MARCH 2015

COMMENTARY

2015 California Labor and Employment Legislative Update

The California Legislature continues to enact novel and often complicated employment-related statutes. In late 2014, Governor Jerry Brown signed all of the principal employment-related statutes enacted by the Legislature. Unlike in prior years, Governor Brown did not veto any of the principal statutes that apply to the private sector. The following are the most significant new statutes. Unless otherwise specified, the statutes became effective January 1, 2015.

Minimum Wage Increase (AB 10)

Effective Date: January 1, 2016

Summary. Assembly Bill 10 raised the minimum wage in California to $9.00 per hour as of July 1, 2014, and will raise it again, to $10.00 per hour as of January 1, 2016. In addition to the obvious impact this has on employers with minimum wage workers, it also affects those with employees that are deemed "exempt" under exemptions that have minimum salary requirements tied to the minimum wage. For example, the minimum salary that employees who are exempt under the "white collar" exemption must be paid is double the state minimum wage; accordingly, the minimum salary for these exempt workers increased to $37,440 as of July 1, 2014, and will further increase to $41,600 as of January 1, 2016.

Effective January 1, 2015, the computer software employee's minimum hourly rate of pay exemption rose to $41.27, the minimum monthly salary exemption rose to $7,165.12, and the minimum annual salary exemption rose to $85,981.40.

The San Diego City Council passed (over the mayor's veto) an ordinance that would have increased the San Diego minimum wage and would also have required San Diego employers to offer paid sick leave in excess of that required under the new California law. In October 2014, however, a ballot initiative garnered the requisite number of signatures, putting both the minimum wage increase and the sick leave requirement on the ballot in 2016.

Sick Leave Required for Most Employees (AB 1522)

Summary. The California Healthy Workplaces, Healthy Families Act of 2014 requires all California employers to provide at least three paid sick days per year to employees, with only limited exceptions. This law applies to all private-sector employers regardless of

size and to all state, county, and municipal employers. The Act's provisions for the accrual and use of paid sick days becomes effective on July 1, 2015.

The California Division of Labor Standards Enforcement (the "Labor Commissioner") has issued a set of frequently asked questions, as well as an updated "Wage Theft Form" that must be used when hiring non-exempt employees. Additionally, the Act contains posting, recordkeeping, and notification requirements that, according to the Labor Commissioner, are effective January 1, 2015. The Labor Commissioner's FAQ sheet, form notice, and sample poster are available on the website for the California Division of Labor Standards Enforcement ("DLSE").

Covered Employees. The Act grants the right to take paid sick leave to all "employees"—exempt and non-exempt alike—who, on or after July 1, 2015, work in California for 30 or more days within a year. The Act excludes only a few categories of employees, including most employees covered by specified collective bargaining agreements that already provide for paid sick leave, in-home health care or supportive services employees, and certain individuals employed as flight deck or cabin crew members by an air carrier subject to the Railway Labor Act.

Permissible Uses of Sick Leave. Paid sick days may be used for the diagnosis, care, or treatment of an existing health condition or preventive care for an employee or the employee's family member. "Family members" include a child, foster child, stepchild, legal ward, a child to whom the employee stands in *loco parentis*, a parent (biological, adopted, or foster parent), stepparent, legal guardian, spouse, registered domestic partner, grandparent, grandchild, sibling, or a person who stood in *loco parentis* when the employee was a minor child. The Act also requires that sick leave be available for use by an employee who is a victim of domestic violence, sexual assault, or stalking.

Amount and Accrual of Paid Sick Leave; Limitations on Use of Paid Sick Leave. The Act requires that employers permit exempt and non-exempt employees to accrue paid sick days at the rate of at least one hour of paid sick leave per every 30 hours worked, or approximately 8.7 sick days per year for a full-time employee. The Act by its terms does not limit the amount of paid sick time an employee may accrue. However, it permits employers to limit the use of paid sick days to 24 hours or three days in each year of employment.

Employees who work 30 or more days within a year from commencement of employment are entitled to accrue and use paid sick leave. An employee is entitled to use accrued sick leave beginning on the 90th day of employment.

