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2006 CALIFORNIA EMPLOYMENT LAW LEGISLATIVE UPDATE

Like the year before it, 2005 brought little in the way of new employment legislation, primarily as a result of Governor Schwarzenegger's effective use of his veto power. The governor's pro-employer stance also minimized any potential negative impact of the legislation that was approved. Indeed, much of the new legislation either clarifies existing law or gives employers more flexibility. This *Commentary* summarizes employment legislation adopted in 2005 that became effective on or before January 1, 2006, and analyzes its impact on employers. It also discusses new and proposed regulations of interest to California employers.

USE OF SOCIAL SECURITY NUMBERS FOR EMPLOYEE COMPENSATION *(SENATE BILL 101–AMENDING LABOR CODE § 226)*

SB 101 was passed on July 21, 2005, to clarify SB 1618 of 2004, which requires employers to use either an existing employee identification number or no more than the last four digits of an employee's Social Security number on employee documents. Although new laws generally become effective on January 1 of the following year, this Act took effect immediately.

Existing Law. Before the enactment of SB 1618, California law required every employer to give each employee an itemized statement at the time of each payment of wages showing, among other things, gross wages earned, total hours worked, all deductions, the name of the employee, and his or her Social Security number. (Labor Code Section 226.) SB 1618 amended Labor Code Section 226 to require the employer, by January 1, 2008, to use no more than the last four digits of the employee's Social Security number or an "existing" employee identification number other than a Social Security number on any "check, draft or voucher" provided to the employee. As written, SB 1618 could be read to prohibit the establishment of new employee identification numbers. SB 1618 is also

flawed in that it applies to the "check, draft or voucher" provided to the employee, instead of to the itemized statement that should accompany that check.

Generally, the state, city, county, or district—or any other governmental entity—is exempt from the provisions of Labor Code Section 226. However, SB 1618 provided that if such entities furnish their employees with a check, draft, or voucher, they must do so in compliance with SB 1618.

Changes Imposed by SB 101. SB 101 addresses certain concerns about the implementation of SB 1618 and makes the following changes:

(1) Strikes the word "existing" as it relates to employee identification numbers in order to allow employers that are not currently using identification numbers to establish new ones.

(2) Amends the language to read that the last four digits of a Social Security number or an employee identification number may be shown on the itemized statement provided to an employee that accompanies the check, draft, or voucher (rather than on the check itself).

Supporters of SB 101 believe this clarification will permit employers to more efficiently retool their payroll systems and protect against identity theft in advance of the January 1, 2008, deadline.

DIRECT DEPOSIT OF EMPLOYEE WAGES *(ASSEMBLY BILL 1093–AMENDING LABOR CODE § 213)*

AB 1093 was approved by the Governor on August 30, 2005, and enacts two distinct provisions. It (1) amends Labor Code Section 213 to allow final wages of an employee to be paid by direct deposit, and (2) modifies Labor Code Section 515.5 to clarify the computer software professional exemption from overtime compensation.

Existing Law. Before the enactment of AB 1093, Labor Code Section 213(d) provided that an employer may directly deposit employee wages into "an account in any bank, savings and loan association, or credit union of the employee's choice *in this state*," provided the employee voluntarily authorized such deposit. As currently written, this statute can be read to prohibit an employer from offering direct deposit unless the employee's financial institution is headquartered or incorporated in California.

The law further provided that if "an employer discharges an employee or the employee quits," that employee's voluntary authorization for direct deposit terminates (thereby preventing direct deposit of final wages).

Changes Imposed by AB 1093. AB 1093 makes the following clarifications and changes to Labor Code Section 213(d):

(1) Provides that the bank, savings and loan association, or credit union the employee chooses needs to have "a place of business located in this state" (and need not be headquartered in California).

(2) Eliminates the automatic termination of an employee's direct deposit authorization upon termination of employment. Therefore, an employer is now authorized to pay an employee's final wages (upon resignation or discharge) by direct deposit into the account authorized by the employee. However, the employer must still abide by the existing time periods for payment of such wages. If an employee is discharged, the earned and unpaid wages are due immediately. If an employee quits, the wages are due not later than 72 hours later, unless the employee has provided at least 72 hours' advance notice, in which case the wages are due at the time of quitting.

