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EMPLOYMENT LAW
COMMENTARY

Volume 21, No. 11 November 2009

Annual California Roundup – Employment Law & 2009 Legislative Sessions in Sacramento and Washington, D.C.

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INTRODUCTION

The 2009 legislative sessions in both Sacramento and Washington, D.C. have yielded significant developments for labor and employment law. Some of the new laws provide greater flexibility for employers and seek to minimize differences between state and federal law. Other laws have created new duties for employers and may expose employers to liability for older claims. Additionally, there are bills still pending that show important policy-making trends in labor and employment law. Overall, the national employment law trends reflect the political changes in Washington, including the increase in legislative influence of labor unions.

CALIFORNIA LEGISLATIVE LOOKBACK

Governor Schwarzenegger vetoed a number of labor and employment bills that crossed his desk this year. However, some important bills were signed into law concerning alternative workweek schedules, discovery, workers' compensation, and discrimination, to name a few.

CALIFORNIA BILLS SIGNED INTO LAW

Alternative Workweek Schedules (A.B. 5 – 2nd Ex. Sess.)

As employers look for ways to restructure their workforces and minimize operating costs in creative ways during this economic downturn, California has amended its existing law regarding alternative workweek arrangements. Alternative workweek schedules allow non-exempt employees to work more than eight hours per day without incurring overtime. By enacting A.B. 5, the legislature has amended California Labor Code § 511, and thereby provided additional clarity and flexibility for employers considering alternative workweek arrangements. Specifically, the legislation codified the definition of "work unit" found in the wage orders, such that Labor Code § 511(i) now defines a "work unit" as "a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision thereof." The provision also makes clear that a single employee can qualify as a work unit "as long as the criteria for an identifiable work unit in this section is met."

Additionally, A.B. 5 clarifies that the menu options offered to employees may include a regular schedule of five eight-hour days in a workweek, with daily overtime due after eight hours under that option. As a result, employees who do not wish to work an alternative workweek schedule now may choose to work the regular five eight-hour days schedule, if approved in an election, while other employees in the work unit can work an alternative option.

The legislation also addresses how frequently employees may move between particular schedule options offered under a menu of options. Labor Code section 511(a) now provides that employees "who adopt a menu of work schedule options may, with employer consent, move from one schedule option to another on a weekly basis."

These changes became effective on May 21, 2009. Employers interested in adopting an alternative workweek arrangement should consider whether these changes will allow them to do so in accordance with their needs.

California's New E-Discovery Law (A.B. 5)

On June 29, 2009, Governor Schwarzenegger signed into law the Electronic Discovery Act. The new law amends the current Civil Discovery Act to include electronically-stored information ("ESI"). The Act makes the California scheme similar to the federal e-discovery system, though there are some small differences. Detailed below are highlights of the new law and its expected impact on employers.

- *Forms of Production.* The Act provides that a discovery request may specify the form in which information is to be produced. If a discovery demand or subpoena fails to specify the form of production for ESI, the recipient can produce the information in the form in which it is usually maintained or in a form that is reasonably usable. Employers will have to be strategic about the most cost-effective and least burdensome way to produce electronically-stored information when the form is not specified. In most cases, native file formats will be the easiest form of production.
- *Objections Based on Inaccessibility.* The Act contains specific provisions for objections to production of ESI based on lack of reasonable access to the material. If the propounding party moves to compel further responses, the burden is on the responding party to demonstrate that the search and production of the ESI would be unduly burdensome or costly. The responding party must specify in its objections the types and categories of ESI that it asserts are not reasonably accessible. Failure to include the required specification could lead to waiver. A party may also move for a protective order on the grounds the information sought is inaccessible. However, courts have the discretion to require limited discovery even in those cases. Employers and their counsel will need to be familiar with their electronically-stored information to facilitate making efficient objections.
- *"Safe Harbor" from Sanctions.* The rules afford a "safe harbor" to protect parties and attorneys from sanctions when ESI cannot actually be produced. Parties and attorneys cannot be sanctioned for failure to produce data that was lost as a result of the "routine, good faith operation of an electronic information system." Cal. Civ. Proc. Code § 2031.060(i)(1). Despite the assurance that sanctions will not inure for lost data, employers

should continue to be diligent about their electronic data storage. They should develop and follow specific policies for document retention and deletion, and make sure to retain any documents that may relate to potential litigation.

