EMPLOYMENT LAW COMMENTARY

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ANNUAL CALIFORNIA LEGISLATIVE ROUNDUP

By Chris Magana

Now that the dust has settled on the California 2016 legislative session, it is once again time to round up and review the new laws impacting California employers. Although there were not any major surprises, there were enough changes affecting existing law that employers—and employees—ought to set aside the time to get up to speed. This Commentary will guide you through the new hoops and potential hurdles California employers will have to navigate in the coming year. Among the more significant bills are changes to the state's minimum wage law and restrictions on forum and choice of law provisions in employment contracts. All newly enacted laws are effective January 1, 2017, unless otherwise noted.

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SB 1241 – FORUM (UN)SELECTION AND CHOICE OF LAW PROVISIONS

Forum selection and choice of law clauses have long been staples of California employment contracts. New legislation chips away at an employer's right to enforce such provisions. The law grants employees who reside and work primarily in California with the unilateral right to void any provision that would require an employee to adjudicate claims arising in California in any outside forum or that would "[d]eprive [such an] employee of the substantive protection of California law with respect to a controversy arising in California." Employees who sue to successfully void such provisions may recover reasonable attorneys' fees under Labor Code § 925(e). SB 1241 applies to all employment agreements entered into, modified, or extended after January 1, 2017. While potentially far-reaching, there are still a number of significant limitations: (1) it does not apply to existing agreements; (2) it only applies to employees who "primarily" live and work in California; (3) it does not apply where the employee was represented by counsel; (4) it only applies if the employee's employment is conditioned upon the agreement; and (5) the employee must demonstrate that underlying claims "arise in California." The impetus for the new law is a legislative concern that California employees are being required to enforce contract rights in out of state forums and under state laws that may lack many of the employee protections otherwise provided for under California law. Employers should review their standard employment agreements containing forum selection and choice of law provisions, as well as severability clauses, to determine whether revision is necessary in light of the new legislation.

SB 3 – MINIMUM WAGE INCREASE

California joins New York in being the first states in the nation to enact a plan to raise the statewide minimum wage to $15. California's current $10 minimum wage will incrementally increase to $15 by 2022. The bill is a partial end-around a competing ballot measure that, if passed, would have increased the minimum wage to $15 a year earlier than SB 3. The new bill also provides the governor with the authority to postpone a wage increase in the event of an economic downturn. For businesses with 26 or more employees, effective January 1, 2017, the minimum wage will increase to $10.50. From 2018 to 2022, the minimum wage is scheduled to increase by $1 each year. Wage increases for businesses with 25 or fewer employees will follow the same incremental scale as that of larger businesses but will be delayed by one year. The minimum wage for such businesses, will increase to $10.50 in 2018 before culminating in $15 in 2023. Counties and cities retain the discretion to enact their own minimum wage laws that are higher than the state's minimum wage. Other jurisdictions have passed legislation calling for a $15 minimum wage on a much faster timeline: San Francisco (7/1/18); Emeryville (7/1/18); Mountain View (1/1/18); El Cerrito (1/1/19); Los Angeles (7/1/20); Santa Monica (7/1/20); Pasadena (7/1/20); and unincorporated areas of Los Angeles County (7/1/20).

SB 836 – PRIVATE ATTORNEY GENERAL ACT FILING PROVISIONS

Passed as part of the state budget package last July, SB 836 makes a number of revisions to the Private Attorney General Act (PAGA). At the governor's request, the bill expands the role of the Labor and Workforce Development Agency (LWDA) in PAGA claims in a stated effort to reduce congestion in state courts. Whether the bill will have the intended effect remains to be seen. The changes ultimately results in a lengthened administrative process and an increase in filing fees. As an initial matter, all PAGA claim notices, and employer cure notices, must be filed online and accompanied by a $75 filing fee. The LWDA now has 60 days (up from 30 days) to review a PAGA notice, and 180 days (up from 120 days) to conduct an investigation. Before filing a lawsuit, a plaintiff now must wait 65 days after sending a PAGA notice to the LWDA. The previous wait-to-file period was 33 days. A plaintiff may still file in court sooner if he or she receives notice

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from the LWDA that the agency does not intend to investigate. Plaintiffs now must provide the LWDA with a number of court documents. After filing a lawsuit, a plaintiff must provide the LWDA with a conformed copy of the complaint within 10 days of filing. Additionally, the parties must provide a copy of any proposed settlement of a PAGA claim to the LWDA at the time it is submitted for approval to the court. Copies of the court's judgment or any orders awarding or denying PAGA claims must be submitted to the LWDA within 10 days.