PAYMENT OF EXEMPT COMPUTER SOFTWARE PROFESSIONALS *(ASSEMBLY BILL 1093–AMENDING LABOR CODE § 515.5)*

Existing Law. Under the federal Fair Labor Standards Act, an employee is exempt from overtime compensation requirements as a "computer software professional" only if, among other things, he or she is paid on a *salary basis*. However, California law provided that an employee is exempt as a "computer software professional" only if, among other things, he or she is paid *at an hourly rate* of pay (currently set at $47.81). This inconsistency has resulted in confusion for many employers, leading to numerous class-action law suits.

Changes Imposed by AB 1093. This bill amends the law to provide that a computer software professional employee may be paid on an hourly basis or the annualized full-time salary equivalent of that rate, provided that all other requirements for satisfying the exemption are met and as long as in each workweek the employee does not receive less than the statutory minimum hourly rate for the computer software professional exemption (currently $47.81 per hour) for each hour worked.

Supporters of the bill stated that this change would clarify that the minimum hourly pay requirement does not prevent the employee's pay from being expressed as an equivalent full-time annual salary. Nevertheless, in either case, the employee must be fully compensated for each hour actually worked at the statutory minimum hourly rate.

MEAL PERIODS IN MOTION PICTURE AND BROADCASTING INDUSTRIES *(ASSEMBLY BILL 1734–AMENDING LABOR CODE § 512)*

AB 1734 was approved by the Governor on September 29, 2005, and amends Labor Code Section 512 to provide an exemption from the meal period requirements for employees in the motion picture and broadcasting industries.

Existing law requires employers to provide meal periods to employees during work periods of specified duration. This new law exempts from the meal period requirement those employees in the motion picture and broadcasting industries who are covered by a valid collective bargaining agreement that contains specified terms. If the collective bargaining agreement "provides for meal periods and includes a monetary remedy if the employee does not receive a meal period required by the agreement," then the terms of the agreement apply in lieu of the state laws pertaining to meal periods.

Supporters of AB 1734 argued that collective bargaining agreements in the motion picture and broadcasting industries recognize the erratic and irregular schedule that often occurs in those industries and generally provide their own meal period requirements, as well as a monetary remedy if the employee is not provided a meal period. The supporters argued that the statutory remedies in Section 512 were unnecessary since they are duplicative of the remedies established in these collective bargaining agreements.

EXTENSION OF DFEH COMPLAINT FILING PERIOD FOR MINORS *(ASSEMBLY BILL 1669–AMENDING GOVERNMENT CODE § 12960)*

AB 1669 was passed by the Governor on October 7, 2005, and amends Government Code Section 12960 to extend the time period for filing administrative complaints with the Department of Fair Employment and Housing ("DFEH") for minors.

Existing Law. Under existing provisions of the California Fair Employment and Housing Act ("FEHA"), a person filing a complaint with the DFEH for an unlawful practice is generally required to file the complaint within one year of the date of the alleged violation.

Generally the time limit to file a lawsuit for an injury suffered by a minor is tolled until the minor reaches the age of majority. However, the California Court of Appeals has held that this extension does not apply to the filing of an administrative complaint because the timely filing of such complaints is a prerequisite to maintaining a civil action under the FEHA. (*Balloon v. Superior Court* (1995) 39 Cal. App. 4th 1116.) This bill intends to correct this disparity.

Changes Imposed by AB 1669. AB 1669 amends the law to provide an extension to the period for filing FEHA claims for minors. Specifically, the bill tolls the statute of limitations for filing an administrative complaint until one year from the date that the aggrieved individual attains the age of majority.

Supporters of the bill contended that the amendment was necessary because young people entering the job market often do not know their rights or have access to legal information when faced with unlawful discrimination.

SERVICE OF DLSE LABOR COMMISSIONER DOCUMENTS *(AB 1311–AMENDING LABOR CODE §§ 98 & 98.1)*

AB 1311 was passed by the Governor on September 29, 2005, and amends Labor Code Sections 98 and 98.1 to permit service of documents relating to a Department of Labor Standards Enforcement ("DLSE") hearing to be served as provided in the rules for service in a general civil action.

