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new laws and regulations

MSK Client Alert

January 2013

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Employee right to inspect personnel files expanded. Under prior law, an employee had a right to inspect his or her personnel records (Labor Code § 1198.5) and to obtain a copy of any document signed by the employee (Labor Code § 432). AB 2674 amends Labor Code § 1198.5 so that, in addition to inspection, an employee or his/her representative also may obtain a copy of any personnel records. For purposes of the statute, "representative" includes any person authorized by a current or former employee in writing. Personnel records must be made available for inspection and/or copying within 30 days of a written request (which may be extended to 35 days by mutual agreement). Moreover, if a verbal request is made, the employer must provide a form on which the request can be made in writing. Where a copy of the records is requested, the employer may require the employee to reimburse the employer for the actual cost of reproduction. Before personnel records are inspected or copied, the employer may redact the name(s) of any nonsupervisory employee appearing in the personnel records.

AB 2674 also expressly extends the right to inspection and copying of personnel records to former employees. However, a former employee only may request to inspect and/or copy records once per year. Moreover, if the former employee was terminated for violating a law or a workplace policy concerning harassment or violence, the employer may comply with an inspection request by bringing the records to a neutral location or by mailing them to the employee. As amended, Labor Code § 1198.5 additionally requires that employers must maintain personnel records for at least three years. A violation of the statute is an infraction (criminal charge), and the new law provides for the recovery of a penalty of $750 per violation, as well as for the recovery of attorneys' fees and injunctive relief.

New law makes it easier to recover penalties for paystub violations. SB 1255 amends Labor Code § 226, which provides that an employee suffering an injury as a result of an employer's knowing and intentional failure to provide itemized wage statements is entitled to penalties, costs, and attorneys' fees. Before SB

1255, courts had ruled that an employee had to show some ***actual injury*** in order to recover penalties. SB 1255 now provides that an employee is "deemed" to suffer an injury if the employer fails to provide a wage statement or fails to provide a wage statement from which the employee can promptly and easily determine the following: the amount of gross or net wages paid, the deductions made from gross wages, the name and address of the employer, and the name of the employee and the last four digits of the employee's Social Security number. Penalties for violation remain the greater of actual damages or $50 for the initial pay period and $100 for each pay period thereafter, up to $4,000.

New law limits employer access to personal social media accounts. California AB 1844 enacts California Labor Code § 980 to prohibit California employers from requesting or requiring employees or applicants to provide their personal social media account access information. Employers are also prohibited from asking employees or applicants to access their personal social media accounts in the employer's presence. This new law also prohibits employers from retaliating against an employee or applicant who refuses to comply with a request or requirement that is made unlawful under the new law. Section 980 defines "social media" as any electronic service or account, or electronic content, including personal videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, and Internet website profiles or locations. There is an exception permitting an employer to request access to an employee's personal social media information that reasonably is believed to be relevant to an investigation of allegations of employee misconduct or violations of law or regulations. Also, an employer may request or require an employee to disclose a username, password, or "other method" of login for the purpose of accessing employer-issued electronic devices. Notably, the statute expressly states that the Labor Commissioner is not obligated to investigate or determine any violation of the act, which will permit claimed violations to proceed directly to court.

FEHC eliminated; duties transferred to the DFEH. SB 1038 eliminates the California Fair Employment and Housing Commission (FEHC), transfers the duties of the FEHC to the Department of Fair Employment and Housing (DFEH), and creates within the DFEH a new entity called the Fair Employment and Housing Council. The former FEHC had two main functions: (1) to adjudicate discrimination complaints prosecuted by the DFEH; and (2) to promulgate regulations and define and interpret the Fair Employment and Housing Act. Under SB 1038, the DFEH will assume the FEHC's regulatory powers, but there will no longer be an administrative body designated to decide DFEH-prosecuted complaints. The new Fair Employment and Housing Council within the DFEH will assume certain of the FEHC's former powers and duties and will decide which cases will be prosecuted by the DFEH. The DFEH is now authorized to file cases directly in California civil court.

FEHA's definition of "sex" expanded to include breastfeeding. The California Legislature has expanded the definition of "sex" in the Fair Employment and Housing Act (FEHA), which prohibits specified discriminatory practices in employment, to include breastfeeding and medical conditions relating to breastfeeding. (Under federal law, breastfeeding is not a protected classification.)

Religious accommodation duty under FEHA expanded. Under the FEHA, employers must reasonably accommodate an employee's religious beliefs and observances, unless doing so would impose an **undue hardship** on the employer. AB 1964 clarifies that religious dress and grooming practices are covered "beliefs and observances." In addition, AB 1964 clarifies that the "undue hardship" standard applied under the FEHA with respect to disability accommodations ("significant difficulty or expense"), rather than the narrower federal Title VII standard, will apply to the FEHA religious-discrimination accommodation. (Under Title VII, undue hardship may be established where accommodating the religious practice would result in more than a de minimis cost to the employer.) AB 1964 also specifies that segregation, such as assigning an employee to a stock room out of public view, is not an acceptable religious accommodation.

