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New California Employment Laws for 2015 and Beyond

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It is that time of year again, California. As the days grow shorter and the nights grow semi-colder (it is still California after all), a flurry of activity begins as employers revisit their policies and handbooks to assess compliance with the bevy of new California employment laws that take effect on January 1, 2015, or thereafter. This year, there is something for everyone: a law that imposes paid sick leave on nearly every business with California operations, an expansion of anti-harassment training requirements, and even a few new wage laws thrown in for good measure. Because these laws have created or expanded employee rights and benefits, employers should consider whether their current handbooks and policies properly address the new requirements. All new laws discussed below are effective on January 1, 2015, unless otherwise indicated.

I. Time Off

A. Mandatory Paid Sick Leave

AB 1522, the "Healthy Workplaces, Healthy Families Act of 2014" ("Act"), is a landmark piece of legislation that requires employers to provide paid sick leave to any employee who works in California for at least 30 days within the first year of employment. The law, which is effective on July 1, 2015, requires the accrual of paid sick time at a rate of one hour of sick time for every 30 hours worked. Employers are allowed to limit an employee's use of paid sick leave to 24 hours (or three days) during each year of employment. Employers must allow sick leave to carry over into the following year of employment unless they provide employees with sick time each year in a lump-sum at the beginning of the year. If sick days are not accrued in a lump-sum, employers must allow employees to accrue up to 48 hours (or six days). While we believe that the Legislature's intention was to allow employers to impose both a three-day limitation on annual use and a six-day cap on accrual where sick days are accrued over time, the statutory language is not perfectly clear. Therefore, the easiest way to comply with the new law (and ensure a three-day limit on the use of sick days is permissible) will be to frontload 24 hours (or three days) of sick time at the beginning of each calendar year.

Accrued, unused sick leave need not be paid out upon termination of employment. Employers may also establish a 90-day waiting period after hire before accrued paid

sick leave may be used and may require sick leave to be used in minimum increments of two hours or less. Employers that wish to impose such limitations are advised to set forth the restrictions in a written sick leave policy.

Employers with vacation/paid time off ("PTO") policies that provide employees with at least the same rights set forth in the Act are not required to offer employees additional paid sick time benefits so long as at least 24 hours (or three days) of the vacation/PTO time may be used for any qualifying purpose under the Act. The qualifying purposes for leave include:

- leave for the purpose of diagnosis, care, or treatment of an existing health condition;

- preventative care for an employee or employee's family member; or

- leave sought by a victim of domestic violence, sexual assault, or stalking to engage in certain protected activities.

Thus, a PTO policy or vacation policy that provides at least three days of vacation per year may be sufficient as to any employees covered by the policy if it permits time off to be taken in two-hour increments (or less) for any purpose. Employers that presently provide sick leave will need to assess whether their current policy comprehensively covers the permitted uses under the new law. For example, many sick leave policies limit half of the allotment to kin care. However, the Act requires that any sick leave provided under the Act be available for use for family members and covers members of the family, such as grandparents, siblings, and those to whom the employee stands *in loco parentis,* who may not be covered by an employer's existing sick leave policy.

There is no minimum number of employees that an employer must employ to trigger application of the law and no requirement that the employee live in California or spend a majority of his or her work time in California. Indeed, an employee may work for six weeks in California at varying points throughout the year and work in Maryland the rest of the time, but he or she will still be covered under the Act. Likewise, part-time and even temporary or seasonal employees may accrue time under the Act. But, of course, if such employees do not remain employed for at least 90 days following the outset of employment, they may never become eligible to actually take sick time. There are very few employees excepted from the law, but such exceptions include in-home health care workers, flight deck and cabin crew members covered by the Railway Labor Act, and some workers covered by a collective bargaining agreement.

The Act contains detailed record-keeping and notice requirements, including a new poster requirement, notice of rights to new employees, and a requirement that available sick leave be documented in employee wage statements. Specifically, the law requires employers to state in a wage statement (pay stub) the number of hours of sick time an employee has left in the applicable year. The law also contains penalties for noncompliance as well as significant protections against retaliation.

B. Time Off for Emergency Duty

AB 2536 makes two significant changes to existing law that prohibits an employer from discharging or in any manner discriminating against an employee who takes time off to perform emergency duty as a volunteer firefighter, reserve peace officer, or emergency rescue personnel. First, the legislation expands the definition of "emergency rescue personnel" to include an officer, employee, or member of a disaster medical response team sponsored or requested by the state. Second, the legislation requires an employee who is a health care provider to notify his or her employer (i) at the time that he or she becomes designated as emergency rescue personnel and (ii) when the employee is notified that he or she will be deployed for emergency duty.

