

WAGE & HOUR

AB 10 – Minimum Wage Increase. AB 10 increases the minimum wage to \$9 an hour effective July 1, 2014, and to \$10 an hour as of January 1, 2016. This marks the first increase to California’s minimum wage law since 2008. Provisions that would have indexed future minimum wage increases to the rate of inflation were removed from the bill before it passed the Legislature. Note that this increase will increase the salary requirement for exempt employees to \$37,440 in July 2014 under Labor Code § 515(a).

AB 442 – Liquidated Damages for Certain Wage Violations. AB 442 expands the Labor Commissioner’s authority, after a citation from a field investigation is issued to an employer for failure to pay minimum wages to workers, to also recover and pay to the workers the unpaid minimum wage liquidated damages provided for in Labor Code § 1194.2. Under current law, the Labor Commissioner could only remedy wage violations in connection with field investigations by recovering unpaid wages and assessing civil penalties.

SB 435 – Paid “Heat Breaks.” SB 435 amends the Labor Code to add a “recovery period” to meal and rest breaks that employers must provide to employees or pay an additional hour’s pay. “Recovery period” is defined as a cool down period offered an employee to prevent heat illness as required in a Cal/OSHA regulation. The regulation, as currently drafted, permits employees to take a five minute cool down rest break.

AB 462 – Employer Right to Attorneys’ Fees. AB 462 amends Labor Code § 218.5 which provides for recovery of attorneys’ fees by the prevailing party in wage hour lawsuits. Under the amendment to the statute, employers can now only recover attorneys’ fees if the court finds that the employee brought the court action in “bad faith.”

AB 241 – Overtime for Domestic Workers. AB 241 creates a “Domestic Worker Bill of Rights” to regulate certain domestic workers’ work hours and provide an overtime compensation rate for those employees who work in excess of nine hours in a workday or 45 hours in a workweek. The Domestic Worker Bill of Rights, commencing with new Labor Code section 1450, will remain in effect until January 1, 2017.

SB 7 – Prevailing Wages for Charter Cities. SB 7 authorizes the state to withhold state funds on all public works projects in charter cities that have local ordinances that prevailing wages do not have to be paid on purely municipal projects paid for with local funds.

EXECUTIVE COMPENSATION AND BENEFITS

AB 1173 – Income Tax for IRS Code 409A Noncompliance. Section 409A of the Internal Revenue Code regulates the treatment for federal income tax purposes in the United States of certain nonqualified deferred compensation, including traditional deferred compensation plans, payments under severance agreements, employment agreements, change in control and retention agreements, discounted stock options, and other forms of equity compensation such as restricted stock units or “phantom” stock. Any such arrangements that are not in compliance with Section 409A’s draconian restrictions may cause the underlying compensation to be taxed before it is paid and cause the individual to incur an additional 20 percent federal tax. Current state law imposes additional taxes of 20 percent for noncompliance with Section 409A. AB 1173 reduces this additional state tax on income from 20 percent to 5 percent for taxable years beginning January 1, 2013.

LEAVES OF ABSENCE

SB 770 – Expansion of Qualifying Relatives Under Paid Family Leave Act. California’s Paid Family Leave Act currently provides benefits to workers who are absent from work to care for seriously ill children, spouses, domestic partners and parents, or to bond with newly born, adopted or fostered children. SB 770 expands the definition of qualifying ill family members to include siblings, grandparents, grandchildren, and parents-in-law. As has always been the case, this bill does not affect the circumstances under which employers must allow employees to take a leave of absence from work, but simply provides that employees who are otherwise entitled to be absent from work to care for an ailing sibling, grandparent, grandchild, or parent-in-law are eligible to receive paid family leave benefits from the state.

DISCRIMINATION AND HARASSMENT

AB 556 – Military/Veteran Status Protected Under FEHA. California’s Fair Employment and Housing Act (“FEHA”) makes it unlawful to discriminate against certain protected categories. AB 556 adds “military and veteran status” to this list. It also permits employers to make inquiries regarding an employee’s or applicant’s military or veteran status for the purpose of awarding a veteran’s preference as permitted by law.

RETALIATION AND WHISTLEBLOWING

SB 496 – Expansion of Whistleblower Protections. This bill, as it pertains to private sector employers, amends section 1102.5 of the Labor Code to expand existing whistleblower protections and rights that prohibit an employer from (a) making, adopting, or

enforcing any rule, regulation, or policy preventing an employee from disclosing violations of, or noncompliance with, laws or regulation, and (b) retaliating against an employee because the employer believes that the employee disclosed or may disclose information related to the potential violation or noncompliance. The amendments expand existing law by (1) including violations of and noncompliance with local laws and regulations, in addition to state and federal ones; (2) protecting disclosures not only to government and law enforcement agencies, but also to employees with authority over the disclosing employee or authority to investigate, discover or collect the potential violation or noncompliance; and (3) prohibiting retaliation based on potential disclosures made in good faith, in addition to actual disclosures.