AB 1676 & SB 1063 – WAGE DISCRIMINATION

California's Fair Pay Act, highlighted in last year's Employment Law Commentary, amended Labor Code § 1197.5 to prohibit an employer from paying an employee at a wage less than the rates paid to employees of the opposite sex within the same establishment for equal work on jobs that require equal skill, effort, and responsibility to perform, and that are performed under similar working conditions. Exceptions to the Act's equal pay requirements include situations where the wage differential is based on a) a seniority system, b) a merit system, c) a system that measures earnings by quantity or quality of production; or d) a bona fide factor other than sex. AB 1676 provides that a prior salary cannot, by itself, justify any disparity under the bona fide exception factor, while SB 1063 expands the Act's requirements to include race or ethnicity, in addition to gender.

AB 1843 – JUVENILE COURT RECORDS OFF-LIMITS

Recent legislative efforts have curtailed the scope of information employers can request about a job applicant's criminal history and impose restrictions on how that information, if obtained, can be used in the hiring process. AB 1843 continues in this vein and prohibits employers from requiring applicants to reveal any information about involvement in the juvenile justice system that did not result in a conviction. Employers are also prohibited from using such information as a factor in the hiring decision of that applicant. Exceptions remain for certain industries, such as law enforcement and specified positions in the health care industry.

AB 1732 – SINGLE USER RESTROOMS

On March 1, 2017, California will become one of the first states in the nation to require that all single-user toilet facilities in any business establishment, place of public accommodation, or government agency be identified as "all-gender" facilities with appropriate signage. The signage requirement can be met by signage that complies with the California Building Code, which requires only that restrooms be marked with one of three geometric symbols to indicate whether they are intended for use by men, women, or all genders. The bill authorizes local building officials responsible for code enforcement to inspect for compliance during any inspection.

AB 2535 – ITEMIZED WAGE STATEMENT REQUIREMENTS

This bill clarifies existing law that employers are required only to track and log on an itemized wage statement the total number of hours worked by nonexempt employees and those who are otherwise paid according to the number of hours worked. This bill is the legislature's response to *Garnett v. ADT, LLC*, 139 F. Supp. 3d 1121 (E.D. Cal. 2015). There, the court found that the exemption in Labor Code § 226 excusing the reporting of total hours worked for certain categories of employees did not apply to an outside salesman paid solely on commission: "While the usefulness of reporting total hours worked for employees paid solely by commission is not entirely clear, it is nonetheless required by Labor Code Section 226 (a)." The legislature's response provides that the reporting requirement is waived for employees who are exempt from payment of minimum wage and overtime under specified statutes or any applicable order of the Industrial Welfare Commission, such as the one covering outside salesmen.

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AB 2337 – EMPLOYMENT PROTECTIONS FOR VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, OR STALKING

In 2013, SB 400 was signed into law, giving workplace protections to victims of domestic violence, sexual assault, or stalking who take time off to tend to those matters. Protection included anti-retaliation and non-discrimination provisions. AB 2337 requires employers with 25 or more employees to provide information in writing to new employees upon hire, and to other employees upon request, regarding their rights under SB 400. The notice requirement will not go into effect until the Labor Commissioner develops a form employers may use to comply with AB 2337 and posts such form on the Commissioner's website. The Commissioner has until July 1, 2017 to do so.