Existing Law. Current law authorizes the DLSE to investigate employee complaints and to provide for a hearing on such claims. When one of these hearings is set, a copy of the complaint, together with notice of the hearing, must be served by the labor commissioner on all parties, personally or by certified mail. Upon filing an order, decision, or award in one of these hearings, the commissioner must also serve a copy of the decision on the parties personally or by first-class mail.

The rules for valid service in a civil action permit an additional form of service. These rules allow service simply by leaving a copy of the summons and complaint at the home or office of the person being served, and thereafter mailing a copy of the summons and complaint to the person at the place where a copy of the summons and complaint was left.

Changes Imposed by AB 1311. AB 1311 essentially brings the rules for service in DLSE hearings in line with the rules for service in a general civil action. Therefore, the labor commissioner is now authorized to serve copies of the complaint and decisions on parties by leaving a copy at the home or office of the person being served, and thereafter mailing a copy to the person at the place where the copy had been left.

PROHIBITION OF DISCRIMINATION BASED ON MARITAL STATUS AND SEXUAL ORIENTATION *(ASSEMBLY BILL 1400–AMENDING CIVIL CODE §§ 51, ET SEQ.)*

AB 1400 was approved by the Governor on September 29, 2005, and amends the Unruh Civil Rights Act (California Civil Code Sections 51, *et seq.*). The Unruh Act generally prohibits business establishments from discriminating or failing to provide "full and equal accommodations, advantages, facilities, privileges, and services" on the basis of "sex, race, color, religion, ancestry, national origin, disability, or medical condition."

AB 1400 codifies existing case law, holding that marital status and sexual orientation are protected categories under the Act. The bill also imports into the act definitions of the terms "disability," "religion," "sex," and "sexual orientation" from the Fair Employment and Housing Act ("FEHA"). In enumerating these characteristics, the bill includes within the protected categories persons who have or are perceived to have those characteristics, as well as anyone associated with such persons.

The bill further contains legislative findings stating that the additions made to the Act are declaratory of existing law and that the enumeration of characteristics is illustrative rather than restrictive. The bill also declares that it does not intend to affect the California Supreme Court's decision in *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721 (1982), which held that the Act protects all persons from arbitrary discrimination by business establishments, not just on the grounds enumerated in the statute.

Supporters of the bill argued that, because marital status and sexual orientation are not explicitly listed in the Act, there is an assumption that they are not protected classes, which has resulted in unnecessary litigation.

PROHIBITION OF HUMAN TRAFFICKING *(ASSEMBLY BILL 22)*

AB 22 was approved by the Governor on September 21, 2005, and amends various sections of the Civil, Evidence, Government, and Penal Codes relating to human trafficking.

Existing Law. Current state law establishes crimes for slavery, involuntary servitude, and false imprisonment. Additionally, it is an offense to entice an unmarried female minor for purposes of prostitution, or to aid or assist with the same, or to procure by fraudulent means any female to have illicit carnal connection with any man. It is also a state crime to take away any minor as specified, for purposes of prostitution.

Current federal law establishes the crimes of kidnapping in interstate or foreign commerce, peonage, slavery, and trafficking in persons, and provides for criminal and civil penalties.

Changes Imposed by AB 22. AB 22 creates new state felonies for (1) trafficking of a person for forced labor or services or for effecting other felonies, and (2) trafficking of a minor for the same purposes. Both crimes are punishable by imprisonment and authorize the forfeiture of assets acquired

from such activity. AB 22 also establishes a cause of action for a victim of trafficking to bring a civil action for actual, restitutionary, and punitive damages against the perpetrator; creates a new evidentiary privilege, named the "human trafficking victim–caseworker privilege," which is substantially similar to the existing sexual assault victim–counselor privilege; and establishes a task force to advise the Legislature on various issues in connection with human trafficking.

WORKPLACE TEMPORARY RESTRAINING AND PROTECTIVE ORDERS *(ASSEMBLY BILL 429–AMENDING THE WORKPLACE VIOLENCE SAFETY ACT)*

AB 429 added provisions to the Workplace Violence Safety Act, which generally provides a means for employers to seek a temporary restraining or protective order against anyone who poses a threat to the workplace. It relaxes the process by which employers can serve the order on the perpetrator to ensure that he or she has been properly noticed, thereby making it easier for employers to protect their employees from violence or the threat of violence.