Temporary variable incentive payments that increase, but do not decrease, exempted from written commission agreement requirement. Labor Code § 2751, enacted in 2011, requires, effective January 1, 2013, that any agreement to pay sales commissions must be in writing and must set forth how commissions are to be calculated and paid. Currently, this requirement does not apply to short-term productivity bonuses (such as those paid to retail clerks) and certain bonus and profit-sharing plans. AB 2675, which amends Labor Code § 2751, adds a third exemption for temporary variable incentive payments that increase the payments to be made "under the written contract." While not free from doubt, this new exemption appears to address temporary additional "spiffs" that some employers use to motivate their commissioned salespeople to move particular merchandise in a designated time period, for example, an extra commission of $350 for each sale of 2012 vehicles made in the month before the new models appear.

DLSE revises WTPA notice template and FAQs. Labor Code § 2810.5, the California Wage Theft Prevention Act (WTPA) of 2011, requires employers to provide a written wage notice "at the time of hiring" to nonexempt employees. In April 2012, the DLSE revised its original notice template and issued revised and expanded FAQs for the second time since the WTPA went into effect. DLSE requires employers to provide the revised notice to employees hired after April 12, 2012. However, employees who received the prior version do not need to be provided with the revised notice until the information provided in a prior notice changes. The revised notice and FAQs are available on the DLSE website:http://www.dir.ca.gov/dlse/Governor_signs_Wage_Theft_Protection_Act_of_2011.html

The prior notice required that employers specify whether the "employment agreement" was oral or written. The revised notice now requires only that the employer indicate whether a written agreement designating the rates of pay exists and, if so, whether all rates and bases of pay are contained in the written agreement. If there is a written employment agreement but it does not specify the rates and bases of pay, then the employer should indicate "no" on the notice. The revised notice also makes the "Acknowledgment of Receipt" portion of the notice optional. If an employee refuses to sign the notice, the employer should indicate the refusal on the employer's file copy of the notice provided to the employee.

In its revised FAQs, the DLSE explained that "time of hire" for purposes of providing the notice means the date that both the employer and employee agree is the "time of hire," as long as it is not after the employee's start date.

Temporary-services employers must provide additional information on paystubs and in wage notice. Beyond the extensive paystub requirements already in place under Labor Code § 226, AB 1744, which becomes effective on July 1, 2013, requires a temporary-services employer to include in its paystubs the rate of pay and the total hours worked for each assignment. Moreover, AB 1744 further requires that wage notices prepared by a temporary-services employer pursuant to Labor Code § 2810.5 include the name, 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 whom the employee will perform work***. Thus, it appears that, each time an employee of a temporary-services employer is assigned to a new client, a new wage notice must be prepared. For purposes of this Act, "temporary-services employer" is defined as an employing unit that contracts to supply workers to perform services for the clients or customers and that performs all of the following functions: negotiates with clients and customers for matters such as the time and place where the services are to be provided; determines assignments or reassignments of workers, even if workers retain the right to refuse specific assignments; retains the authority to assign or reassign a worker to another client or customer when the worker is determined unacceptable by a specific client or customer; assigns or reassigns workers to perform services for clients or customers; sets the rate of pay of workers, whether or not through negotiation; pays workers from its own account or accounts; and retains the right to hire and terminate workers.

Wage agreements to pay a fixed amount as compensation for both straight time and overtime hours unenforceable. California AB 2103 amends the Labor Code and states that payment of a fixed salary to a nonexempt employee will be deemed to be payment only for the employee's regular nonovertime hours, notwithstanding any private agreement or "explicit mutual wage agreement" to the contrary. The legislative history of AB 2103 makes clear that its express intent is to overturn *Arechiga v. Dolores Press*, 192 Cal. App. 4th 567 (2011), in which a "mutual wage agreement" that specified a salary to be paid for a fixed number of regular and overtime hours per week was held enforceable under California law. AB 2103 adopts the California DLSE's position that any agreement to pay a fixed amount as compensation for both straight time and overtime hours is unenforceable, and, where such an agreement exists, the fixed amount would be deemed to compensate the employee only for the first forty (40) hours of work each week.

Workers' compensation reform. SB 863 is workers' compensation reform legislation. The legislation offsets increases in permanent disability benefits and potentially lowers system costs for employers by eliminating or reforming services that are frequently subject to litigation. For example, the bill eliminates increased permanent disability benefits associated with "add-on claims" (such as psychiatric, sexual-dysfunction, and sleep-disorder claims added on to the original injury), lowers permanent disability payments by 15% in some circumstances, limits access to doctors outside of the Medical Provider Network (MPN), and implements an Independent Medical Review (IMR) process pursuant to which the finding of the IMR is binding on all parties.