SB 1234 – REQUIRED EMPLOYEE RETIREMENT SAVINGS PLANS

Through this bill, the legislature provides approval for the creation of the California Secure Choice Retirement Savings Program and sets forth recommendations and requirements for the implementation of the program. Essentially a 401(k) plan operated by the state and open to private-sector workers whose employers do not offer a retirement savings plan, the Secure Choice plan calls for eligible workers to be automatically signed up by their employers and have 2%-4% of their wages invested in the plan, unless they opt out. Once the Secure Choice plan is up and running, companies with five or more employees would be required to offer either their own retirement savings program as described in the Cal. Govt. Code § 100032(g) (e.g., a 401(k) plan) or participation in the Secure Choice plan. The plan could be more than a year away from operation, as there are a number of details that have yet to be worked out. The federal government recently rolled out the myRA program, administered by the Treasury Department, as a retirement vehicle for workers who don't have access to a retirement savings plan at work. A key limitation of the myRA plan is that it allows participants to save only $15,000 before they have to move their cash to a private account.

SB 269 SMALL BUSINESS PROTECTIONS FROM ADA LAWSUITS

A modified version of the bill Governor Brown vetoed just last year, this bill attempts to curtail the cottage industry of those seeking to take advantage of the private enforcement provisions of the Americans with Disabilities Act. Business owners have long complained of frivolous and abusive lawsuits brought under the ADA that can cost thousands of dollars. SB 269 creates a rebuttable presumption for businesses with 25 or fewer employees that certain technical violations of the ADA do not cause a plaintiff to experience difficulty, discomfort, or embarrassment for the purposes of minimum statutory damages if certain conditions are met. The technical violations covered by the Act primarily relate to indoor and outdoor signage, the condition of parking lot striping, and detectable warning surfaces on access ramps. Covered business owners would have 15 days from the date of notice of the violation to correct the technical violation in order for the rebuttable presumption to apply. The Act provides additional relief to slightly larger businesses. Businesses with fewer than 50 employees would be allowed to hire a certified access specialist to conduct an inspection and would receive a full 120 days to fix violations before liability for minimum statutory damages attaches.

AB 1847 – NOTICE OF CALIFORNIA EITC ELIGIBILITY

Federal law requires employers to notify all employees that they may be eligible for the federal earned income tax credit. AB 1847 requires employers to notify all employees about the state earned income tax credit as well. Notice must be provided within one week before or after the employer provides an annual wage summary (e.g., Form W-2, Form 1099) to any employee. General notice, such as a bulletin board posting,

is insufficient to satisfy the notice requirement. Notice must be hand delivered to the employee or mailed to the employee's last known address.

AB 2899 – MINIMUM WAGE VIOLATION CHALLENGES

Any employer challenging a decision by the Labor Commissioner finding a violation of minimum wage laws must post a bond with the Labor Commissioner that covers the unpaid wages and damages owed the employee. If, after 10 days from the conclusion of the proceedings, the employer fails to pay amounts owed to the employee, the employer forfeits the full amount of the bond in favor of the employee. The stated purpose of the law is to preserve the ability of an employee to collect wages in case the employer shuts down or hides their assets to evade payment of an adverse ruling.

AB 7 & SBX2-5 – SMOKING IN THE WORKPLACE

A pair of bills bring additional restrictions on smoking in the workplace. SBX2-5 expands the definition of "smoking" and "tobacco products" to include e-cigs and similar devices. AB 7 expands the prohibition of tobacco products in the workplace to include an owner-operated business and 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.

AB 1066 – WAGE REQUIREMENTS, AGRICULTURAL WORKERS

Agricultural workers, as defined by Industrial Welfare Commission Order No. 14-2001, will soon be treated similarly to workers in other industries when it comes to wages, hours, and working conditions. Currently, agricultural employees are exempted from laws setting wages, hours, meal breaks, overtime wages, and other working conditions. Effective January 1, 2016, the bill extends the same meal period and day of rest rules to agricultural workers that generally apply to employees in other industries. The overtime exemption will be phased out over four years, from 2019 to 2022. At the start of 2019, working more than 9.5 hours a day or 55 hours a week will entitle an employee to time-and-a-half pay. The hourly threshold decreases to 9 hours a day or 50 hours a week in 2020, 8.5 hours a day or 45 hours a week in 2021, and, finally, 8 hours a day or 40 hours a week in 2022. Farms with 25 or fewer employees are granted an additional three years to comply with the phasing in of these overtime requirements.