Essentially, the new law requires law enforcement officers responding to the scene of an incident to provide the perpetrator with verbal notice of the protective order and its terms. The officer's verbal notice constitutes service of the order and sufficient legal notice. Subsequent to verbal notice of the order, the employer need only mail an endorsed copy of the restraining order to the perpetrator within one business day.

PAYROLL INFORMATION ON PUBLIC WORKS PROJECTS *(SENATE BILL 759–AMENDING LABOR CODE § 1776)*

SB 759 was approved by the Governor on October 4, 2005, and amends Labor Code Section 1776, which requires the payment of prevailing wages for workers employed on public works projects costing more than $1,000. Under existing law, contractors and subcontractors on such projects are required to make available for inspection certified payroll records containing certain information specified by the Division of Labor Standards Enforcement. Each payroll record must be verified by a written declaration, made under penalty of perjury, confirming compliance with prevailing wage law requirements.

The new law provides that such certified payroll records may consist of printouts of payroll data that are maintained as computer records, as long as the printouts contain the same information and are verified in the same manner as currently required for written payroll records.

THIRD-PARTY PROVIDERS OF LABOR COMPLIANCE PROGRAMS *(ASSEMBLY BILL 414–AMENDING LABOR CODE § 1771.7)*

AB 414 was approved by the Governor on October 6, 2005, and amends Labor Code Section 1771.7 relating to labor compliance programs. Existing law allows a third party to initiate and enforce a labor compliance program with an awarding party on a public works project that uses funds derived from either the Kindergarten-University Public Education Facilities Bond Act of 2002 or the Kindergarten-University Public Education Facilities Bond Act of 2004.

The new law clarifies that a third party that has contracted with an awarding party to conduct a labor compliance program may not review the payroll records of its own employees or the employees of its subcontractors. Furthermore, the awarding body or an independent third party must review such payroll records for purposes of the labor compliance program.

CAL-OSHA HEAT ILLNESS REGULATIONS *(8 CAL. CODE REGS. § 3395)*

On August 22, 2005, the California Occupational Safety and Health Standards Board ("Cal-OSHA") adopted emergency regulations to prevent heat illness. The regulations were originally set to expire on December 21, 2005, but they were recently readopted and will now expire on April 20, 2006.

The regulations are designed to prevent heat illness in "outdoor places of employment" and apply whenever working conditions create the possibility that heat illness could occur. During such times, the employer is required to:

(1) Provide sufficient drinking water and encourage frequent drinking of water.

(2) Provide "access to an area with shade" for a period of no less than five minutes for an employee who is suffering from heat illness or who believes that a preventative recovery period away from heat is needed in order to avoid heat illness.

(3) Provide training to all employees who work outdoors and their supervisors regarding heat illness and proper prevention techniques.

FEHC'S PROPOSED SEXUAL HARASSMENT TRAINING REGULATIONS *(ASSEMBLY BILL 1825)*

On December 16, 2005, the Fair Employment and Housing Commission issued proposed regulations interpreting AB 1825, the law passed in the 2003-2004 session requiring employers with 50 or more employees to provide supervisors with at least two hours of harassment training every two years. The DFEH will conduct hearings on these proposed regulations in February 2006, and they are likely to be amended before final approval.

Existing Law—AB 1825. Governor Schwarzenegger signed AB 1825 into law in September 2004, adding Section 12950.1 to the Government Code. In brief, the legislation requires California employers with 50 or more employees to provide supervisory employees with at least two hours of sexual harassment training before January 1, 2006, and then every two years thereafter.

Although training must be provided to all employees possessing "supervisory authority," the term "supervisory authority" is not defined. The training provided must include: (1) "information and practical guidance regarding federal and state [sexual harassment laws]," (2) information about the prevention and correction of sexual harassment and remedies available to victims, and (3) "practical examples" aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation. The training must also be presented "by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination and retaliation"; however, the act does not require the trainer to hold any particular license or credentials.

Clarifications to AB 1825 by the Proposed Regulations. The proposed regulations make the following clarifications:

(1) "Having 50 or more employees" means employing 50 or more employees for each working day in any 20 consecutive weeks in the current or preceding calendar year.