Emergency Extension of Unemployment Benefits (A.B. 23 and A.B. 29)

On March 27, 2009, the Governor signed A.B. 23 and A.B. 29 into law. A.B. 23 paved the way for unemployed Californians to receive up to 20 additional weeks of unemployment assistance under the federal stimulus extension. Prior to the passage of this bill, the length of unemployment benefits was limited to 26 weeks under the state program, plus 33 weeks in federal supplements. The bill only extends the duration of benefit payments by an additional five months, or twenty weeks; it does not increase the amount of weekly benefit payments. Only jobless Californians whose existing benefits expired after February 21, 2009 are eligible for this extension. Benefits under this extension will not be paid after December 26, 2009.

A.B. 29 qualified California for an additional $844 million in federal stimulus funds by creating a new "alternative base period" (ABP) that allows more people to qualify for unemployment benefits by altering the ABP calculation used to determine whether laid off workers have earned enough wages to qualify.

The combined impact of both bills is to allow California to take advantage of federal economic stimulus funds to get through and recover from this difficult economic time.

Medical Treatment Under Workers' Compensation (S.B. 186)

Under workers' compensation law, employers are required to pay for medical treatment incurred by their employees for the treatment of work-related injuries. Existing law provided employees with the right to be treated by their own physician from the date of the work-related injury, if specified requirements were met, including the requirement that the physician agree to be pre-designated. S.B. 186 indefinitely preserves the right of employees to pre-designate their own physicians for treatment of on-the-job injuries by deleting the December 31, 2009 repeal date of the prior legislation.

Penalty for Failure to Obtain Workers' Compensation Insurance (S.B. 313)

Existing law requires every employer, except the state, to secure the payment of workers' compensation benefits through insurance or self-insurance. S.B. 313 alters existing law by modifying the method for calculating the monetary penalty to be imposed on employers who fail to obtain workers' compensation insurance coverage, with the effect of increasing the penalty. Under the new legislation, the penalty is set at either $1,500 per employee or twice what the employer would have paid in workers' compensation insurance premiums the previous three years, whichever is greater.

Discrimination (S.B. 367)

In this tough economic climate, some businesses have offered or are considering offering discounts or other incentives to individuals who have had their salaries reduced, have been furloughed, or have lost their jobs. S.B. 367 makes clear that it is not a violation of the Unruh Civil Rights Act for businesses to provide discounts to groups of people who have suffered a loss of employment or reduction in wages, and that such actions do not constitute arbitrary discrimination.

Mandatory Workers' Compensation Coverage (A.B. 1093)

The Legislature has clarified that a workers' compensation claim cannot be denied based solely on a personal characteristic of a victim and a perpetrator's hatred of that characteristic, such as race, religion,

gender, or sexual orientation. The legislation was promoted by the murder of Taneka Talley in 2006. Ms. Talley was killed while working at a retail store by a man who later confessed that he killed her because she was black. The retailer refused to pay workers' compensation benefits to Ms. Talley's family—despite the fact that she was on the job when her murder occurred—taking the position that the murder was a hate crime and such crimes are not work-related. In October 2009, Governor Schwarzenegger signed A.B. 1093 into law, making it illegal to deny claims on the basis of a perpetrator's motives when an employee is injured and/or killed on the job.

Gender Equality for Health Coverage (A.B. 119)

On October 11, 2009, Governor Schwarzenegger signed into law a bill that will prohibit health insurers in California from charging a different premium based on the insured person's gender (i.e., "gender rating"). Under A.B. 119, women who purchase individual health insurance may not be required to pay higher monthly premiums than those paid by similarly-situated men. Federal laws already prohibited employers from charging men and women different rates for employer-sponsored health insurance; additionally, California law also precluded gender rating for employer groups of 2-50 employees. A.B. 119 supplements the federal and state legislation by prohibiting gender rating for individual health insurance rates.

No Texting While Driving (S.B. 28)

California law now prohibits a broad range of activities while driving, including writing, sending, or reading text-based communications (such as text messages, instant messages and e-mail) on a wireless device or cell phone while driving. Employers with employees whose job duties include driving should review their driving policies to ensure they are in full compliance with the new law. Violation of this law is an infraction punishable by a base fine of twenty dollars for the first offense, and fifty dollars for each subsequent offense.

Minimum Wage Reminder

The federal minimum wage increased in July 2009 to $7.25 per hour. The California minimum wage remains at $8.00 per hour, so employers of California employees are unaffected by the federal minimum wage increase.

