Morgan Lewis

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labor and employment lawflash

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Another New Wave of Employment Laws in California

Newly signed bills set forth procedures and timing for providing personnel records, accurate wage statements and Wage Theft Notice for temporary workers, and laws on social media and religious dress in the workplace.

In September 2012, California Governor Jerry Brown enacted more than 850 new laws—a number of which relate to employment. Almost all of the new employment laws will become effective on January 1, 2013. California employers will need to take prompt action to ensure compliance, including revising employment policies and practices. A reference chart summarizing the most important employment-related changes is provided below, followed by a more detailed discussion of these new laws and their impact.

Bill	Effective Date	Topic	Description
AB 2674	1-1-2013	Requires employers to respond to requests for personnel files within 30 days.	Amends Cal. Labor Code § 1198.5 to require employers to respond to employees' written requests for personnel files within 30 days. Employees' "representatives" also may make the request. Failure to comply can result in a $750 penalty, injunctive relief, and attorneys' fees. Also amends Section 226 to require the production of copies of wage statements that contain all of the information required by Section 226(a) when requested by an employee.
SB 1255	1-1-2013	Defines "injury" for failure to provide accurate wage statements under Cal. Labor Code § 226.	Amends Cal. Labor Code § 226, which imposes statutory penalties and other remedies where employees are injured as a result of employers' intentional failure to provide specified information on wage statements. The amendment defines "injury" so that employees may recover under the statute even in the absence of evidence of actual injury caused by the alleged deficiency in the wage statement.
AB 1744	7-1-2013; 1-1-2013	Adds requirements for wage statements and Wage Theft Act notices provided to temporary services employees.	Amends Cal. Labor Code § 226(a) to require temporary services employers to include the rate of pay and the total hours worked for each temporary services assignment on wage statements. (Effective 7-1-2013.) Amends Cal. Labor Code § 2810.5 to require employers to provide a Wage Theft Act notice that includes contact information for the employer and the legal entity for whom the employee will perform work. (Effective 1-1-2013.)
AB 1964	1-1-2013	Expands California's discrimination law to	Amends Cal. Fair Employment and Housing Act (FEHA), Cal. Gov't Code §§ 12940, *et seq.*, to

		prohibit discrimination and require accommodation of religious dress and grooming practices.	expand the definition of "religion." The law prohibits discrimination and requires accommodation (except in cases of undue hardship) for religious dress and grooming practices.
AB 2386	States it is declaratory of current law	Expands FEHA to prohibit discrimination against breastfeeding mothers.	Amends FEHA to add "breastfeeding" and "medical conditions related to breastfeeding" to the statutory definition of "sex." The new amendment states that it is declaratory of current law.
AB 2103	1-1-2013	Requires that nonexempt employees paid on a salary basis be paid overtime above and beyond salary.	Amends Cal. Labor Code § 515(d) to provide that, regardless of the agreement between an employee and an employer, a salaried, nonexempt employee must be paid for each overtime hour at a rate that is at least 1.5 times the weekly salary divided by no more than 40.
AB 2492	1-1-2013	Expands whistleblower protection under California's False Claims Act.	Amends Cal. Gov't Code § 12653 to expand whistleblower protections under California's False Claims Act. Adds a new section that applies not only to employees but also to all contractors and agents.
AB 2675	1-1-2013	Refines definition of "commissions" under new law requiring commission plans to be in writing.	Amends new Cal. Labor Code § 2751, which requires that commission plans be in writing and acknowledged by employees. The amendment refines the definition of "commissions" to exclude "[t]emporary, variable incentive payments that increase, but do not decrease, payment under the written contract."
AB 1844	1-1-2013	Restricts employers from requesting access to social media.	Adds Cal. Labor Code § 980, which restricts companies from asking job applicants and employees for access to their social media accounts. Access may be requested as part of an investigation.
AB 1855	1-1-2013	Requires written agreements for certain types of labor and services contracts.	Amends Cal. Labor Code § 2810 to add warehouse contractors to the list of vendors (previously construction, farm labor, garment, janitorial, and security guard) for whom the vendor contract must contain specific language regarding payment of wages.
AB 1875	1-1-2013	Limits depositions to one seven-hour day.	Amends Cal. Code of Civ. Proc. § 2025.290 to impose a one-day, seven-hour time limit on depositions. The law includes an express exception for employment cases.
AB 1450	**Vetoed**	Sought to prohibit discrimination in employment based on unemployment status.	Proposed amendment to Cal. Labor Code sought to prohibit job discrimination against prospective applicants because they are currently unemployed. Governor Brown did *not* sign this bill.
AB 889	**Vetoed**	Sought to require certain labor protections for domestic workers.	Proposed amendment to Cal. Labor Code sought to require overtime pay and meal and rest breaks for certain domestic workers. Governor Brown did *not* sign this bill.