(2) "Supervisory employees" are "supervisors" as defined in Government Code Section 12926(r):

> [A]ny individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Supervisory employees need not be physically located in California as long as they supervise California employees, and simply attending harassment training does not create an inference that an employee is a supervisor.

(3) The following three forms of training may be used: (a) "classroom" training, defined as "in-person, instructor-led instruction, created by a qualified instructional designer and provided to a supervisor by a qualified trainer, in a setting removed from the supervisor's usual work environment"; (b) "e-learning" training, defined as "individualized, computer-based training created by a qualified instructional designer"; or (c) "webinar" training, defined as "a web-based seminar created by a qualified instructional designer and taught by a qualified trainer."

(4) An employer may use either of the following methods or a combination of the two to track compliance: (a) "individual" tracking, where an employer tracks its training requirement for each supervisor, measured two years from the date of completion of the last training of the individual supervisor; or (b) "training year" tracking, where an employer designates a "training year" in which it trains its supervisors and then retrains them by the end of the next "training year," two years later.

(5) Businesses created after January 1, 2006, must provide training within six months of their establishment and thereafter biennially, measured by either the individual or

training-year tracking method. New supervisors (those promoted or hired after July 1, 2005) must also be trained within six months of assuming their supervisory positions and every two years thereafter.

(6) The training required does not need to be completed in two consecutive hours. For classroom training or webinars, the minimum duration must be at least half an hour. For e-training, the minimum training segment must be at least 15 minutes.

(7) "Trainers or educators" may include "California licensed attorneys, human resource professionals, psychologists or others, provided they have legal education or practical experience in harassment training and knowledge of California laws prohibiting unlawful harassment." An effective trainer is one who can use various training methodologies; can facilitate small and large group discussions; is an effective listener; has a credible, positive professional reputation; and continues to learn about gender and cultural issues and concerns.

(8) Subjects that must be covered in the training include: (a) a definition of unlawful harassment; (b) FEHA and Title VII statutory provisions and case law concerning the prohibition against and the prevention of unlawful harassment in employment; (c) the kinds of conduct that constitute harassment; (d) remedies available for harassment; (e) strategies to prevent harassment in the workplace; (f) "practical examples," including but not limited to role playing, case studies, group discussions, and examples with which the employees will be able to identify and which apply in their employment settings; (g) the confidentiality of the complaint process; (h) resources for victims of unlawful harassment, such as to whom they should report any alleged harassment; (i) training on how to conduct an effective investigation of a harassment complaint; (j) training on what to do if the supervisor is personally accused of harassment; and (k) training on the contents of the employer's antiharassment policy and how to utilize it if a harassment complaint is filed.

VETOED LABOR AND EMPLOYMENT BILLS

Governor Schwarzenegger used his veto power to reject the majority of labor and employment bills that came his way. Although this helped spare employers from any severely burdensome legislation this year, at least some of these bills are likely to return in the future. The bills include:

- Assembly Bill 48 (increasing the minimum wage)
- Assembly Bill 169 (creating stiffer penalties against employers who violate existing gender pay equity laws)
- Assembly Bill 202 (requiring the filing of a petition pursuant to C.C.P. §1281.2 as the exclusive means by which to compel arbitration)
- Assembly Bill 391 (providing unemployment benefits for employees who are locked out because of a trade dispute)
- Assembly Bill 755 (creating rest period rules for piecerate workers)
- Assembly Bill 879 (requiring review of labor commissioner rulings on an abuse-of-discretion basis when an employer fails to answer the administrative complaint or attend the hearing)
- Assembly Bill 985 (requiring an employer to pay six months of salary to an employee who is not reinstated after military service)
- Assembly Bill 1310 (forbidding employers from securing voluntary resignation of 25 or more employees unless certain disclosures and a reconsideration period are provided)
- Senate Bill 174 (creating a new representative action for employees receiving less than twice the minimum wage to recover unpaid minimum wages or overtime compensation)

LAWYER CONTACT

For further information, please contact your principal Firm representative or the lawyer listed below. General e-mail messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Deborah C. Saxe
1.213.243.2622
dsaxe@jonesday.com

Donna Mezias
1.415.875.5822
dmezias@jonesday.com

Mark Kemple
1.949.553.7520
mkemple@jonesday.com

G. Roger King
1.858.314.1134
gking@jonesday.com