II. Discrimination, Harassment, and Retaliation Protections

A. Protections for Unpaid Interns and Volunteers

On September 9, 2014, California Governor Jerry Brown signed into law AB 1443. This law amended California's Fair Employment and Housing Act ("FEHA") to add unpaid interns (and persons under limited-duration programs that provide unpaid work experience) to the list of persons protected by California's anti-discrimination and anti-harassment laws. Specifically, AB 1443 prohibits discrimination against any person in the "selection, termination, training, or other terms or treatment of that person in an unpaid internship, or another limited duration program to provide unpaid work experience for that person." The legislation also extends religious belief protections and religious accommodation requirements to anyone in an apprenticeship training program, an unpaid internship, or any other program to provide unpaid experience in the workplace or industry.

B. Harassment Training: Prevention of Abusive Conduct

AB 2053 requires employers subject to the mandatory sexual harassment prevention training requirement for supervisors to now include a component in such training on the prevention of abusive conduct. "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." According to the statute, "abusive conduct" may include the repeated infliction of verbal abuse (e.g., 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. A single act will not typically constitute abusive conduct unless it is especially severe and egregious.

The law does not create a cause of action for abusive conduct in the workplace, but it does appear to be the first step toward protecting workers against bullying in the workplace that is not linked to any form of illegal discrimination.

C. National Origin Discrimination: Driver's Licenses for Undocumented Persons

Beginning January 1, 2015, the California Department of Motor Vehicles is scheduled to start issuing driver's licenses to undocumented persons who can submit satisfactory

proof of identity and California residency. AB 1660 makes it a violation of FEHA for an employer to discriminate against an individual because he or she holds or presents such a driver's license and amends FEHA to specify that "national origin" discrimination includes discrimination on the basis of possessing such a driver's license.

The legislation also makes it a violation of FEHA for an employer to require a person to present a driver's license, unless possessing a driver's license is required by law or is required by the employer, and the employer's requirement is otherwise permitted by law. For example, a retail clerk may not need a driver's license in the scope of his or her duties. Therefore, while the employer's application for employment may ask for the applicant's driver's license information, it may not condition the job upon the applicant providing this information.

AB 1660 provides that actions taken by an employer that are required to comply with federal I-9 verification requirements under the Immigration and Nationality Act ("INA") do not violate California law. Thus, AB 1660 does not affect an employer's rights or obligations under the federal INA if presented with such a driver's license.

Finally, the new legislation requires employers to treat employee driver's license information as confidential and prohibits disclosure to any unauthorized person or use for any purpose other than to establish identity and authorization to drive.

D. Unfair Immigration-Related Practices

AB 2751 makes "cleanup" changes to prior law protecting employees from "unfair immigration-related practices." AB 2751 expands the definition of an "unfair immigration-related practice" to include threatening to file or filing a false report or complaint with any state or federal agency.

The new legislation also revises California Labor Code section 1024.6, which prohibits employers from "discharging or in any manner discriminating, retaliating, or taking any adverse action against an employee because the employee updates or attempts to update personal information," defined as information relating to "a lawful change of name, [S]ocial [S]ecurity number, or federal employment authorization document."

The updated Labor Code section also removes a provision that allowed an employer to take adverse action if the employee's personal information changes are directly related to the skill set, qualifications, or knowledge required for the job. Given these changes, as well as a recent Executive Order permitting employment authorization to undocumented workers who have no criminal background, it is much more likely that employees who assumed identities or presented false documents will come forward. This may test an employer's honesty policy and lead to possible discrimination claims under California law. Employers are cautioned against taking adverse action against an employee who provides a new Social Security number for falsifying a job application or other employment document, even if the employer suspects that the change is due to a previously unlawful employment status.

The new legislation also clarifies existing law regarding potential penalties for retaliating against an employee who reports unfair immigration-related practices under Labor Code

section 98.6. Specifically, the cleanup legislation makes clear that, if a civil penalty is awarded under Labor Code section 98.6, the award is payable to the employee.

E. Non-Discrimination Against Public Assistance Recipients

AB 1792 prohibits employers with more than 100 employees who are beneficiaries of the Medi-Cal program from (i) discharging, discriminating, or retaliating in any manner against an employee who enrolls in a public assistance program; (ii) refusing to hire a beneficiary for reason of being enrolled in a public assistance program; or (iii) disclosing that an employee receives or is applying for public assistance, unless otherwise permitted by state or federal law.

F. Harassment Training: Farm Labor Contractors

SB 1087 requires a farm labor contractor to certify to the Labor Commissioner that its employees received required sexual harassment training in order to receive a farm labor contractor's license. Unlike the training requirements of AB 1825, supervisory employees of farm labor contractors must be trained for at least two hours each calendar year, and nonsupervisory employees also must be trained (i) at the time of hire, and (ii) once every two years thereafter.

The law also (i) restricts the State of California from granting a license to a farm labor contractor who has engaged in sexual harassment; (ii) changes the mandatory written examination process; and (iii) increases licensing fees, bonding requirements, and penalties.

