

FIFTEEN DEVELOPMENTS IN EMPLOYMENT LAW FOR 2014

by TODD WULFFSON and SHIRIN FOROOTAN

California lawmakers were busy this past year enacting a host of laws that will affect employers in 2014. These pro-employee laws range from protections for undocumented workers to penalties for employers for missed “recovery periods” intended to prevent heat illness. This article discusses the most noteworthy of these laws and, where applicable, the steps employers should take to comply with them.

1. Minimum Wage Increase

Under Assembly Bill 10, the minimum wage for California employees will increase to \$9.00 per hour starting July 1, 2014. (Another increase to \$10.00 per hour will take effect in 2016). Assemb. 10, 2013 Leg. Sess. (Cal. 2013). While employers can comply easily enough with the new law by raising the hourly wage for their minimum wage workers to \$9.00, they should also revisit the salary levels for their exempt managerial, administrative, and professional employees. An exempt employee must receive a salary equal to or greater than two times the minimum wage (1.5 times for commissioned, inside sales employees). Thus, when the minimum wage for nonexempt employees increases to \$9.00 on July 1, the annual salary for exempt employees must be at least \$37,440 (2080 hours x \$9.00) to retain exempt status. Employers should also bear in mind that the increased minimum wage will affect split-shift premiums, meal and rest period penalties, and other payments based on minimum wage.

2. Expanded Protection for Whistleblowers

Senate Bill 496 expands state law protections to employees who blow the whistle on their employers. Sen. 496, 2013 Leg. Sess. (Cal. 2013). Whistleblower protection used to be reserved for employees who reported an employer’s illegal or wrongful conduct to an outside agency (for example, a worker reporting unsafe working conditions to OSHA). Now under Senate Bill 496, even an employee who discloses a legal violation internally is protected from any form of retaliation. Also, the employee need only reasonably believe that a legal violation has occurred (as opposed to actually referencing some law that was violated) and report it to someone who has authority over the employee or authority to investigate the violation. The fact that an employee

only has to have a reasonable belief that some law was violated means that it will be much easier for employees to prove their whistleblowing claims. Employers should train their managerial, supervisory, and human resources personnel to proceed cautiously when disciplining or dealing with any employee who has complained of—or even mentioned—a workplace condition, policy, or practice that might violate a law, regulation, or ordinance.

3. Clarifying Definition of Sexual Harassment

Senate Bill 292 amends California’s anti-harassment laws to clarify that conduct may constitute sexual harassment even if the conduct was not motivated by sexual desire. Sen. 292, 2013 Leg. Sess. (Cal. 2013). The legislature passed this new law to overturn a recent court decision that had dismissed a plaintiff-employee’s sexual harassment claim because the plaintiff failed to show that the employer’s harassing actions arose from an “expression of actual sexual desire or intent.” Nevertheless, this legislative fine-tuning of the sexual harassment definition is probably not significant enough to warrant modifying existing workplace discrimination and harassment policies.

4. Expanded Protection for Military and Veteran Status

Assembly Bill 556 adds “military and veteran status” to the California Fair Employment and Housing Act’s list of categories protected against



discrimination. Assemb. 556, 2013 Leg. Sess. (Cal. 2013). Protected employees include veterans of the U.S. Armed Forces (including Reserve), the U.S. National Guard, and the California National Guard. Employers will therefore want to ensure that military and veteran statuses appear as protected categories in their Equal Employment Opportunity policies.

5. Expansion of Crime Victim Leave

Existing California laws require employers to allow time off for employees who are crime victims in order to attend court proceedings related to the crime. In Senate Bill 288, the legislature has broadened the definition of “victim” to include any employee who suffers “direct or threatened physical, psychological or financial harm as a result of the commission or attempted commission of a crime.” Sen. 288, 2013 Leg. Sess. (Cal. 2013). The term “victim” is also expanded to include the employee’s spouse, parent, child, sibling, or guardian.

6. Leave Protections Expanded to Include Stalking Victims

Existing California law protects the time off of employees who are victims of domestic violence or sexual assault. In newly passed Senate Bill 400, the legislature has extended employment leave protections to employees who are victims of stalking. Sen. 400, 2013 Leg. Sess. (Cal. 2013). The employer must allow time off to employee-victims for medical treatment or court proceedings, and the new law prohibits an employer from discriminating or retaliating against an employee who is a domestic violence, sexual assault, or stalking victim. More significantly, the new law requires an employer to make reasonable accommodations (*e.g.*, job transfer, reassignment, changed work telephone, modified work schedule, lock installation, etc.) to an employee who is a victim of domestic violence, sexual assault, or stalking, unless the accommodation would result in undue hardship to the employer.

7. Undocumented Worker Protections

Senate Bill 666 and Assembly Bill 263 are two of the more aggressive and controversial bills passed by our legislature. The first bill, Senate Bill 666, prohibits an employer from taking any adverse action against a worker who exercises his or her rights under the California Labor Code. Sen. 666, 2013 Leg. Sess. (Cal. 2013). The exercise of California Labor Code rights can be as innocuous as a worker’s asking about the calculations on a paycheck, and the list of “adverse actions” an employer is prohibited from taking includes reporting, or threatening to report, to a government agency a worker’s suspected

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citizenship or immigration status. Thus, any employer who suspects that a worker might not have the required citizenship status must, before investigating or inquiring, verify that there is no record of that worker’s taking any action or making any complaint or comment that might relate to California wage-and-hour laws.