AB 2844 – CIVIL RIGHTS COMPLIANCE FOR PUBLIC WORKS BIDS

A person who submits a bid or proposal, or otherwise proposes to enter into or renew a contract, with a state agency with respect to any contract in the amount of $100,000 or more is required to certify, under penalty of perjury, at the time the bid or proposal is submitted or the contract is renewed, that they are in compliance with the Unruh Civil Rights Act and the California Fair Employment and Housing Act. The bill further requires bidders to certify that any policy they have adopted against a sovereign nation, or people recognized by the federal government, is not used to discriminate in violation of the Unruh Act or FEHA. As initially drafted, the bill would have limited the ability of individuals participating in the Boycott, Divestment, and Sanctions movement against Israel to enter into contracts with the state of California. The final version represents not only a compromise recognizing the right of individuals and businesses to exercise their constitutionally protected freedoms, but also the right of the state to selects its business partners and its obligation to ensure it does not use taxpayer money to fund unlawful discrimination. The Unruh Act, specified in Civil Code Section 51, and FEHA, established in Government Code Section 12920, prohibit discrimination in employment, housing, public accommodation, and services provided by business establishments on the basis of specified personal characteristics, such as sex, race, color, religion, ancestry, national origin, age, disability, medical condition, genetic information, marital status, or sexual orientation.

AB 326 – PUBLIC WORKS, EXPEDITED RETURN OF CONTRACTOR'S BOND

Under existing law, contractors may seek review of an initial adverse decision by the Labor Commissioner that there was a violation of the laws regulating public works contracts. Contractors have the option of depositing the full amount of the assessment or notice, including penalties, in an escrow account with the Department of Industrial Relations (DIR) pending administrative or judicial review. By doing so, employers can avoid being otherwise liable for liquidated damages in an amount equal to the amount of unpaid wages if the assessment or penalty remains unpaid after 60 days. This bill would require the DIR to release the funds deposited in escrow plus interest earned, to those persons and entities within 30 days following either the conclusion of all administrative and judicial review or upon the Department receiving written notice from the Labor Commissioner.

SB 1167 – HEAT ILLNESS AND INJURY PREVENTION FOR INDOOR WORKERS

The Division of Occupational Safety and Health will have until January 1, 2019, to develop a heat illness prevention standard for indoor workers. Current regulations establish a heat illness prevention standard for employers with outdoor worksites under which employers must provide: 1) heat illness training to all employees; 2) enough fresh water free of charge so that an employee can drink one quart per hour; and 3) access to shade and a five-minute cool-down rest period if requested. SB 1167 stems from a citation issued to an employer for the heat illness suffered by an employee who was working inside a metal freight container with a temperature over 100 degrees. The employer prevailed in its challenge of the citation in an administrative proceeding. The Cal/OSHA Appeal Board overturned the ALJ's decision reinforcing the responsibility that employers have to protect the health and safety of their workers from heat related illness and injury. SB 1167 clarifies and reinforces that responsibility.

SB 1342 – LOCAL WAGE THEFT INVESTIGATION POWER

SB 1342 encourages counties and cities to implement measures that target and remedy wage theft. Existing law authorizes the Industrial Welfare Commission to subpoena witnesses and to seek judicial enforcement of compliance in connection with investigations and hearings into enforcement of statewide wage laws. SB 1342 specifies that legislative bodies of counties and cities also have the power to issue subpoenas and to seek judicial compliance in order to enforce any local law or ordinance, including local wage laws.

AB 2063 – WORK EXPERIENCE FOR MINORS

High school students who are at least 14 years old will be allowed to work up to 40 hours a semester if a principal certifies that it is necessary for the pupil's participation in a career technical education program.