The Act further requires that accrued paid sick days carry over from year to year, but it provides two provisos. First, the employer may limit the amount of carried-over, accrued paid leave to 48 hours or six days, as long as the employer does not otherwise limit the employee's right to accrue and use paid sick leave. Second, the Act permits employers to avoid carryovers by granting 24 hours or three days of accrued sick leave at the beginning of each year.

The Act generally gives employees the right to determine how much paid sick leave they need to use. While sick leave may be used in increments of less than a full day, employers may establish a reasonable minimum increment, not to exceed two hours, for the use of paid sick leave.

Effect on Existing Sick Leave or PTO Plans. Many employers already have sick leave or "personal time off" ("PTO") plans that comply with most or all of the statute, but an employer should not assume that its sick leave or PTO plan satisfies the statute. For those employers, the employer's current plan will be deemed to satisfy the statute, and no additional leave accrual is required, if the employer (i) makes available the required amount of leave to be used for the same purposes as the Act, including paid sick leave for absences occasioned by the employee's illness, the illness of a child, spouse, parent, stepparent, grandparent, grandchild, sibling, or certain other family members, and for absences occasioned by the employee's status as a victim of domestic violence; (ii) the employer's plan provides for paid leave at the same rate of pay as the employee normally earns during regular work hours; and (iii) the employer's plan permits the carryover of paid sick leave and an accrual rate no less favorable than required by the statute.

Existing sick leave or personal time off plans will also be deemed to comply with the accrual/carryover requirements if

the plan provides no less than 24 hours or three days of paid sick leave or the equivalent for each year of employment.

Note: Employers should not assume that their sick leave or personal time off plans comply with the new statute simply because they provide for as much as or more accrual and carryover than required. The existing plans must also permit the use of sick leave for all of the statutorily defined purposes, and the rate of pay for sick leave must comply with the statute (which can be significant for employees paid by commission or who have multiple hourly rates of pay).

No Payment of Accrued Sick Leave on Termination (Usually). Generally, sick leave pursuant to the Act need not be paid on termination of employment (discharge, quitting, or retirement). However, many employers' current personal time off plans are treated under California law as the equivalent of vacation pay. Accrued, unused leave under those plans must be paid at the time of termination of employment.

If an employee separates from employment and is rehired by the employer within one year from the date of separation, previously accrued and unused pay sick days must be reinstated. The employee being rehired is entitled to use the previously accrued but unused paid sick days and to accrue additional paid sick days based on the date of rehire.

Rate of Pay for Paid Sick Leave. The rules for payment of non-exempt employees are straightforward. Hourly employees are paid according to their hourly rate of pay. For employees paid by methods where the wages fluctuate (e.g., commission, piece rate, multiple hourly rates, etc.), the rate of pay for paid sick leave is determined by dividing the employee's total wages for all full pay periods for 90 days of employment before taking the sick leave by the total hours worked in those periods, excluding overtime premiums.

Sick leave taken by an employee must be paid no later than the payday for the next regular payroll period after the sick leave was taken.

Notice Requirements. The Act contains notice rules for employers and employees. For employees, the Act's notice rules are straightforward: Employees must provide reasonable advance notice of the use of paid sick leave if the reason for the paid sick leave is foreseeable. If the need for the paid sick leave is not foreseeable, employees need only provide notice of the need for leave as soon as practicable.

The notice rules for employers are more onerous, given the panoply of notice rules with which California employers must already comply.

First, the Act obligates California employers to display yet another poster in a conspicuous place in the workplace. The poster, an exemplar of which has been created by the Labor Commissioner, must: explain that employees are entitled to accrue, request, and use paid sick days; describe the amount of sick days employers must provide; and explain terms for use of paid sick days.

Second and with respect to newly hired non-exempt employees, the Act requires employers to update their Wage Theft Prevention Act notices to confirm that non-exempt employees may accrue and use sick leave, have "a right to request and use accrued paid sick leave," "may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave," and have "the right to file a complaint against an employer who retaliates."

Third, and with respect to *all* current employee, the Act obligates employers to provide written notice of the amount of paid sick leave available or paid time off that the employer provides in lieu of sick leave, either on the employee's itemized wage statement or in a separate writing provided on the designated paid date with the employer's payment of wages. This creates an obligation to notify all employees every pay period of the amount of sick leave or paid time off that can be used for purposes stated in the Act. Failure to do so can result in penalties as discussed below.

