JONES DAY

OCTOBER 2012

2012 CALIFORNIA LABOR AND EMPLOYMENT LEGISLATIVE UPDATE

California Governor Edmund G. Brown has recently signed into law a variety of important new employment and labor-related statutes. Gov. Brown vetoed two controversial measures as well. The following are the most significant of the measures signed and vetoed by Governor Brown. Most of the new statutes are effective January 1, 2013. The effective date of each statute is included below.

EMPLOYERS MAY NOT REQUIRE EMPLOYEES OR APPLICANTS TO DISCLOSE SOCIAL MEDIA ACCESS INFORMATION (AB 1844)

Effective January 1, 2013, this law prohibits an employer from requiring or requesting an employee or employment applicant to disclose his or her social media username or password, to access his or her personal social media in the presence of the employer, or to divulge any personal social media. It defines "social media" as an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or internet web site profiles or locations. This bill also prohibits an employer from discharging, disciplining, threatening to discharge or discipline, or otherwise retaliating against an employee or applicant for not complying with a request or demand for access to the employee's personal social media.

An employer can request an employee to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or violation of laws and regulations, and an employer can also require or request an employee to disclose a username, password, or other method of accessing an employer-issued electronic device. The bill contains no definition of an "investigation of allegations of employee misconduct."

The new law contains no enforcement provision. Potentially, an employee terminated for refusing to

provide access to a social media username or password could bring a claim for wrongful termination. Additionally, it is possible that a violation of the new statute could result in a claim for penalties under the California Labor Code Private Attorneys General Act ("PAGA"), Cal. Labor Code section 2698 *et seq.*

BILL AMENDS FAIR EMPLOYMENT AND HOUSING ACT TO INCLUDE BREASTFEEDING AND RELATED MEDICAL CONDITIONS UNDER THE DEFINITION OF "SEX" (AB 2386)

Under the California FEHA, it is unlawful to engage in specified discriminatory employment practices on the basis of sex. Under existing law, "sex" includes gender, pregnancy, childbirth, and medical conditions related to pregnancy or childbirth. Assembly Bill 2386 amends the FEHA so that the term "sex" also includes breastfeeding or medical conditions related to breastfeeding. This bill is effective January 1, 2013, and amends Section 12926 of the California Government Code.

EMPLOYMENT AGREEMENTS INVOLVING COMMISSIONS MUST BE IN WRITING (AB 1396)

Adopted in 2011 but effective January 1, 2013, this bill requires employers who establish commission plans to reduce commission agreements to writing. The written agreement must set forth the method by which commissions are computed and paid and must be signed by both the employer and employee. A signed copy must be provided to each employee who is a party to it. The law applies to all employers with commissioned employees in California, whether or not the employer is located in California.

If the contract expires but the parties continue to perform under its terms, the contract's terms are presumed to remain in full force until a new contract superseding its terms is executed or either party terminates the employment relationship.

The law excludes from the definition of "commissions" short-term productivity bonuses and bonus and profit-sharing plans, unless the employer offers to pay a fixed percentage of sales or profits as compensation for work performed.

NEW LIMITATIONS ON AMOUNT OF GARNISHMENT OF EMPLOYEES' WAGES (AB 1775)

Existing law limits the amount of employee earnings subject to an earnings withholding order to the amount specified by federal law, unless an exception applies. Federal law prohibits the amount of earnings subject to garnishment from exceeding 25 percent of an individual's weekly "disposable earnings" or the amount by which the individual's disposable earnings for the week exceeds 30 times the federal minimum hourly wage in effect at the time the earnings are payable.

This bill, which is effective July 1, 2013, defines "disposable earnings" as the portion of an individual's earnings that remains after deducting all amounts required to be withheld by law. The bill limits the amount of an individual's weekly disposable earnings subject to garnishment to the lesser of 25 percent of the individual's weekly disposable earnings or the amount by which the individual's disposable earnings for the week exceeds 40 times the state minimum hourly wage (currently, $8.00 per hour).

FAIR EMPLOYMENT AND HOUSING ACT PROTECTS RELIGIOUS DRESS AND GROOMING PRACTICES (AB 1964)

Under the California Fair Employment and Housing Act ("FEHA"), an employer is required to reasonably accommodate the religious belief or observance of an employee unless the accommodation would constitute an undue hardship on the business of the employer or other entity.

Signed by Gov. Brown on September 8, 2012, AB 1964 clarifies that a religious dress practice or a religious grooming practice is included within the FEHA's protections against religious discrimination. The new law also specifies that it is

not a reasonable accommodation to require that the person be segregated from the public or other employees due to the employee's religious dress or grooming practice.

This bill amends Section 12926 of the California Government Code and is effective January 1, 2013.

EXPANSION OF AN EMPLOYEE'S RIGHT TO INSPECT OR COPY PERSONNEL RECORDS (SB 2674)

Labor Code Section 1198.5 currently grants employees the right to inspect the personnel records that the employer maintains relating to an employee's performance or to any grievance concerning the employee. This bill substantially amends Section 1198.5.