AB 2674: Procedures and Timing for Providing Personnel Records Under Labor Code § 1198.5

The Bill

AB 2674 imposes requirements on how and when employers respond to employees' requests for inspection and copying of their personnel files. Currently, Labor Code § 1198.5 provides employees the right to inspect, "within a reasonable time" after the request, their personnel records "relating to the employee's performance or to any grievance concerning the employee." Effective January 1, 2013, AB 2674 makes the following changes to Section 1198.5:

- The request also may be made by an employee's "representative," which is a person authorized in writing by the employee. An employer need not respond to more than 50 requests by a "representative" in one calendar month.
- Employers must provide a copy of personnel records or make them available for inspection within 30 calendar days of a written request. The parties can agree to extend this deadline but only up to five additional days.
- The request must be in writing. Employers also must provide a request form for employees' use, but employees are not required to use the form.
- For *current* employees, inspection or copies must be provided at the place where the employee reports to work or at another mutually agreeable location. If the employee is required to go to a different location, no loss of compensation to the employee is permitted.
- For *former* employees, inspection or copies must be provided at the location where the employer stores the records, unless the parties mutually agree in writing to a different location. Former employees may receive a copy by mail if they reimburse the employer for actual postal expenses. Employers are required to respond to only one request per year from former employees.
- For *former employees who were terminated for a violation of law or policy involving harassment or workplace violence*, employers may comply by (i) making the personnel records available to the former employee for inspection at a location other than the workplace that is within a reasonable driving distance of the former employee's residence or (ii) providing a copy by mail.
- Employers may redact the names of any nonsupervisory employees.
- The requirements do not apply to (1) records relating to the investigation of a possible criminal offense; (2) letters of reference; (3) ratings, reports, or records that were obtained prior to the employee's employment, prepared by identifiable examination committee members, or obtained in connection with a promotional examination.
- Employers must maintain copies of personnel records for a minimum of three years after termination.
- If a current or former employee files a lawsuit that relates to a personnel matter, the right to inspect or copy files ceases during the pendency of the lawsuit.
- The requirements do not apply to employees covered by a collective bargaining agreement that provides for (1) wages, hours of work, and working conditions; (2) a procedure for the inspection and copying of personnel records; (3) premium wage rates for all overtime hours worked; and (4) a regular rate of pay of not less than 30% more than the state minimum wage rate.
- An employer that fails to comply is liable to the employee or the Labor Commissioner for a penalty of $750, plus injunctive relief and attorneys' fees. An employer may assert impossibility of performance as an affirmative defense to an alleged violation.

In addition, AB 2674 amends Labor Code § 226(a) to require that, when an employee requests copies of his or her itemized wage statements, the employer must produce a copy that is actually a duplicate of the original itemized statement or a computer-generated record that contains *all* of the information required by Section 226(a).

Practical Implications for California Employers

California employers should create a request form for inspection or a copy of personnel records. Employers should designate an individual to whom requests should be made and put in place processes to ensure

compliance. For example, employers should track the dates on which requests are made to ensure timely responses, track the number of requests made by employee representatives, and review retention policies and practices to ensure that covered personnel records are maintained for at least three years after termination. Employers should also train human resources employees regarding these new requirements and update all relevant policies, procedures, and handbooks.

Employers should ensure they can reproduce either wage statements that are duplicative of those provided to employees or wage statements that contain all of the Section 226(a) information. Currently, some payroll systems do not have this capability. Employers should also remember that Labor Code § 226(c) contains different requirements for wage-related records. That provision requires employers to provide copies of or an opportunity to inspect wage-related records within 21 days of a written or oral request.

SB 1255: Presumed "Injury" for Failing to Provide Accurate Wage Statements Under Labor Code § 226

The Bill

Labor Code § 226(a) requires employers to provide itemized wage statements containing nine specific pieces of information. Section 226(e) authorizes employees to recover the greater of actual damages or up to $4,000 in statutory penalties, as well as costs and attorneys' fees, if the employee suffers an "injury" as a result of a "knowing and intentional failure by an employer to comply" with the requirements of Section 226(a). Before the new law, the term "injury" was not defined by statute, and multiple state and federal cases required an employee to show actual injury as a result of how a wage statement displayed information in order to recover a penalty. SB 1255 now defines "injury" to mean that the employer does one of the following:

- Entirely fails to provide a wage statement.
- Fails to provide accurate and complete information as required by Section 226(a) and, as a result, "the employee cannot promptly and easily determine from the wage statement alone one or more of the following":
  - The amount of the gross or net wages paid to the employee during the pay period, the total hours worked, the number of piece-rate units earned, all deductions, the dates of the period for which the employee is being compensated, and all hourly rates in effect during the pay period
  - The deductions from gross wages made by the employer to determine the net wages
  - The name and address of the employer and, if the employer is a farm-labor contractor, the name and address of the legal entity that secured the services of the employer during the pay period
  - The name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number

SB 1255 provides that a person can "promptly and easily determine" information if a reasonable person would be able to readily ascertain the information without reference to other documents or information. Isolated and unintentional errors made as a result of a clerical or inadvertent mistake do not constitute a "knowing and intentional failure." In determining whether a "knowing and intentional failure" has occurred, the fact finder may consider whether the employer, prior to an alleged violation, has adopted and was in compliance with a set of policies, procedures, and practices that fully comply with Section 226. The requirements of this bill go into effect on January 1, 2013.

Practical Implications for California Employers

SB 1255 defines Section 226 to permit the recovery of penalties under certain circumstances even in the absence of evidence that employees reviewed or relied on the wage statements in a way that detrimentally affected them. Employers should carefully evaluate both the substance and format of wage statements to make any changes necessary to comply with all requirements of Section 226. The wage statements should include the required information in a clear and readily understandable manner, and training or written guidance on understanding wage statements should be considered.

AB 1744: Itemized Wage Statements and Wage Theft Notice for Temporary Workers Under Labor Code §§ 226, 2810.5

The Bill

AB 1744 addresses wage statements for temporary services employees. Wage statements provided to temporary workers must include the rate of pay and total hours worked for each temporary services assignment. In addition, on the Wage Theft Notice mandated by Labor Code § 2810.5, employers must provide the physical address of the main office, the mailing address of the main office if different from the physical address, the telephone number of the legal entity for whom the employee will perform work, and any other information the Labor Commissioner deems material and necessary. Security services companies that are licensed by the Department of Consumer Affairs and that provide only security services are not covered. The requirements of this bill go into effect on July 1, 2013.

Practical Implications for California Employers

Employers of temporary workers should evaluate the system or program they use to provide wage statements to their temporary workers to ensure the system or program is able to provide the information required by this bill. In many cases, employers may need to consult with vendors and make changes to the programs or systems they use to generate paychecks and paystubs in order to capture the additional information required, including generating multiple paystubs for one paycheck or generating a paystub separate and detached from the paycheck. Employers should also update their Wage Theft Notice in accordance with this new law.

AB 1964: No Employment Discrimination Based on Religious Dress and Grooming Practices

The Bill

Titled "The Workplace Religious Freedom Act of 2012," AB 1964 amends California's Fair Employment and Housing Act (FEHA), Cal. Gov't Code §§ 12940 *et seq*., as of January 1, 2013. The bill makes several changes related to religious dress and grooming practices.

First, AB 1964 expands the definition of "religion" and "religious creed" to include "religious dress practice" and "religious grooming practice." "Religious dress practice" is "construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed." "Religious grooming practice" is "construed broadly to include all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed."

Second, AB 1964 requires employers to *accommodate* employees' religious dress and grooming practices unless the employer can show an "undue hardship." The bill incorporates the "undue hardship" standard codified in Government Code § 12926(t). This standard requires an employer to demonstrate "significant difficulty or expense" when considered in light of several factors, including the nature and cost of the accommodation, the overall financial resources of the facility or covered entity involved, and the type of operations of the workforce.

Third, the bill amends FEHA to state the following: "An accommodation of an individual's religious dress practice or religious grooming practice is not reasonable if the accommodation requires segregation of the individual from other employees or the public." Cal. Gov't Code § 12940(l)(2).

Practical Implications for California Employers

Employers should update their handbooks, policies, and procedures to reflect the new broadened scope of FEHA. Employers should pay particular attention to policies regarding uniforms and standards of appearance. Given that the "undue hardship" standard may be a challenging burden to meet, employers should use caution before denying any request for accommodation of religious clothing, piercings, and jewelry or proscribing the length of employee's head hair or facial hair. This is especially true for employers who require uniforms or uniform appearance for aesthetic or customer-relations reasons. There is no indication that the bill is meant to preempt

other preexisting health and safety requirements or to exempt employees from such local, state, and federal regulations.

AB 2386: No Employment Discrimination Against Breastfeeding Mothers

The Bill

AB 2386 expands the scope of FEHA to protect breastfeeding mothers against employment discrimination. Specifically, AB 2386 adds "breastfeeding" and "medical conditions related to breastfeeding" to the statutory definition of "sex." AB 2386 specifies that it is "declaratory" of current law and should not be construed as creating new law.

