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together

California Employment Law Year in Review

New California Employment Laws for 2015

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Discrimination and Retaliation

AB 2053

Harassment Training

- Supervisor harassment training must include prevention of “abusive conduct,” even if such conduct may not constitute legally prohibited discrimination or harassment.
- “Abusive conduct” is conduct, with malice, that a reasonable person would find “hostile, offensive, and unrelated to an employer’s legitimate business interests.”
- Examples include “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.”
- Not effective until January 1, 2015, but employers should amend their training now to comply with the new requirement.

AB 1443

Discrimination Protection for Unpaid Interns and Volunteers

- Extends certain workplace protections against discrimination and harassment under FEHA to unpaid interns and volunteers
 - Amends California Government Code section 12940(c), which prohibits discrimination in apprentice training programs, to also prohibit discrimination on the basis of any legally protected characteristic against unpaid interns and volunteers
 - Amends California Government Code section 12940(j)(i) to prohibit harassment against unpaid interns or volunteers because of a legally protected characteristic
 - *An employer may now potentially be liable for nonemployees allegedly harassing the employer's unpaid interns and volunteers*

AB 1443

Discrimination Protection for Unpaid Interns and Volunteers

- Amends California Government Code section 12940(c) to prohibit discrimination based on protected characteristics in the “selection, termination, training, or other terms” of apprentices, unpaid interns, and volunteers
- Extends the existing religious belief discrimination protection and accommodation requirements in California Government Code section 12940(l)(i) to apprentices, unpaid interns, and volunteers

AB 1443

Discrimination Protection for Unpaid Interns and Volunteers

- Recommendations
 - Update employee handbooks, discrimination and harassment policies, and sexual harassment training materials to make clear that protections apply to unpaid interns and volunteers
 - Make unpaid interns and volunteers aware of mechanisms and procedures for reporting concerns regarding alleged inappropriate conduct

AB 1660

Discrimination Protection for Holders of Undocumented Resident Driver's Licenses

- Makes discrimination against the holder of an undocumented resident driver's license a violation of FEHA.
 - Employers will still need to meet their obligations under federal law to require employees to provide documented proof of identity and legal authorization to work in the United States.

AB 1660

Discrimination Protection for Holders of Undocumented Resident Driver's Licenses

- Recommendations
 - Employers should exercise caution in requiring an employee to provide a valid driver's license. Employers should not request an employee to present a driver's license unless possession of a driver's license is a lawful requirement of employment.
 - Employers also should exercise caution in responding to an employee who presents a driver's license issued under Vehicle Code section 12801.9 (undocumented residents). Employers who learn that an employee possesses such a driver's license may not discriminate against the employee for possessing the license, must keep the license information confidential, and may only use the license to establish identity and authorization to drive.

AB 2288 (New Labor Code § 1311.5)

Child Labor Protection Act of 2014

- Provides treble damages to an employee subjected to discrimination or retaliation for filing a Labor Code claim alleging a violation that occurred while the employee was a minor.
- Tolls Labor Code claim until a minor employee turns age 18.
- Imposes a \$25,000 to \$50,000 penalty for each violation presenting an imminent danger or a substantial threat of death or serious physical harm to a minor 12 years of age or younger.

AB 2617

No Waiver of Rights or Agreements to Arbitrate Claims Under Hate Crime Statute

- Prohibits waiver of rights under California Civil Code sections 51.7, 52, and 52.1
- California Civil Code sections 51.7, 52, and 52.1 forbid violence or threats of violence based upon political affiliation, involvement in a labor dispute, sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation
- Also prohibits agreement to arbitrate these claims
- Arbitration agreement prohibition likely to be held preempted under Federal Arbitration Act

AB 802

Arbitration

- Amends California Code of Civil Procedure section 1281.96 to create additional disclosure requirements for private arbitration companies. Such companies must now also disclose whether arbitration was demanded pursuant to a pre-dispute arbitration clause and, if so, whether the pre-dispute arbitration clause designated the administering private arbitration company.
- Private arbitration companies must disclose all required information in a format that is searchable and sortable, and accessible from an Internet link on the arbitration company's webpage.

AB 2751

Prohibiting Retaliation Against Immigrant Workers for Engaging in Protected Activities

- Defines “unfair immigration-related practice” as including the threatening to file or the filing of a false report or complaint with any state or federal agency.
- Prohibits discriminating, retaliating, or taking any adverse action against an employee for updating or attempting to update personal information “based on a lawful change of name, social security number, or federal employment authorization document.”
- Civil penalties of up to \$10,000, which are available against an employer per employee for each violation, are payable to the aggrieved employee.