Effective January 1, 2013, Senate Bill 2674 requires an employer to provide a current or former employee, or his or her representative, an opportunity to inspect and receive a copy of those records within 30 calendar days after the employer receives a written request to inspect or copy the records. The employer and employee can agree, in writing, to extend this deadline beyond 30 calendar days, but the maximum extension is 35 calendar days. If the employee requests a copy of the records, the employer can provide the copy at a charge, not to exceed the actual cost of copying the records. If the requestor is a current employee, the employer is not required to make the personnel records available during the employee's working hours.

A request to inspect or receive a copy of personnel records can be made in writing or by completing an employer-provided form. An employee can verbally request a form from his or her supervisor. An employee or an employee's representative can also verbally submit a request to an individual specially designated by the employer.

An employer must make a current employee's records available for inspection, or provide copies, at the request of the employee. The records must be available at the employee's workplace or another location agreeable to the employer and the requestor. This bill establishes similar provisions for former employees. The employer is required to make the records available at the location where they are stored, unless the parties agree in writing to a different location. Prior to making personnel records available, an employer may redact the name of any nonsupervisory employee contained in the personnel records.

An employer is required to maintain a copy of all personnel records for a minimum of three years after an employee is terminated.

An employer is not required to comply with more than 50 requests to inspect or receive a copy of personnel records filed by a representative or representatives of employees in one calendar month. The provisions do not apply to an employee covered by a valid collective bargaining agreement if the agreement provides for a procedure for inspection and copying of personnel records.

If an employee or former employee files a lawsuit that relates to a personnel matter against his or her employer or former employer, the right of the employee, former employee, or his or her representative to inspect or copy personnel records ceases during the pendency of the lawsuit.

Under existing law, an employer who fails to permit an employee to inspect the employee's personnel records is guilty of a misdemeanor. This bill changes that to an infraction. This bill authorizes an employer to assert impossibility of performance (not caused by or resulting from a violation of law) as an affirmative defense.

Labor Code Section 226 currently requires an employer to keep a copy of each employee's itemized wage statements and records of deductions on file for at least three years at the place of employment or at a central location within the State of California. This bill provides that the term "copy" includes a duplicate of the itemized statement provided to an employee or a computer-generated record that accurately shows all of the information required in the itemized statement.

An employer who violates Sections 226 or 1198.5 may be liable to the employee or Labor Commissioner for a penalty of $750, and a current or former employee may obtain injunctive relief and attorneys' fees.

AN EMPLOYEE IS DEEMED TO "SUFFER INJURY" IF AN EMPLOYER FAILS TO PROVIDE AN ITEMIZED WAGE STATEMENT OR IF THE EMPLOYEE CANNOT PROMPTLY AND EASILY DETERMINE CERTAIN INFORMATION (SB 1255)

The California statute requiring itemized wage statements (California Labor Code section 226(a)) also provides that an employee may recover a penalty not to exceed $4,000 where the employee "suffers injury" as the result of a "knowing and intentional failure" by the employer to provide a proper wage statement. Effective January 1, 2013, this bill defines "suffer injury" to include (i) if the employer fails to provide a wage statement, or (ii) if an employer fails to provide accurate and complete information and the employee cannot promptly and easily determine from the wage statement alone the amount of the gross or net wages paid to the employee during the pay period, the deductions the employer made from the gross wages to determine the net wages paid to the employee during the pay period, the name and address of the employer or legal entity that secured the services of the employer, and the name of the employee and either the last four digits of the employee's Social Security number or an employee identification number other than a Social Security number.

TEMPORARY SERVICES EMPLOYERS MUST PROVIDE SPECIFIC INFORMATION IN ITEMIZED WAGE STATEMENTS TO EMPLOYEES (AB 1744)

Existing law requires every employer, semimonthly or at the time of each payment of wages, to furnish each employee with an accurate itemized statement in writing showing specified information. This bill additionally requires temporary service employers, on and after July 1, 2013, to include in the itemized wage statement the rate of pay and the total hours worked for each assignment.

In addition to the itemized wage statement requirement, California also currently requires that all newly hired, nonexempt employees receive a written notice, at the time of hiring, including information such as the rate of pay and its basis (hourly, salaried, commissioned, or otherwise) among other items of information. This bill additionally requires that, if the employer is a temporary services employer, the notice include the name, the physical address of the main office, the mailing address if different from the physical address of the main office, and the telephone number of the legal entity for which the employee will perform work.

Assembly Bill 1744 is effective January 1, 2013. Knowing and intentional violations of the itemized wage statement requirement can result in penalty claims by aggrieved employees. The statute requiring written notification at the time of hire of pay/wage information does not contain a specific enforcement provision, but violations could result in claims for penalties under the California Labor Code PAGA.