CALIFORNIA BILLS VETOED

Choice-of-Law in Employment Contracts (A.B. 335)

A.B. 335 sought to create a rebuttable presumption that any provision in an employment contract or handbook is void if it requires an employee or job applicant to agree to a forum other than California, or to the laws of any state other than California, to resolve any employment-related dispute.

Consumer Credit Reports (A.B. 943)

A.B. 943 would have narrowed the circumstances under which employers could procure consumer credit reports on applicants and employees. This bill was similar to legislation the Governor vetoed last year. In declining to sign AB 943, Governor Schwarzenegger explained that "California's employers and businesses have inherent needs to obtain information about applicants for employment and existing law already provides protections for employees from improper use of credit reports."

Indoor Excessive Heat Standard (A.B. 838)

This legislation would have required the Occupational Safety and Health Standards Board to adopt a standard for heat-illness prevention where employees work indoors. The legislation was introduced following a series of heat-related deaths in the agricultural industry.

Falsification of Payroll Records (A.B. 527)

Proposed A.B. 527 addressed employee claims or complaints

investigated by the Labor Commissioner. Upon a finding by the Commissioner that two or more payroll records had been intentionally falsified, the legislation would have required that all payroll records relating to that claim or complaint be presumed false. The Governor vetoed the legislation, explaining that "[r]ather than creating a presumption in statute, an evaluation of all payroll records is better left to the trier of fact."

Collective Bargaining Representative Selection for Agricultural Employees (S.B. 789)

S.B. 789 would have set in place a "majority signup election" or "card check" process for agricultural employees to select union representation. Such a process would have fundamentally altered an employee's right to a secret ballot election.

California's Failed Ledbetter Legislation (A.B. 793)

A.B. 793 would have amended the statute of limitations applicable to claims of compensation discrimination by specifying when the cause of action for unlawful discrimination regarding compensation accrues. On the federal front, however, legislation effectively reversing the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.* was signed into law by President Obama.

CALIFORNIA REGULATORY CHANGE

First Aid Requirements Extended to All Employers

California's Occupational Safety and Health Standards Board has voted to amend the Medical Services and First Aid Regulations set forth in the California Code of Regulations (§ 3400) to require all employers to make provisions in advance to ensure that employees receive prompt medical treatment in the event that an employee is seriously injured or falls seriously ill. To avoid unnecessary delay in treatment, employers are required to adopt one, or a combination of, the following measures:

1. A communication system for contacting a doctor or emergency medical service, such as access to 911;
2. Readily accessible and available on-site treatment facilities suitable for treatment of reasonably anticipated injury or illness; and/or
3. Proper equipment for prompt medical transport when transportation of injured or ill employees is necessary and appropriate.

The amendment is effective September 26, 2009. This amendment does not significantly change the requirement that all employers ensure the ready availability of medical personnel for advice and consultation on matters of industrial health or injury, nor does it change the requirement to make first aid readily available to employees.

FEDERAL UPDATE: EMPLOYMENT LAW REFORM IN THE OBAMA ADMINISTRATION

Lilly Ledbetter Fair Pay Act

In January 2009, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009 ("Ledbetter Act"), amending Title VII, the Age Discrimination in Employment Act of 1967 ("ADEA"), the Americans with Disabilities Act of 1990 ("ADA"), and the Rehabilitation Act of 1973. The Ledbetter Act, which applies retroactively to claims pending on or after May 28, 2007, overturns the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, in which the Court held that an unlawful employment act occurs only when the discriminatory compensation decision is made and not each time a paycheck is issued. The Act provides that the statute of limitations for claims of discrimination in compensation is re-started each time an employee is affected by application of a discriminatory compensation decision or practice.

The Act further provides that, under Title VII, the ADA, and the Rehabilitation Act, if an employer is found to have engaged in pay discrimination, an affected employee would be entitled to back pay dating to two years prior to the filing of the charge, in addition to other damages. The Act specifies no temporal limitation on back-pay damages for claims under the ADEA or for compensatory and punitive damages under any of the statutes.

Employers should review their employment policies and procedures, and conduct equity analyses of their pay practices.

American Recovery and Reinvestment Act of 2009

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 ("ARRA"). ARRA was enacted to provide a stimulus to the U.S. economy in the wake of the economic downturn brought about by the subprime mortgage crisis and resulting credit crunch.