AB 2751

Prohibiting Retaliation Against Immigrant Workers for Engaging in Protected Activities

- Implications for employers
 - Employers can be subject to penalties for engaging in an “unfair immigration-related practice.”
 - Employers should promptly seek advice of legal counsel regarding any uncertainty about whether an employment decision/conduct constitutes an “unfair immigration-related practice,” even when the employer believes the purpose of such conduct is nonretaliatory.
 - Allows employers to discipline employees for making false statements separate and apart from their immigration status
 - *BUT -- employers may not take action against workers for updating their personal information based on lawful changes.*

AB 2494

Resurrection of Monetary Sanctions for Frivolous Litigation Tactics

- Revives section 128.5 of the Civil Procedure Code and provides judges and arbitrators with the authority to award monetary sanctions when litigants employ bad-faith litigation tactics that are frivolous or solely intended to cause unnecessary delay.

Leave, Benefits, and Miscellaneous

AB 1522

Healthy Workplaces, Healthy Families Act

- The Healthy Workplaces, Healthy Families Act of 2014 (AB 1522) makes California the second state (after Connecticut) to require employers to provide paid sick leave.
- Effective July 1, 2015, employers must provide at least 24 hours or 3 days of paid sick time to current and new employees (except for limited exceptions).
- **Do not be lulled into a false sense of security!** There is currently no exemption from burdensome requirements for employers with more generous policies.

AB 1522

Healthy Workplaces, Healthy Families Act

- The devil is in the details!

AB 1522

Healthy Workplaces, Healthy Families Act

- Who is covered?
 - An employer that employs one or more persons in the State of California for more than 30 days in a year is required to provide sick leave.
- Track:
 - Employees outside of California who travel to California to perform work for more than 30 days in a year.
 - Intermittent workers (part-time, temporary) as to when they trigger the 30-day requirement. Cannot exclude such workers from coverage.

AB 1522

Healthy Workplaces, Healthy Families Act

- Limited exceptions for employees not covered by the new law are:
 - Employees covered by a valid collective bargaining agreement (CBA) that provides paid leave and has other required provisions
 - Employees in the “construction industry” covered by a valid CBA
 - Providers of in-home supportive services
 - Flight deck or cabin crew members of air carriers if they receive paid time off
- Review the CBA to make sure those employees fall within the exception.

AB 1522

Healthy Workplaces, Healthy Families Act

- What must employers provide?
- Two methods: Accrual and Lump Sum Advance

AB 1522

Healthy Workplaces, Healthy Families Act

- Accrual
 - An employee must accrue paid sick time at the rate of one hour for every 30 hours worked. (For a full-time employee working 2,080 hours per year, that would be 69.33 hours (8.66 days) per year.)
 - The employer may prohibit use until the employee completes 90 days of employment.
 - May limit use to 3 days or 24 hours in each year of employment.
 - Accrued sick days must carry over to the following year of employment, but an employer can cap an employee's total accrual to 6 days or 48 hours. (Compare to SF Ordinance cap of 72 hours.)

AB 1522

Healthy Workplaces, Healthy Families Act

- Lump Sum Advance
 - Employers may provide three days of paid sick leave in a lump sum at the beginning of each year to employees. (Need to define “year,” e.g., calendar.)
 - No carryover of sick days is required.

AB 1522

Healthy Workplaces, Healthy Families Act

- For both Accrual and Lump Sum Advance
 - No requirement to provide compensation to an employee for any accrued but unused paid sick days upon separation from employment unless otherwise provided by law or policy, e.g., PTO policies.
 - Employees who separate from employment and are rehired within one year by that same employer must have their accrued but unused paid sick leave banks reinstated and be allowed to use them immediately. (Law is unclear, but we assume that there is no obligation to reinstate if paid out!)
- Detail: If you have a more generous sick or PTO policy, make sure the accrual matches the requirement of law.

AB 1522

Healthy Workplaces, Healthy Families Act

- Permitted uses: Broad, and will require changes to most policies
 - For employee's own need or for that of a "family member" for:
 - *Diagnosis, care, or treatment of an existing health condition; or*
 - *Preventive care*
 - Family member: A biological, adopted, or foster child, stepchild or legal ward, or a child to whom the employee stands *in loco parentis*; a biological, adoptive, or foster parent, stepparent, or legal guardian of any employee or the employee's spouse or registered domestic partner, or a person who stood *in loco parentis* when the employee was a minor; a spouse or registered domestic partner; a grandparent; a grandchild; or a sibling
 - An employee who is a victim of domestic violence, sexual assault, or stalking

AB 1522

Healthy Workplaces, Healthy Families Act

- Employer control over use:
 - Employer may set a reasonable minimum increment, not to exceed two hours, for the use of paid sick leave.
 - No regulation or guidance on whether an employer can request documentation. (Presumably no conflict with other laws such as FMLA and CFRA that allow for documentation.)
 - Employers can require notice of paid sick time when foreseeable, but they cannot punish employees who take time off that is not foreseeable because the statute prevents retaliation.
- Again: Review your policies!