Practical Implications for California Employers

Employers should be mindful that AB 2386 must be read in conjunction with Labor Code §§ 1030–1033, which require an employer to provide a reasonable amount of break time to accommodate an employee who needs to express breast milk and also requires that an employer provide adequate private space for an employee to express breast milk. Whereas previously under the Labor Code an employee's only remedy for an employer's noncompliance was an action for civil penalties ($100 per instance).

Employers should update their handbooks, policies, and procedures to reflect the new broadened scope of FEHA. Employers also should carefully review their policies and procedures relating to accommodations for expressing breast milk to ensure they are fully compliant with the requirements of the Labor Code.

AB 2103: Restrictions on Method of Calculating Nonexempt Employees' "Regular Rate of Pay"

The Bill

AB 2103 amends Labor Code § 515(d) to clarify that salaried, nonexempt employees must be paid for each overtime hour at a rate equal to at least 1.5 times their salary divided by 40, regardless of the agreement between the employer and the employee.

Many full-time, nonexempt employees are paid on a salary basis, meaning that their salary is not defined by an hourly rate (for example, $10 per hour) but instead by a yearly or monthly salary (for example, $40,000 per year). When such employees work more than eight hours in one day or 40 hours in one week, they are entitled to overtime. In *Arechiga v. Dolores Press, Inc.*, 192 Cal. App. 4th 567 (2011), a California court of appeal upheld an explicit written mutual wage agreement that predetermined a nonexempt employee's overtime compensation and included it as part of the employee's salary. The *Arechiga* court concluded that Labor Code § 515 did not specifically invalidate such agreements. The new law overrules the decision in *Arechiga.* To calculate the appropriate overtime rate, employers must follow Labor Code § 515(d), which states that, "[f]or the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee's regular hourly rate shall be 1/40th of the employee's weekly salary." AB 2103 adds the following to Section 515(d)(2): "Payment of a fixed salary to a nonexempt employee shall be deemed to provide compensation only for the employee's regular, non-overtime hours, notwithstanding any private agreement to the contrary."

Practical Implications for California Employers

AB 2103 provides that the method of calculating overtime for salaried, nonexempt employees cannot be altered by any agreement between the employer and the employee. Regardless of such an agreement, overtime for a salaried, nonexempt employee must be calculated as follows: (1) divide the weekly salary by no more than 40 to get a "Regular Rate"; (2) multiply the Regular Rate by 1.5 to get the applicable "Overtime Rate"; and (3) pay the Overtime Rate for each overtime hour worked during the week.

AB 2492: Expansion of Whistleblower Protections Under California's False Claims Act

The Bill

AB 2492 expands a number of provisions of California's False Claims Act (CFCA), Cal. Gov't Code §§ 12650 *et seq*., including the whistleblower provision. In general, the CFCA prohibits the submission of false claims to the state government for money, property, or services. The law authorizes individuals (called qui tam plaintiffs or relators) to bring civil actions to enforce the law and to share in any monetary recovery. Qui tam plaintiffs may share in any monetary recovery even if they participated in the wrongful conduct. AB 2492 expands the CFCA's existing whistleblower provision codified at Government Code § 12653.

AB 2492 repeals the prior version of Section 12653 and adds a new section that applies not only to employees but also to all contractors, agents, and "associated others." Relief includes reinstatement with seniority, two times the amount of back pay, interest on the back pay, special damages, punitive damages, costs, and attorneys' fees. The amendment also clarifies that the whistleblower provision applies when qui tam plaintiffs are retaliated against for furthering an action under the CFCA or for trying to stop a violation. Currently, the provision applies only after a qui tam plaintiff discloses information about the false claim *to the government*. The amendment also clarifies that defendants may recover attorneys' fees against either the state or the qui tam plaintiff (whichever prosecuting party remains in the action) if the claim was frivolous.

Practical Implications for California Employers

Employers should carefully evaluate their policies and practices regarding whistleblowing and retaliation. Employers that do business with the state should be particularly cautious when addressing employee complaints about any work-related matter.

AB 2675: Limitation on Definition of "Commissions" Under Labor Code § 2751

The Bill

Last year, California enacted revisions to Labor Code § 2751, which mandated that any employment agreement involving "commission" payments be put into writing, that a signed copy of the agreement be given to the employee, and that the employer obtain a signed receipt from the employee. Employers must be in compliance with this law by January 1, 2013. AB 2675 refines the definition of "commissions" in Section 2751. The amendment states that the term "commissions" does not include "[t]emporary, variable incentive payments that increase, but do not decrease, payment under the written contract."