ARRA contains several employment-related provisions. Chief among these are COBRA-related provisions that affects employers maintaining group health plans; new sweeping whistleblower protections for employees of private employers and state and local governments; and executive compensation requirements for entities receiving financial assistance under the Troubled Assets Relief Program ("TARP").

COBRA Provisions in ARRA

Federal COBRA legislation requires group health plans maintained by employers with 20 or more employees to provide elective continuation coverage to employees and their beneficiaries upon the occurrence of certain "qualifying events" such as termination of employment, reduced working hours, death, or divorce. Prior to the enactment of ARRA, qualified beneficiaries could be charged 100% of the cost of continued coverage plus a 2% administrative fee.

Under ARRA, employees earning less than $125,000 if single or $250,000 if filing jointly, who are involuntarily terminated from employment between September 1, 2008 and December 31, 2009, will be required to pay only 35% of the COBRA premium. The former employer is required to pay the remaining 65% of the premium, subject to reimbursement via wage withholdings and FICA payroll tax credits, with any remainder made up by the Treasury Department.

ARRA also imposes a notice requirement on employers—i.e., eligible individuals must be given 60 days to elect to receive the subsidy. The 60-day notice requirement also applies to individuals who initially declined coverage or elected coverage but subsequently allowed the coverage to lapse.

Eligibility for the subsidy terminates when the individual is eligible for coverage under another group health plan or Medicare, or at the end of the nine-month subsidy period, whichever comes first. *See* Paul Borden *et al.*, *COBRA Provisions of the American Recovery and Reinvestment Act of 2009*, Morrison & Foerster LLP Legal Updates & News, Feb. 2009, for a more comprehensive review of the COBRA-related provisions in ARRA.

Whistleblower Provision in ARRA

To stimulate the economy and create jobs, ARRA provides funding for investment in transportation, defense, education, environmental protection, technological advances in science and health, and other infrastructure to provide long-term economic benefits.

If your organization receives a contract, grant, or other payment appropriated or made available by ARRA, you should review the broad whistleblower provisions set forth in the legislation, including the requirements to post notice regarding whistleblower rights

and remedies. As part of the accountability focus in ARRA, employees are encouraged to disclose instances of a "reasonable belief" of gross mismanagement of ARRA funds. Further, organizations may not discharge, demote, or discriminate against whistleblowers for disclosing such information. ARRA calls for investigation of all employee complaints of reprisal (with few exceptions); aggrieved employees may also initiate civil litigation for compensatory damages if they believe they have been treated contrary to ARRA's provisions after raising concerns.

Employers receiving ARRA funds should take proactive steps to prevent and detect mismanagement, fraud, waste, situations creating public danger, abuse, or unlawful activity concerning ARRA funds. At a minimum, employers should review and update policies and related training and monitoring programs to ensure appropriate procedures are in place to prevent whistleblower claims under ARRA. See Daniel P. Westman & Vanessa R. Waldref, *Sweeping New Whistleblower Law May Cover All Employers Who Receive Stimulus Funds*, Morrison & Foerster LLP Legal Updates & News, February 2009, for a more comprehensive review of the whistleblower provision in ARRA.

Executive Compensation Requirements in ARRA

ARRA also expands the executive compensation requirements previously imposed under the Emergency Economic Stabilization Act of 2008 ("EESA"), which established the Troubled Assets Relief Program ("TARP"). ARRA's executive compensation restrictions apply to any entity that has received or will receive financial assistance under TARP and generally will continue to apply for as long as any TARP financial obligation remains outstanding.

Extension of FMLA Coverage to Military Families

The Family and Medical Leave Act (FMLA) provides unpaid leave for the birth, adoption, or foster care placement of an employee's child; for the "serious health condition" of a spouse, son, daughter, or parent; or for the employee's own medical condition. To be eligible for the leave, employees must work in organizations of 50 or more employees and work at least 1,250 hours in a 12-month period.

In October 2009, President Obama signed H.R. 2647 into law. This measure builds on a 2008 law that gave new FMLA rights to military families. The bill contains provisions further expanding FMLA coverage for families of employees in the military. Under the new law, eligible employees will be allowed to take up to 12 weeks of job-protected leave in a 12-month period for any "qualifying exigency" arising out of the active duty or call to active-duty status of a spouse, son, daughter, or parent. In addition, eligible employees are permitted to take up to 26 weeks of job-protected leave in a "single 12-month period" to care for a covered service member with a serious injury or illness.