Recordkeeping Rules. The Act obligates employers to keep records for at least three years documenting the hours worked and paid sick leave days accrued and used by each employee. The Labor Commissioner must be allowed access to these records, and the employer must make the records available to an employee upon request in accordance with the provisions of California Labor Code Section 226. If the employer does not maintain such records, it cannot enforce the three-day annual usage and six-day maximum accrual

"caps" unless it shows the employee's actual usage, or the existence of those caps, by "clear and convincing evidence."

Anti-Retaliation Provision. The Act includes a provision that an employer may not discriminate against an employee for using accrued sick leave, attempting to exercise the right to use accrued sick days, filing a complaint with the Labor Commissioner or alleging a violation of the Act, cooperating in an investigation or prosecution of an alleged violation of the Act, or opposing any "policy or practice or act that is prohibited" by the Act. Further, the anti-retaliation provision creates a rebuttable evidentiary presumption of unlawful retaliation if an employer denies an employee the right to use the accrued sick days or discharges, threatens to discharge, demotes, suspends, or otherwise discriminates against an employee within 30 days of (i) the filing of a complaint by the employee with the Labor Commissioner or "alleging a violation" of the Act, (ii) cooperation of an employee with an investigation or prosecution of an alleged violation of the Act, or (iii) "opposition" by the employee to a policy, practice, or act that is prohibited by the Act.

Enforcement and Remedies. The Act contains no provision for a private right of action. Instead, the Act states that "the Labor Commissioner shall enforce this Article, including investigating an alleged violation, and ordering of appropriate temporary relief to mitigate the violation or to maintain the status quo pending the completion of a full investigation or hearing…."

The Act contains penalty provisions. If paid sick days are unlawfully withheld, the employer must pay the amount unlawfully withheld multiplied by three, or $250, whichever is greater, but no more than an aggregate penalty of $4,000. If the violation of the Act results in "other harm" to the person such as a discharge from employment, the penalty may include $50 for each day or portion thereof that a violation occurred or continued, but not to exceed $4,000. The Labor Commissioner or the Attorney General may bring a civil action in court against an employer who violates the Act and may seek legal or equitable relief, such as reinstatement, back pay, and reasonable attorneys' fees. It is unclear whether private parties may seek such penalties under the Labor Code Private Attorney Generals Act ("PAGA").

Effective Date. Although the accrual/sick leave usage provision states that accrual need not begin until July 1, 2015, there is no provision in the statute for the effective date of the paystub disclosure, posting, notification, and recordkeeping requirements. The apparent intent of the Act is that the disclosure, posting, and related requirements would also be effective as of July 1, 2015. However, the Labor Commissioner has opined that the posting, notification, paystub disclosure, and recordkeeping requirements are effective January 1, 2015. There may be litigation in court over the effective date of those provisions. Despite the lack of clarity on the effective date of these provisions, we recommend that employers comply with the posting, notification, paystub disclosure, and recordkeeping requirements as of January 1, 2015.

Sick Leave Legislation in Certain California Cities. Several California cities have already enacted similar mandatory paid sick leave laws. These include San Francisco, San Diego, and Long Beach (for certain hotel employees). The Act contains an anti-preemption provision that allows cities or other municipalities to establish different, more generous paid sick leave requirements.

No Effect on Other Paid or Unpaid Leave Statutes. The Act does not affect the employer's obligations under other statutes that provide for other forms of paid or unpaid time off, such as the California Family Rights Act, the California paid family leave provisions of the Unemployment Insurance Code, and various statutes requiring unpaid leave for victims of crimes or domestic violence, or for jury duty or other purposes.

Joint Employer Liability for Wage and Hour Violations of Labor Provider (AB 1897)

Effective Date: January 1, 2015.

Summary. In response to a perceived need to hold employers accountable "for serious violations of workers' rights, committed by their own labor suppliers, to workers on their premises," as well as a perceived need to "incentivize the use of responsible contractors, rather than a race to the bottom," the Legislature enacted AB 1897 to impose significant new joint employer liabilities on private sector employers for violation of certain California labor laws committed by "labor contractors."