AB 1522

Healthy Workplaces, Healthy Families Act

- How sick leave is paid
 - Must pay sick leave taken by an employee no later than the payday for the next regular payroll period.
 - Special attention to calculation of rate of pay! If in the 90 days of employment before taking accrued sick leave an employee had different hourly pay rates, was paid by commission (outside sales!) or piece rate, or was a nonexempt salaried employee, then the rate of pay is calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.
- Many policies only pay the base rate. Do not track hours/pay for outside sales. (Requesting DLSE guidance)

AB 1522

Healthy Workplaces, Healthy Families Act

- Employer Notice, Posting, and Recordkeeping Requirements
 - Employers must notify employees of their right to paid sick leave by THREE means:
 - (1) *Employers must display a poster, created by the Labor Commission.*
 - (2) *Employers must include an additional clause regarding sick leave entitlement in the Wage Theft Prevention Act notice for nonexempt employees.*
 - (3) *Wage Statement: Employers must provide each employee with written notice at the time of each payment of wages showing “the amount of paid sick leave available, or paid time off leave an employer provides in lieu of sick leave.” Such “payday” notice may be included in an employee’s wage statement or in a separate, simultaneous writing.*
- The Wage Statement requirement is significant for many employers.

AB 1522

Healthy Workplaces, Healthy Families Act

- Recordkeeping: An employer must keep for at least three years records documenting the hours worked and paid sick days accrued and used by an employee. Employees may inspect the records in the same manner as other personnel records available to an employee as described in Labor Code section 226.

AB 1522

Healthy Workplaces, Healthy Families Act

- Prohibitions and Penalties
 - For every paid sick day unlawfully withheld, treble damages are available up to a maximum of \$250, not to exceed an aggregate penalty of \$4,000.
 - Additional penalties apply for violations of posting and notice obligations.
 - Recoveries exclude PAGA penalties and are limited to restitution, equitable or injunctive relief, and reasonable attorneys' fees and costs.
- Need clarification from DLSE
- Enforced by a combination of the Labor Commissioner, the Attorney General, and civil actions under the California Private Attorneys General Act (PAGA)

AB 1522

Healthy Workplaces, Healthy Families Act

- Recommendations
 - Review paid sick leave, paid time off, “unlimited” vacation, absenteeism, and leave of absence policies and procedures to ensure they meet the law’s requirements. (Pay special attention to accrual, calculations, permitted uses, notices, and tracking.)
 - Monitor the Labor Commissioner's public notices (poster and Wage Theft Prevention Act notice) and website for template notices and workplace posters: <http://www.dir.ca.gov/dlse/>.
 - Ensure timekeeping, payroll, and benefits systems properly calculate, track, and detail accrued and used sick time.

AB 1522

Healthy Workplaces, Healthy Families Act

- Recommendations (cont'd)
 - Ensure that all itemized wage statements or other written notices provided at the time of payment to an employee include the amount of paid sick leave available to the employee.
 - Formulate a compliance plan and policy to achieve compliance with all applicable (state and local) paid sick leave laws. More than a dozen cities (three of which are in California) have passed their own paid sick leave laws.
 - Train HR, managers, and payroll of the new law's requirements, including broad definitions of “family” and “no retaliation.”

AB 2536

Emergency Rescue Personnel

- Amends California Labor Code section 230.3.
- Employees who also work as “emergency rescue personnel” can take protected leave relating to those emergency duties.
- “Emergency rescue personnel” now includes an officer, member, or employee of a “state-sponsored disaster medical response team.”
- Recommendations
 - Do not discriminate or discharge employees who have taken time off to perform emergency duties as part of a state-sponsored disaster medical response team.
 - **For 50 or more employees:** Provide up to 14 aggregated days of leave per calendar year for emergency rescue training.

AB 326

Cal-OSHA

- Technical change to method for immediately reporting serious occupational injuries, illnesses, or death, modifying the wording of section 6409.1(b) of the Labor Code from “report by telephone or telegraph” to “report by telephone or email.”
- Practice Tip:
 - Content of statements made to the Division of Occupational Safety and Health (DOSH) may be used as evidence against the company. Accordingly, reports should be factual and should not speculate as to the cause of injury.
 - *After reporting a serious injury or accident, a DOSH inspection is likely forthcoming. If the accident resulted in a fatality, the visit is likely to be immediate.*

AB 1634

Cal-OSHA

- Requires supporting evidence of abatement through submission of a signed statement “with supporting evidence when necessary to prove abatement” if a serious violation is not abated at the time of the initial or subsequent inspection.
 - Statement will not be “considered as evidence of a violation during an appeal.”
- When seeking reconsideration of an Appeals Board decision, employers must request a stay of abatement for a citation classified as serious, repeat serious, or willful serious, and show that the stay will not adversely affect employee health or safety.
 - As in the past, abatement is stayed during the initial appeal.