PAYMENT OF A FIXED SALARY TO A NONEXEMPT EMPLOYEE IS COMPENSATION ONLY FOR THE EMPLOYEE'S REGULAR, NON-OVERTIME HOURS, NOTWITHSTANDING ANY PRIVATE AGREEMENT TO THE CONTRARY (AB 2103)

Assembly Bill 2103 is intended to overturn the California Court of Appeal's decision in *Arechiga v. Dolores Press* (2011) 192 Cal.App.4th 567. This law amends Section 515 of the California Labor Code to state that payment of a fixed salary to a nonexempt employee provides compensation *only* for the employee's regular, non-overtime hours, notwithstanding any private agreement to the contrary. The *Arechiga* case had been used by some employers to reduce overtime obligations to employees whose regular hours fluctuate from week to week. In *Arechiga*, the court held that Section 515 of the California Labor Code, which pertains to overtime rates of compensation, permits an employer and a nonexempt employee to enter into an explicit mutual wage agreement. Under such an agreement, an employer and employee agree before the employee starts work to pay the employee a guaranteed salary, including all pay for non-overtime *and* overtime hours worked, as long as the employee receives at least one-and-one-half times his basic rate for any hours worked beyond the statutorily defined workday of eight hours. Such agreements are now unenforceable. This bill goes into effect on January 1, 2013.

CALIFORNIA EXTENDS WHISTLEBLOWER PROTECTIONS UNDER FALSE CLAIMS ACT (AB 2492)

Assembly Bill 2492 makes California the first in the nation to update its state false claims statute to align with the federal False Claims Act. The bill amends the current version of the California False Claims Act, adding whistleblower protections covering employees, contractors, and agents; allowing for awards of legal fees and costs; and raising civil penalties for violations of the state law from $5,000 to $10,000 per false claim to between $5,500 and $11,000. The California False Claims Act applies to persons who knowingly make or use a false statement or document to either obtain money or property from the State or avoid paying or transmitting money or property to the State.

The greater protections may encourage employees to disclose fraudulent activities involving the State, but they may also lead to an increase in retaliation claims. This bill could encourage more current and former employees to assert claims against their employers because there are financial incentives to do so. False claims cases may also become more attractive to attorneys because the bill allows qui tam relators to recover their attorneys' fees if they prevail. This bill goes into effect on January 1, 2013.

CALIFORNIA PLACES LIMITATIONS ON DISABILITY ACCESS CLAIMS (SB 1186)

Senate Bill 1186 is designed to curb abusive Americans with Disabilities Act construction-related access lawsuits "by a small minority of disability rights lawyers and plaintiffs" in the State of California. The bill, which received broad bipartisan support and went into effect immediately upon signing by the Governor on September 19, 2012, places limitations on the procedure for bringing disability access suits and on the damages that claimants collect from these lawsuits.

SB 1186 requires attorneys to send a copy of prelitigation demand letters or civil complaints alleging construction-related disability access violations to the California Commission on Disability Access or to the State Bar of California for review. The bill also prohibits prelitigation letters from including a request or demand for money or an offer to accept money.

The bill also requires that prelitigation demand letters and complaints alleging construction-related disability claims contain language allowing defendants to determine the basis of the violations supporting the claim, including the "date or dates of each particular occasion on which the claimant encountered the specific access barrier."

The bill caps statutory minimum damages for construction-related violations at $1,000 per offense (rather than $4,000) where a defendant corrects all access violations within 60 days of receiving a civil complaint and the business can show that the property had previously been Certified Access Specialist Program ("CASp") inspected. Alternatively, the bill caps statutory damages at $2,000 where a defendant corrects all violations within 30 days and the defendant is a small business. For properties leased after January 1, 2013, the bill also requires landlords to disclose to tenants whether their buildings are CASp certified to comply with ADA access regulations.

VETOED BILLS

The following bills were vetoed by Governor Brown:

Discrimination on the Basis of Unemployment Status Would Have Been Prohibited (AB 1450)

AB 1450 would have prohibited employers, employment agencies, and persons who operate web sites from posting jobs in California, from publishing a job advertisement or announcement for any job that includes either a provision stating that an individual's current employment is a requirement for a job or that an employer will not consider an applicant for employment based on an individual's employment status. Employers could still publish ads or announcements that set forth other lawful job qualifications or state that only applicants who are currently employed by that employer would be considered.

Regulations for Domestic Worker Employees (AB 889)

Assembly Bill 889 would have required the Department of Industrial Relations to adopt regulations, by January 14, 2014, governing the working conditions of domestic workers (including persons employed in the home who provide supervision or assistance to an elderly or disabled

person). Due to Governor Brown's veto, domestic workers will continue to be governed by the existing provisions of the California Industrial Welfare Commission Wage Orders (notably, Wage Orders 15 and 5). Historically, most domestic workers in California have not been subject to the overtime and meal/rest period provisions applicable to most other private-sector, nonagricultural employees.

LAWYER CONTACTS

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

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