The statute does not apply when the workers provided are exempt from the payment of overtime compensation.

Specifically, AB 1897 creates a new section 2810.3 to the California Labor Code, which will require "client employers" to share with their "labor contractors" the obligation and liability for paying wages to workers. AB 1897 also prohibits a client employer from shifting to its labor contractor the legal obligation to maintain a safe workplace as required by Cal-OSHA. The term "client employer" is defined to include business entities that, within their "usual course of business," obtain work from a labor contractor. The term "labor contractor" is defined to include an individual or entity that supplies a company with workers to perform labor within the company's day-to-day business operations.

We expect to see disputes and litigation concerning whether the work performed by contractor or staffing company employees is within the "client employer's" "usual course of business." The statute defines "usual course of business" as "the regular and customary work of a business, performed within or upon the premises or work site of the client employer."

The new employer liability rules do not apply to workers provided by nonprofit community-based organizations, apprenticeship programs, motion picture payroll services companies, or third parties in certain employee leasing agreements that contractually obligate the employer to assume all of the civil legal responsibility and liability that exists under the new law.

AB 1897 exempts from coverage: (i) employers with a workforce of fewer than 25 workers, (ii) a business entity with five or fewer workers provide by labor contractors at any given time, (iii) the state or any political subdivision of the state, (iv) employers that are not motor carriers of property based solely on the employers' use of a third-party motor carrier of property with interstate or intrastate operating authority to ship or receive freight, (v) motor carriers of property, (vi) cable providers, (vii) motor club services, (viii) nonprofit community organizations, (ix) labor organizations, apprenticeship programs, or hiring halls operated pursuant a collective bargaining agreement, (x) motion picture payroll services, and (xi) third parties engaged in an employee leasing arrangement under the California Workers' Compensation Experience Rating Plan, if the employee leasing arrangement contractually obligates the client employer to assume all civil legal responsibility and civil liability.

Indemnification provisions are permitted under AB 1897. The bill does not prohibit employers from agreeing to any otherwise lawful remedies against labor contractors for indemnification from liability created by acts of the labor contractor. Similarly, labor contractors will have the same opportunity to contract with employers for indemnification.

Prior to implementation of this statute, employers typically could be held liable only for employment law violations committed by third-party staffing agencies if aggrieved employees could establish the existence of a joint employment relationship between the employer and the agency. For liabilities created by AB 1897, this is no longer the case. Now, aggrieved employees can directly sue "client employers" as long as they provide notice of the alleged violations 30 days prior to filing suit. Before filing a civil action against the labor contractor's customer, a worker (or a representative on behalf of the worker) must provide 30 days' notice to the customer of the alleged violations.

The new statute authorizes the Labor Commissioner, the Division of Occupational Safety and Health, and the Employment Development Department to adopt necessary regulations and rules to administer and enforce the bill's provisions.

Discrimination Prohibited Against Employees Because of Driver's Licenses Issued to Undocumented Citizens (AB 1660)

Effective Date: January 1, 2015.

Summary. AB 1660 provides that an employer may not discriminate or refuse to hire a person because of the method by which the person obtained a driver's license. The statute amends the Fair Employment and Housing Act ("FEHA") to prohibit discrimination against an individual because he or she holds or present a driver's license issued under Vehicle Code Section 12801.9, except as specified. Such licenses are issued to persons who lack documentation necessary to be employed in the United States. It also adds subdivision (v) to Government Code Section 12926, specifying that national origin discrimination includes discrimination on the basis of

possessing a driver's license, and prohibits a governmental authority or its agent from discriminating against an individual because he or she holds or presents a specified license.

This law does not affect an employer's obligations to obtain information required under federal law to determine identity and authorization to work, and it provides that actions taken by an employer that are required by the federal Immigration and Nationality Act would not violate this law.

Mandatory Anti-Harassment Training Must Include "Abusive Conduct" (AB 2053)

Effective Date: January 1, 2015.

Summary. FEHA currently requires employers with 50 or more employees to provide at least two hours of sexual harassment training for supervisors in California every two years. AB 2053 amends the FEHA to now require that such training include the prevention of "abusive conduct," even if the conduct is not based on a protected characteristic nor constitutes legally prohibited discrimination or harassment.