SB 1001 – UNFAIR IMMIGRATION-RELATED PRACTICES

This bill is a rehash of last year's AB 1065, which died in committee. SB 1001 makes it unlawful for employers to request additional or different documents than those required under federal law to verify that an individual is not an unauthorized immigrant. Employers are also prohibited from refusing to honor documents that on their face reasonably appear to be genuine, to refuse to honor documents or work authorization based upon the specific status or term of status that accompanies the authorization to work, or to reinvestigate or reverify an incumbent employee's authorization to work. Violators are subject to a $10,000 penalty.

AB 908 – EXPANDED PAID FAMILY LEAVE BENEFITS

Employees can expect to see increases in the benefits provided through the Paid Family Leave and State Disability programs. For periods of disability commencing on or after January 1, 2018, the new law will increase benefits from the current level of 55% of an employee's salary to either 60% or 70% depending on the employee's

income. In addition, AB 908 eliminates the current seven-day waiting period at the start of a benefit period during which benefit payment is prohibited. Although the changes do not appear to impact employer obligations, employers may wish to review employee handbooks and other materials to ensure that employees receive up to date information on the PFL and SDI programs.

SB 1289 AND AB 2687 – TRANSPORTATION NETWORK COMPANIES

The California legislature continues to adapt to the rise of ride-sharing services with a pair of new bills. SB 1289 is the legislature's response to a 2014 lawsuit accusing ride-sharing companies of misleading customers by suggesting their background checks were the toughest in the industry. The bill imposes uniform standards for background checks and prohibits ride-sharing companies from hiring drivers with any violent felony convictions. Previously, background checks went back only seven years, the maximum period permitted under state law at the time. The new law also prohibits the hiring of registered sex offenders, drivers with violent misdemeanors, or drivers who have been cited for a DUI within the past seven years. Violations could result in fines up to $5,000 for each driver. AB 2687 makes it unlawful for a person who has a .04% or higher blood alcohol level to drive a motor vehicle when there is a passenger for hire in the vehicle. SB 1289 goes into effect on January 1, 2017, while AB 2687 goes into effect on July 1, 2018.

AB 1978 – PROTECTIONS FOR JANITORIAL WORKERS

Championed by labor groups as a means to protect janitorial workers from sexual harassment and other abuses at the hands of their employers, AB 1978 would create a public registry of janitorial services by July 1, 2018. In addition, the bill would create by 2019 an advisory committee to develop an awareness training program. By 2020, all employees must undertake sexual assault prevention training. Until the advisory committee develops a training program, effective January 1, 2018, employers will be required to provide employees with a pamphlet of the Department of Fair Employment and Housing on sexual harassment. Current law mandates sexual assault prevention training for businesses with more than 50 employees. The new law would cover businesses with fewer than 50 employees as well.

VETOED BILLS

Governor Brown's veto pen was also busy throughout the legislative session. The governor likes to exercise his own judgment, even when presented with a bill like AB 1922—which would have affected workers' compensation insurance policy requirements—that passed with unanimous consent in both chambers. His veto messages often suggest revisions that would likely result in his ultimate support for a bill. For that reason, vetoed bills never really die, and some of these bills may resurface in coming sessions.

AB 1050 – ELEVATOR SAFETY VARIANCE

AB 1050 would have required employers seeking a permanent variance from an elevator safety order to notify the union representing elevator workers in the region where the building is located, and to also notify the workers who would be performing the work. Governor Brown's veto statement reflected his view that the existing notice process is sufficient, observing that the Cal/OSHA Board "routinely works with stakeholders to provide timely written notice of a variance request and permits those interested parties to intervene in the proceedings."

AB 1890 – EQUAL PAY FOR EQUAL WORK ACT

Governor Brown deemed the Equal Pay for Equal Work Act of 2016 to be unnecessary and duplicative of existing requirements. Under AB 1890, a company with a state contract valued at $50,000 or more that a) is required by federal regulations to submit a federal nondiscrimination report to the U.S. Equal Employment Opportunity Commission; or b) has 100 or more employees in California is required to submit to the DFEH a nondiscrimination program designed to ensure equal employment opportunities and to submit periodic reports of compliance.