New FMLA regulations also went into effect earlier this year. These regulations include a number of substantive changes. See Daniel J. Aguilar, *New FMLA Regulations and Their Effect on California's CFRA*, Morrison & Foerster LLP Legal Updates & News, March 2009, for a summary of these changes.

Federal Regulatory Issue

The Department of Homeland Security ("DHS") has rescinded the proposed "no-match" rule, which was intended to prevent the employment of illegal immigrants and would have required employers to terminate workers whose employment information did not match their Social Security records. DHS Secretary Janet Napolitano announced a preference for the E-Verify system, which she explained "is a smart, simple

Legislation entitled the "Healthy Families Act" has also been introduced to require employers with 15 or more employees to provide one hour of paid sick leave for every 30 hours worked, to a maximum of 56 hours (seven days) per year to care for themselves and their family's medical needs.

and effective tool that reflects our continued commitment to working with employers to maintain a legal workforce." E-Verify is a free web-based system operated by DHS in partnership with the Social Security Administration; the system compares information from the Employment Eligibility Verification Form (I-9) against federal government databases to verify workers' employment eligibility.

Pending Federal Legislation

Significant pro-employee legislation is currently pending before Congress. Given President Obama's expressed commitment to the labor movement and the composition of the 111th Congress, once the health care reform issue has been addressed, these bills will likely gain headway and, if passed, would very likely be signed.

Of the current bills pending in Congress, the Employee Free Choice Act ("EFCA"), which President Obama supported during his presidential campaign, is perhaps the most contentious. The current version of the bill would permit employees to form unions through check cards, thus eliminating secret-ballot elections. The EFCA would also tighten penalties for interfering with union efforts. Currently, unions win about 50% to 55% of supervised secret-ballot elections. The use of card checks is likely to result in a significant boost to the U.S. labor movement. As it stands, the Democratic majority does not have the votes to invoke cloture in the Senate. Senator Spector and other moderates are looking for a compromise that can garner 60 votes.

President Obama is also likely to support the pending Family and Medical Leave Enhancement Act (H.R. 824), which if enacted in its current form, would: (1) allow employees to take parental involvement leave to participate in or attend their children's and grandchildren's educational and extracurricular activities; (2) clarify that leave may be taken for routine family medical needs and assisting elderly relatives, and for other purposes; (3) make the FMLA applicable to employers with 25 or more employees, instead of the 50 employees currently required for the FMLA to apply; and (4) explicitly sanction intermittent leave. Legislation entitled the "Healthy Families Act" has also been introduced to require employers with 15 or more employees to provide one hour of paid sick leave for every 30 hours worked, to a maximum of 56 hours (seven days) per year to care for themselves and their family's medical needs.

Additionally, President Obama is likely to support the pending Working Families Flexibility Act (H.R. 1274). If enacted, this legislation would provide employees a statutory right to request, and would ensure employers consider requests for, flexible work terms and conditions, such as modifications of the employee's work hours, schedule, or work location. Then-Senator Obama co-sponsored similar legislation introduced in the last congressional session.

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Also pending is the Paycheck Fairness Act, which seeks to update and strengthen the current Equal Pay Act. The Equal Pay Act prohibits employers from paying unequal wages to men and women who perform substantially equal work. Under current law, once employees have provided *prima facie* evidence of sex discrimination, the burden of proof shifts to the employer to show that the difference in wages results from "any factor other than sex." Among other things, the proposed Paycheck Fairness Act would limit that broad affirmative defense for Equal Pay Act claims by toughening the burden on employers and requiring them to prove that disparate pay decisions are justified by "business necessity" and "job performance"; permit unlimited punitive and compensatory damages for strict liability violations of the law; and make it easier to bring class action suits by using an opt-out method.

Proposed legislation has also been introduced to amend the Fair Credit Reporting Act to strictly limit the use of consumer credit checks against prospective and current employees. The bill would prohibit the use of consumer credit checks by employers as part of the hiring or firing process, unless the job involves national security, Federal Deposit Insurance Corporation clearance, or positions of "significant financial responsibility." The legislation would also prohibit employers from asking applicants to voluntarily submit to credit checks.

CONCLUSION

If the current legislative trends continue, 2010 is likely to bring more developments that substantially affect relationships between employers and employees. It has been 15 years since the Democratic party controlled the White House and both chambers of Congress. There are many organized labor and other key Democratic constituencies that have aggressive legislative agendas they would like to accomplish before the 2010 mid-term elections. If Congress takes up this agenda, employers should anticipate significant changes in the legal landscape. ■

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