"Abusive conduct" is defined as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests." The new law further defines "abusive conduct" as including "repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating or humiliating, or the gratuitous sabotage or undermining of a person's work performance." The law clarifies that a single act does not constitute abusive conduct, unless especially severe and egregious.

Notably, this statute does not make "abusive conduct" a prohibited activity under the FEHA.

Prohibition Against Requiring "Waivers" for Various Civil Rights Claims (AB 2617)

Effective Date: January 1, 2015.

Summary. AB 2617 prohibits employers from requiring an individual to agree to arbitrate or waive the right to file a claim for an alleged violation of Civil Code Sections 51.7, 52, and 52.1 (primarily the Bane and Ralph Acts) as a condition of being able to provide, receive, or enter into a contract for goods or services. Under AB 2617, employers are also prohibited from refusing to contract with individuals who refused to waive such legal rights. The statute does not on its face apply to claims under FEHA or the Labor Code.

This bill applies only to "waivers" entered into on or after January 1, 2015, and does not apply to post-dispute agreements to arbitrate or to waive a claim. The statute is likely preempted by the Federal Arbitration Act and will likely be challenged judicially in the near future.

Protection for Harassment and Discrimination of Unpaid Interns and Volunteers (AB 1443)

Effective Date: January 1, 2015.

Summary. This bill expands the FEHA to prohibit harassment and discrimination of unpaid interns and volunteers on the same basis as it applies to employees. Specifically, the protections under the FEHA are expanded to the "selection, termination, training, or other treatment" of unpaid interns and individuals in a limited duration program providing unpaid work experience. AB 1443 similarly extends the existing religious belief accommodation requirements to unpaid interns and volunteer workers.

Longer Limitations Period for Recovering Liquidated Damages for Unpaid Minimum Wages (AB 2074)

Effective Date: January 1, 2015.

Summary. AB 2074 extends the statute of limitations for liquidated damages for claims on unpaid minimum wages. Currently, California Labor Code Section 1194.2 authorizes a claim for "liquidated damages" equal to the unpaid wages plus interest in civil actions regarding minimum wage violations. Courts have reached varying and inconsistent holdings as to the applicable statute of limitation for such claims. AB 2074 amends Section 1194.2 to specify that the statute of limitations to pursue liquidated damages is the same as the statute of limitations for the underlying minimum wage claim (presumably, three years).

Labor Code "Waiting Time Penalties" Can Be Imposed by Labor Commissioner in Minimum Wage Citations (AB 1723)

Effective Date: January 1, 2015.

Summary. The Legislature enacted AB 1723 to correct a perceived oversight in the Labor Code that prevented the Labor Commissioner from issuing citations for waiting time penalties for employer failures to pay the minimum wage.

Prior to enactment of AB 1723, California law allowed employees seeking to recover unpaid minimum wages three separate alternatives: First, employees could file administrative wage claims with the DLSE. Second, employees could bypass the DLSE administrative wage claim process by filing a civil lawsuit to recover unpaid minimum wages. Third, Deputy Labor Commissioners of the DLSE could issue citations to the employer, requiring payment of the minimum wage. In the first two proceedings, employees could recover "waiting time penalties" pursuant to Labor Code Section 203 in addition to unpaid wages and other penalties. However, California law did not expressly give the DLSE a right to include waiting time penalties in the minimum wage citation process. AB 1723 corrects this oversight. It amends Labor Code Section 1197.1 to permit the DLSE to add waiting time penalties in citations issued to employers for failure to pay the minimum wage.

Proposed California Statute Not Enacted– Employee Wage Lien Statute (AB 2416)

Summary. This widely watched bill never passed the Senate, but it likely will be reintroduced in 2015. In its current form, AB 2416 would permit pre-judgment wage liens to be filed against an employer by wage claimants. It allows employees to file liens on an employer's real or personal property, or property where work was performed, based on alleged, but not yet proven, wage claims. Such liens would be similar to mechanics liens and could affect the employer's ability to obtain financing or to buy or sell a business or a unit of the business.

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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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