AB 1634

Cal-OSHA

- Limits Modification of Penalties
 - Amends section 6319(g) to prohibit DOSH from granting a proposed modification to civil penalties for abatement or credit for abatement for serious violations unless an employer has:
 - *Abated the violation at the time of the initial inspection;*
 - *Abated the violation at the time of a subsequent inspection prior to the issuance of a citation; or*
 - *Submitted a signed statement under penalty of perjury and supporting evidence, when necessary to prove abatement, within 10 days after the end of the period fixed for abatement.*
- Recommended Action:
 - Upon receiving a citation, employers should act quickly to identify and implement abatement measures.

AB 1710

Further Amendments to Data Security Breach Notification Law

- Under existing law, California Civil Code section 1798.82 requires persons or businesses to notify affected individuals in the event of a security breach involving personal information.
- Credit monitoring service—(IF offered?)—must be offered for at least 12 months at no cost to the individual.
- Extends data security requirements to businesses that “maintain” personal information (prior requirement for organizations that “own” or “license” personal information).
- Prohibits the sale, advertisement for sale, or offer to sell an individual’s Social Security number.

Wage and Hour

AB 1897

Contractor Liability for Wage Payment/Workers' Compensation

- Client employers are liable along with labor contractors for nonexempt employee:
 - Wages
 - Ensuring workers' compensation coverage
 - Complying with Cal-OSHA
- Client employer = business entity that obtains workers to perform labor within the usual course of business from a labor contractor
 - Excludes business entities with fewer than 25 workers
 - Excludes business with five or fewer workers supplied by labor contractor
- Labor contractor = supplier of workers to perform labor within the usual course of business
- Usual course of business = regular and customary work of the business
- Must make records of payment of wages, Cal-OSHA compliance, and workers' compensation insurance available upon request by state agency

AB 1897

Contractor Liability for Wage Payment/Workers' Compensation

- Best Practices
 - Make sure that no one, including contingent workers, works off the clock
 - Make sure that staffing companies are properly calculating the regular rate and overtime in compliance with California laws
 - Make sure that contingent workers take meal and rest breaks
 - Regularly audit workers' compensation policies held by vendors
 - Include contingent workers in safety training, policies, practices, etc.
 - Make sure that a procedure exists for rapid access to time and wage records upon request
 - Work with well-established contractors who have proven track records of legal compliance
 - Review and strengthen indemnification provisions in agency contracts

SB 1360

Recovery Periods

- Clarifies new “recovery period” provision in California Labor Code section 226.7.
- Legally required recovery periods and rest breaks are both treated as hours worked and employees must be compensated for this time.
- Recommendation
 - Ensure that time records include time spent during recovery periods and rest breaks as hours worked and that employees are properly paid for this time.
 - Consider revising production-based pay plans for nonexempt employees so that a base hourly rate of at least minimum wage is always paid.

AB 1723

Penalty Provision for Failure to Timely Pay Wages upon Discharge

- Three ways for an employee to recover unpaid wages:
 - File an administrative wage claim with the Labor Commissioner
 - Berman Hearing (Cal. Lab. Code § 98)
 - File a civil action (Cal. Lab. Code § 1194)
 - Labor Commissioner issues a citation (Cal. Lab. Code § 1197.1)
- Waiting Time Penalties (Cal. Lab. Code § 203)
 - Penalty of up to 30 days' wages for an employer that willfully fails to pay an employee who is discharged or quits
 - Currently only available through Berman Hearing or a civil action
- AB 1723 amends California Labor Code section 1197.1 to allow the Labor Commissioner to include waiting time penalties in a citation following an inspection or investigation

AB 1939

Prevailing Wages

- Existing law generally requires contractors to pay prevailing wages to workers on public works projects.
- AB 1939 adds section 1784 to the California Labor Code to authorize a contractor to bring an action to recover any increased costs from the party it directly contracts with, such as the difference between the wages actually paid to an employee and the prevailing wage for the project as a result of any decision to classify the project as a public work.
 - Hiring parties must inform contractors any time a project receives a public subsidy, is publicly funded, or is otherwise classified as a public works project, triggering the requirement that the contractor pay prevailing wages to workers.

Thank You



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