SB 666 – Anti-Retaliation for Complaining of Unpaid Wages; Restrictions on Reporting Immigration Status. SB 666 adds new section 244 to the Labor Code, providing that reporting or threatening to report an employee’s, former employee’s, or prospective employee’s suspected citizenship or immigration status, or the suspected citizenship or immigration status of the employee’s or former employee’s family member, as defined, to a federal, state, or local agency because the employee, former employee, or prospective employee exercises a designated right would constitute an adverse action for purposes of establishing a violation of the designated right. For the purposes of this new statute, a “family member” includes a spouse, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, or grandchild related by blood, adoption, marriage, or domestic partnership. Upon application, a court will have discretion to order the appropriate government entity to suspend or revoke the business license of employers found to have violated new Labor Code section 244 by retaliating or taking an adverse action against an employee, former employee or applicant on the basis of their citizenship and immigration status. The bill also expands the anti-retaliation provisions of Labor Code section 98.6 to protect employees who complain of unpaid wages, among other things. Such violations carry a \$10,000 civil penalty in addition to other remedies available at law.

AB 263 – Anti-Retaliation for Complaining of Unpaid Wages; Restrictions on Reporting Immigration Status. Like SB 666, AB 263 expands the anti-retaliation provisions of Labor Code section 98.6 to protect employees who complain of unpaid wages, among other things. AB 263 also adds Labor Code section 1019 to prohibit specified “unfair immigration-related practices.” The bill provides for civil penalties of up to \$10,000 per employee per violation for any

retaliation against an employee and authorizes a private right of action for equitable relief, damages, and penalties, including a court order directing the appropriate government entity to suspend or revoke an offending employer’s business license. The bill also expands the employer conduct prohibited by Labor Code section 1102.5 to include preventing an employee from, or retaliating against an employee for, providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry.

EMPLOYEE PRIVACY

AB 218 – Criminal Background Checks for Government Employees. AB 218 adds a new provision to the Labor Code prohibiting state and local government agencies from inquiring about an applicant’s criminal conviction history until after the agency has determined that the applicant already meets the requirements for the position. This law will take effect on July 1, 2014, and it excludes criminal justice agencies and positions for which criminal background checks are required by law.

WORKPLACE SAFETY AND ACCOMMODATIONS

SB 400 – Prohibition on Adverse Actions Against Stalking Victims. SB 400 amends sections 230 and 230.1 of the Labor Code to extend current protections (including taking time off and non-retaliation) for employees who are victims of domestic violence and sexual assault to employees who are known or suspected victims of stalking; the legislation requires reasonable accommodations that may include the implementation of safety measures or procedures for a victim of domestic violence, sexual assault or stalking.

AB 633 – Good Samaritan Employer. This bill adds a new section to the Health and Safety Code prohibiting employers from adopting a policy prohibiting employees from providing emergency medical services, including cardiopulmonary resuscitation, in the workplace. Employers may adopt a policy requiring only employees trained in such services to provide emergency care but if none are available, any employee must be allowed to voluntarily provide emergency care. Employers may adopt a policy prohibiting such emergency services on a person if that person has a Do Not Resuscitate, or similar order, in effect.

Significant Unpassed and Vetoed Bills

SB 404 would have added “familial status” to the various protected categories under California’s antidiscrimination statute, the Fair Employment and Housing Act. There was no floor vote on the bill this legislative session, but it is likely to be revived in the 2014 session.

Meet Ann Bevitt, London Employment + Labor Partner



1. What is the best thing about your job?

The variety of issues on which we are asked to advise and the interplay of legal requirements in different jurisdictions when handling cross-border work.

2. What are the hot topics in employment law this year in the UK?

There are no huge changes expected in the near future, but over the past year there has been a number of employment law reforms designed to make things easier for employers. For example, the length of service an employee needs to have before he or she can bring an unfair dismissal claim has been increased to two years and employees now need to pay fees in order to issue employment tribunal claims and have those claims heard. Looking ahead, however, there appears to be a more employee friendly trend. For example, the right to request

flexible working is being extended to all employees and not just those who are parents or carers in the Spring/Summer of 2014.

3. What are the key employment law challenges employers currently face in the UK?

Keeping on top of the ever changing myriad rights and entitlements of employees is always going to be a challenge for employers; however, the UK is not thought to be as demanding as some other continental European jurisdictions (watch this space).

4. If you weren't an employment lawyer, what would you be?

I would be a psychologist, as I find people and their motives for behaving the way they do fascinating.

SB 655, vetoed by Governor Brown, would have lowered the standard of proof and allowed employees to seek greater recoveries in mixed-motive discrimination cases. In response to the recent California Supreme Court ruling in *Harris v. City of Santa Monica* which held that plaintiffs must show that discrimination was a “substantial” motivating factor in their firing to recover in mixed-motive cases, SB 655 would have defined “substantial” in this context to mean “more than a remote or trivial factor, but need not be the only or main cause of the employment action.”

AB 729 – Evidentiary Privilege for Union Agents and Represented Workers. AB 729, vetoed by Governor Brown, would have added section 1048 to the Evidence Code to create a new evidentiary privilege making confidential most communications between a union agent and a union member.

CONCLUSION

Employers should update their policies to ensure they are in compliance with the new statutes, especially the new minimum wage with its ramifications for exempt status under California wage/hour law.

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