AB 654 – EXPANDED PARENTAL LEAVE RIGHTS

The New Parent Leave Act would have allowed parents at companies with 20 to 49 employees to take six weeks' leave to care for a newborn or newly adopted child, without fear of losing their jobs. Existing law provides such protections to new parents at companies with 50 or more employees. In addition, the bill would have allowed new parents to receive benefits under the Paid Family Leave Program. Governor Brown's veto statement reflected his concern about the bill as written, but he also indicated that he would have supported the bill had it included a proposed amendment that would allow an employee and employer to pursue mediation prior to lawsuit being brought. Expect a version of this bill to make a comeback in the coming year.

AB 1922 – WORKERS' COMPENSATION POLICY REQUIREMENTS

This bill would have exempted large employers with high-deductible workers' compensation polices from seeking the Insurance Commissioner's approval of ancillary documents to a high-deductible plan. Existing law requires all employers to file workers' compensation insurance "policies" and "endorsements" yet fails to define either term. Earlier this year, the Insurance Commissioner issued regulations finding that ancillary documents fall within the statutory filing requirement. Large employers had expressed concern that the approval process was a hindrance to executing necessary commercial agreements. Surprisingly, Governor Brown vetoed the bill despite unanimous approval in both chambers. In his veto message he noted the newness of the regulations and expressed his desire to "allow time for them to work."

SIGNIFICANT FEDERAL CHANGES

2016 also saw a number of significant actions by the federal government affecting employers. The most significant of which, the Department of Labor's new overtime rules, is set to go into effect in just a few weeks.

DEPARTMENT OF LABOR – NEW OVERTIME RULES

The Department of Labor issued a final rule on new overtime provisions with much fanfare from employees and much consternation to employers. The final rule doubles the minimum annual salary for FLSA "white collar exemptions" from $23,660 to $47,476. It also raises the total compensation level for Highly Compensated Employees from $100,000 to $134,004. These salary levels will automatically adjust every three years beginning on January 1, 2020. While the automatic adjustment won't kick in for a number of years, the new rule is effective December 1, 2016. Twenty-one states and a number of organizations, including the U.S. Chamber of Commerce, have filed lawsuits in federal court seeking to block the new rule. Whether their efforts will be successful is unknown at this time. Employers should assume that the rule's effective date applies until a court rules otherwise.

DEPARTMENT OF LABOR – SICK LEAVE REQUIREMENTS FOR FEDERAL CONTRACTORS

The Department of Labor issued a final rule requiring federal contractors to provide seven days of paid sick leave annually. The new rule applies to all contracts issued on or after January 1, 2017, and covers the following types of agreements: 1) procurement contracts for construction covered by the Davis-Bacon Act; 2) service contracts covered by the McNamara-O'Hara Service Contract Act; 3) concessions contracts; and 4) contracts in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public. Employers may use either the accrual or "frontloading" method. Under the accrual method, employees accrue one hour of leave for every 30 hours worked, up to 56 hours per calendar year. Up to 56 hours of paid sick leave carries over from one year to the next. Alternatively, employers could provide employees 56 paid sick days up front at the beginning of the calendar year or provide a prorated amount to new employees hired during the year.

DEFEND TRADE SECRETS ACT OF 2016 – NOTICE PROVISIONS

Effective May 11, 2016, the federal Defend Trade Secrets Act (DTSA) provides private litigants the right to file a trade secret misappropriation claim in federal court. In addition to federalizing an area of law that had been primarily left to the states, the DTSA includes whistleblower immunity and notice requirements that employers must provide to their employees. Failure to provide notice will not preclude an employer from filing a DTSA claim against a current or former employee; however, failure to comply limits a plaintiff's right to recover "extraordinary" remedies, including exemplary damages and attorneys' fees. See our June 2016 Employment Law Commentary for more details.

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