Practical Implications for California Employers

Many retail sales representatives receive at least partial compensation from commissions, which often are adjusted based upon the purchasing trends of consumers. These temporary sales incentives may be short in duration and, for example, may apply only to a limited number of products or services offered for a sale during a given day or week. AB 2675 makes it clear that such temporary incentives are not "commissions" and, therefore, do not trigger the need for a completely updated commission agreement. Since this is a new law, there is little case authority to provide further clarity on how courts will interpret the term "commissions." If in doubt, the safest course is to comply with Section 2751.

AB 1844: Restriction on Employer Requests for Access to Social Media

The Bill

AB 1844 restricts companies from asking job applicants and employees for access to their social media accounts, such as Facebook and Twitter. Under the new law, employers may not require or request that an employee or job applicant disclose a username or password; access personal social media in the employer's presence; or divulge personal social media. Employers still may request access to social media that may be relevant to an

investigation of employee misconduct or violations of law—but the social media can be used solely for those purposes. Employers also may request disclosure of an employee's username or password for the purpose of accessing an electronic device that was issued by the employer. The new law also contains an anti-retaliation provision.

Practical Implications for California Employers

Employers should review and update their social media policy. The policy should be broad enough to cover a broad range or social media platforms (including future platforms) but specific enough to provide employees with real guidance on permissible social media use. In addition to complying with AB 1844, employers' social media policies should not be so restrictive as to "chill" their employees' right to engage in concerted activities under Section 7 of the National Labor Relations Act (NLRA). For example, the National Labor Relations Board (NLRB) has found an employer's policy that prohibited "[m]aking disparaging comments about the company through any media" to be unlawful because it contained no limiting language that would clarify to employees that the rule does not restrict their Section 7 rights. Additionally, NLRB administrative law judges have found that employers have violated the NLRA by disciplining or terminating employees based on online activity that is deemed to be "concerted" and protected by Section 7.

AB 1855: Written Agreements Required for Certain Types of Labor and Services Contracts

The Bill

AB 1855 expands the categories of vendors for whom a business is liable if the business "knows or should know that the contract . . . does not include funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws or regulations governing the labor or services to be provided." AB 1855 amended Labor Code § 2810 to add "warehouse contractors" to the list that previously included only construction, farm labor, garment, and security guard providers.

Practical Implications for California Employers

Employers having vendor contracts for any of the specified services should make sure that their contracts satisfy the relatively onerous safe-harbor provisions of Labor Code § 2810. The section does not apply to a person or entity "who executes a collective bargaining agreement covering the workers employed under the contract or agreement."

AB 1875: Time Limit on Depositions Is *Not* Applicable to Employment Cases

The Bill

Like the Federal Rules, AB 1875 imposes a limit on depositions to one seven-hour day unless ordered otherwise by the court. But the time limit does *not* apply to "any case brought by an employee or applicant for employment against an employer for acts or omissions arising out of or relating to the employment relationship."

Practical Implications for California Employers

Due to the express exception for employment cases, AB 1875 should not have an impact on employers when employment-related cases are brought in California state court.

AB 1450: Veto of Proposed Law Prohibiting Discrimination Based on Unemployment Status

The Bill

There was significant media attention on AB 1450, which would have amended the Labor Code to prohibit job discrimination against prospective applicants because they are currently unemployed. Governor Brown did *not* sign this law into effect.

Contacts

Morgan Lewis will host a webinar, "New California Employment Laws for 2013: What Employers Need to Know," to discuss these new laws in more detail. Watch for the announcement of the date and time.

We have a nationwide team of attorneys who advise employers in designing and implementing hiring practices and policies that comply with all applicable legal standards. For questions on any of the issues raised in this LawFlash, please contact one of the following Morgan Lewis attorneys:

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About Morgan Lewis's Labor and Employment Practice

Morgan Lewis's Labor and Employment Practice includes more than 265 lawyers and legal professionals and is listed in the highest tier for National Labor and Employment Practice in *Chambers USA 2011*. We represent clients across the United States in a full spectrum of workplace issues, including drafting employment policies and providing guidance with respect to employment-related issues, complex employment litigation, ERISA litigation, wage and hour litigation and compliance, whistleblower claims, labor-management relations, immigration, occupational safety and health matters, and workforce change issues. Our international Labor and Employment Practice serves clients worldwide on the complete range of often complex matters within the employment law subject area, including high-level sophisticated employment litigation, plant closures and executive terminations, managing difficult HR matters in transactions and outsourcings, the full spectrum of contentious and collective matters, workplace investigations, data protection and cross-border compliance, and pensions and benefits.

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