New law targets abuses of disability access law. In recent years, retailers and other establishments serving the public have been bombarded with lawsuits under public accommodation laws alleging that such establishments are not fully accessible to the disabled. (These lawsuits often address such issues as aisle width, counter height, etc.) SB 1186 limits such litigation arising from technical violations concerning disability access. The bill bars lawyers from issuing prelitigation "demands for money." In addition, SB 1186 requires attorneys to send a notice letter, listing any alleged construction-related violations, at least 30 days ***before*** filing a lawsuit. The bill also significantly reduces potential damages against business owners who correct alleged violations within 30-60 days of receiving such a notice from a minimum of $4,000 to as little as $1,000. SB 1186 also prevents "stacking" of multiple claims, wherein a claimant makes repeated visits to the same establishment in order to increase monetary damages. SB 1186 now requires a plaintiff to explain the need for multiple visits to the same business with a known uncorrected barrier to access.

New human trafficking posting requirements. SB 1193 requires certain businesses and establishments to post a Department of Justice model notice that contains information related to slavery and human trafficking, including information related to organizations that provide services in support of the elimination of slavery and human trafficking. This law requires covered establishments to post the notice in a conspicuous place near the entrance of the establishment or in another conspicuous location in clear view of employees and the public where similar notices are customarily posted. Businesses subject to the posting requirement are: (1) Off-sale general licensees under the Alcoholic Beverage Control Act; (2) adult or sexually oriented businesses; (3) airports; (4) intercity passenger rail or light rail stations; (5) bus stations; (6) highway truck stops; (7) emergency rooms within general acute-care hospitals; (8) urgent-care centers; (9) farm labor contractors; and (10) privately operated job recruitment centers.

New law authorizes evaluation of potential retirement savings law. California SB 1234, the California Secure Choice Retirement Savings Trust Act (the "Act"), authorizes the establishment of a board to evaluate the feasibility of a state-mandated retirement savings program. If adopted, the program would require private nonunionized employers without a retirement or 401(k) plan to offer eligible employees the option to contribute a portion of their salary or wages to a State-created retirement savings account. Unless they opt out, eligible employees will be required to participate by contributing three percent of their wages to this program. Before the program can be established, there are several preconditions that must be met. First, the appointed board must conclude that this program would be legally and financially possible. Legally, the individual employee retirement accounts would have to receive the equivalent of IRA treatment from the IRS so that the compulsory contributions would not be subject to immediate income tax. Also, the entire program would have to receive an exemption from ERISA's detailed regulation of retirement plans, which might not happen since this program is clearly intended to be a retirement plan. Finally, the Legislature later would have to authorize actual commencement of this program.

New Pregnancy Disability Leave regulations take effect. The California Fair Employment and Housing Commission has promulgated new pregnancy disability leave ("PDL") regulations that became effective on

December 30, 2012. The Fair Employment and Housing Act ("FEHA") has long obligated an employer with five or more employees to provide an employee with up to four months of PDL per pregnancy during a twelve-month period, and there are no minimum-hours-worked or length-of-service requirements. The new regulations clarify some of the prior requirements pertaining to PDL, including specifying that breastfeeding is protected under the PDL laws. The new PDL regulations also require employers to provide employees with reasonable advance notice of employees' rights and obligations under the Fair Employment and Housing Act ("FEHA") regarding pregnancy, childbirth, or related medical conditions. The PDL regulations provide two new alternative notices that comply with this requirement – Notice A (for employers with fewer than 50 employees) and Notice B (for employers with more than 50 employees that also are required to comply with the California Family Rights Act and the federal Family Medical Leave Act). Employers are required to post the new notices in a "conspicuous place or places where employees congregate," and electronic or email notification is sufficient. A copy of the applicable notice also must be provided as soon as practicable after the employee notifies the employer of her pregnancy or requests a reasonable accommodation, transfer, or leave. Employers who fail to provide the required notice are prohibited from taking any "adverse action" against an employee, such as denying a reasonable accommodation, transfer, or leave for pregnancy-disability purposes. An employer also must continue to provide health-insurance coverage to an eligible employee during the PDL, for up to four months, at the same level and under the same conditions as existed prior to the employee's leave. In addition, if the employee subsequently takes leave under the California Family Rights Act ("CFRA") to bond with a baby, the employer must continue to provide health insurance for the period of the CFRA leave, up to twelve weeks.

When an employee on PDL leave is ready to return to work, an employer may no longer refuse to reinstate the employee to the same position on the grounds that preserving the employee's job duties (such as leaving it unfilled or filling it with a temporary employee) would substantially undermine the employer's ability to operate the business safely and efficiently. Now an employer may deny reinstatement to the same position only where the position no longer exists for reasons unrelated to the leave. If an employer has legal grounds not to reinstate the employee to the same position, it must place the employee in a comparable position, unless it can prove by a preponderance of the evidence that she would not have been offered a comparable position if she had been continuously at work. Otherwise, the employer has an affirmative duty to provide notice to the employee of available comparable positions. A position is "available" if it is open within 60 calendar days of the employee's reinstatement date.

The new PDL regulations prohibit employers from discriminating against or harassing an employee based on "perceived pregnancy," meaning that the employee is "regarded or treated by an employer or other covered entity as being pregnant or having a related medical condition." An employer, however, is not required to reasonably accommodate, transfer, or provide leave to an employee based on "perceived pregnancy."