The second bill, Assembly Bill 263, prohibits an employer from discharging or taking any adverse action against an employee who “updates” his “personal information” on file with the employer. Assemb. 263, 2013 Leg. Sess. (Cal. 2013). The bill is intended to protect the job seeker who, while in this country without legal documentation, obtains employment by providing false immigration papers or information to

an employer. If or when the employee eventually obtains legal status, the employee can “update” or “correct” his information with the employer, and the employer is powerless to take adverse action on the employee’s previous dishonesty.

8. Expansion of Paid Family Leave Benefits

Under Senate Bill 770, Paid Family Leave, wage replacement benefits that are available to employees who take time off to care for a seriously ill child, spouse, parent, or domestic partner, are now also available for the serious illnesses of a grandparent, grandchild, sibling, or parent-in-law. Sen. 770, 2013 Leg. Sess. (Cal. 2013).

9. Employer Penalties for Missed “Heat Illness Recovery” Periods

By now, nearly all California employers are well aware of the penalties they can incur (*i.e.*, one hour of pay) if their employees miss a meal or rest period. Under newly enacted Senate Bill 435, an employer will be subject to those same penalties if its employees who perform work outdoors are not given a recovery period of at least five minutes in the shade to cool off as needed whenever the temperature exceeds eighty-five degrees. Sen. 435, 2013 Leg. Sess. (Cal. 2013).

10. Prohibition Against Employer Policies That Restrict Emergency Aid

Under Assembly Bill 633, employers may not prohibit an employee from providing voluntary emergency medical aid, including CPR, in response to a medical emergency. Assemb. 633, 2013 Leg. Sess. (Cal. 2013). The new law is presumably a legislative response to a widely publicized case in which a nursing home resident died after, despite it being a case where the nursing home staff might have attempted CPR, the nursing home’s policies prevented staff from performing CPR. (This new law does not require that employers train employees on CPR or other medical procedures.)

11. Limiting Employers' Ability to Recover Attorneys' Fees in Wage and Hour Cases

Senate Bill 462 amends California Labor Code section 218.5 to provide that an employer who prevails in an action for the nonpayment of wages can only recover its attorneys' fees and costs from the losing employee if the court finds that the employee filed the action in bad faith. Sen. 462, 2013 Leg. Sess. (Cal. 2013).

12. Domestic Worker Bill of Rights

Under Assembly Bill 241, individuals performing certain in-home domestic work, related to the care of individuals in private households or the maintenance of those households, will be entitled to overtime compensation for hours worked in excess of nine hours per day or forty-five hours per week. Assemb. 241, 2013 Leg. Sess. (Cal. 2013). This law has detailed definitions of who are included and excluded as in-home workers. For example, casual babysitters, babysitters under the age of eighteen, and residential care facility workers are excluded.

13. New Law for San Francisco Employers, the "S.F. Family-Friendly Workplace Ordinance"

Even as California leads the country in expanding employee rights and job protections, San Francisco leads California. Effective in 2014, companies that employ twenty or more employees (including part-time) in San Francisco are subject to the city's Family-Friendly Workplace Ordinance. S.F., Cal., Admin. Code Ch. 12Z, Ordinance 209-13 (2013) (amended 2014). An employee with six or more months of service who works at least eight hours per week may request a flexible work arrangement from the employer as an accommodation to care for a child, parent over sixty-five years old, or relative with a serious health condition. Flexible work arrangements that an employee may request include, but are not limited to, alternative work schedules, telecommuting, job sharing, or part-time work. Employers subject to this ordinance are required to meet

with an employee who requests such arrangement within twenty-one days of the employee's request, and to respond to that request within twenty-one days. Any denial of a request must be in writing and must provide an explanation for the denial, as well as notice to the employee of the right to request reconsideration.

14. Amendment of California Background Check Law

California's background check law has been amended under Senate Bill 530 to prohibit an employer from asking a job applicant about any conviction that has been judicially dismissed, expunged, or ordered sealed. Sen. 530, 2013 Leg. Sess. (Cal. 2013). This law also prohibits employers from using such information as a basis for any employment-related decision. Exceptions to this prohibition include where the employer is legally required to obtain the information, where an employer is legally prohibited from hiring an employee with any criminal convictions, and where the applicant is required to possess or use a firearm during the course of his or her employment.

15. Protected Time Off for Volunteer Emergency Training

Under Assembly Bill 11, employers with fifty or more employees are required to allow up to fourteen calendar days of unpaid leave per year to employees who wish to train as volunteer firefighters, reserve peace officers, or emergency rescue personnel. Assemb. 11, 2013 Leg. Sess. (Cal. 2013).

As a result of these new employment laws, employers should, at minimum, do the following to minimize the risk of litigation: (1) review compensation practices to ensure compliance with the minimum wage increase, including proper calculation of regular rate for overtime purposes and the proper salary basis compensation for exempt employees; (2) review the policies and practices for criminal background checks to ensure compliance with the new California requirements; and (3) review work rules

and handbook policies to ensure they reflect the expanded Equal Employment Opportunity policies, time off, and leave policies. Employers should also watch for the outcome in *Iskanian*, a key California Supreme Court decision to be issued this year regarding the validity of class action waivers and PAGA waivers in the employment context. *Iskanian v. CLS Transp. L.A., LLC*, 142 Cal. Rptr. 3d 372 (2012).



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