III. Wage and Hour

A. Client Liability for Labor Contracts

AB 1897 imposes liability for wage and hour violations of staffing agencies or subcontractors on employers that contract for labor. Under the new law, if a labor contractor fails to pay its workers properly or fails to provide workers' compensation coverage for those employees, the "client employer" can be held legally responsible and liable. A worker or the worker's representative must notify the client employer of specified violations at least 30 days prior to filing a civil action against a client employer to provide an opportunity to cure the violation.

The legislation also expands to client-employers' liability resulting from the staffing agency or subcontractor entering into a contract for labor or services with a construction, farm labor, garment, janitorial, security guard, or warehouse contractor, if the staffing agency or subcontractor knows or should know that the contract or agreement does not include sufficient funds for it to comply with laws or regulations governing the labor or services to be provided.

AB 1897 also prohibits an employer from retaliating against a worker for notifying it of a wage violation or for filing a claim or civil action.

B. Clarification of Rest and Recovery Periods

Last year, Labor Code section 226.7 was amended to provide rest and recovery periods for employees to recover from heat illness. SB 1360, which was made effective upon passing in June 2014, confirms that rest and recovery periods are paid breaks and count as hours worked. SB 1360 does not create new law but merely clarifies the existing requirements.

C. Waiting-Time Penalties

AB 1723 authorizes the Labor Commissioner, in issuing citations for failure to pay the minimum wage, to award any applicable penalties for an employer's willful failure to timely pay wages to a resigned or discharged employee, also called "waiting time" penalties.

Another new law, AB 2743, provides a waiting-time penalty if unionized theatrical and concert venue employees violate any agreed-upon timeframe for payment of final wages contained in a collective bargaining agreement.

D. Labor Code Complaints

AB 2751 amends Labor Code section 98.6 to clarify that the $10,000 penalty for retaliation against an employee who complains of Labor Code violations will be awarded to the employee or employees who "suffered the violation." This law does not create a new penalty but merely clarifies existing law.

E. Timeframe for Recovery of Liquidated Damages

Existing law permits an employee to recover liquidated damages from the employer for failure to pay the minimum wage, in the amount of the unpaid wages plus interest. AB 2074 clarifies that the statute of limitations for a lawsuit to pursue liquidated damages for failure to pay the minimum wage will not run until the expiration of the statute of limitations for the wages for which the penalties are sought, which is three years. Some recent court cases had held that liquidated damages claims had to be filed within one year, the statute of limitations for penalties. AB 2074 effectively overrules those holdings by statute.

F. Foreign Labor Contractors

SB 477 affects employers that use foreign labor contractors to recruit foreign workers for projects in California. The new law changes the definition of "foreign labor contractor" to mean a person who performs "labor contracting activity," including "recruiting or soliciting for compensation a foreign worker who resides outside of the United States in furtherance of that worker's employment in California."

The new law protects foreign workers in a variety of ways. First, the new law prohibits a foreign labor contractor from charging a fee or cost to a foreign worker for foreign labor contracting activities. Second, the new law prohibits charging a foreign worker with any costs or expenses not customarily assessed against similarly situated workers, and limits the amount of housing costs charged to the foreign worker to the market rate for

similar housing. Third, the new law prohibits requiring a foreign worker to pay any costs or expenses prior to commencement of work or changing the terms of the contract originally provided to and signed by the foreign worker (unless the foreign worker is given at least 48 hours to review and consider the additional requirements or changes and specifically consents to each additional requirement or change).

In addition, the new law requires foreign labor contractors to meet registration, licensing, and bonding requirements by July 1, 2016, and prohibits employers from using non-registered foreign labor contractors to supply workers in California.

The new law also provides for civil action and penalties for noncompliance and joint liability for employers that use non-registered foreign labor contractors.

G. Prevailing Wages

Several bills passed this year impact employers that provide services for public works projects requiring payment of the prevailing wage. Among them are AB 26, which redefines the word "construction" in public works projects to also include work performed during the post-construction phases of construction, including all cleanup work at the jobsite, and AB 2744, which allows enforcement mechanisms that can be used against contractors or subcontractors on public works projects to now be used for violations relating to the employment of apprentices on these projects. New legislation also allows a contractor to bring an action against "hiring parties" to recover any increased costs (including labor costs, penalties, and legal fees) incurred because of the untimely designation of a contract as a public works project.

H. Child Labor Law Violations: Increased Remedies

AB 2288, the Child Labor Protection Act of 2014, provides additional penalties for violations of California labor laws regarding employment of minors. The law adds section 1311.5 to the Labor Code, which provides treble damages if an individual is discriminated or retaliated against because he or she filed a claim or civil action alleging a violation of employment laws that occurred while he or she was a minor, a penalty of $25,000 to $50,000 for certain violations involving minors 12 years of age or younger, and a tolling of the statute of limitations for violations of employment laws until the minor turns 18.

IV. Workplace Safety

A. Penalties for Failure to Abate Safety Hazards

AB 1634 prohibits the state Occupational Safety and Health Appeals Board from modifying civil penalties for abatement or credit for abatement unless the employer fixed the violation at an initial inspection or a subsequent inspection prior to the issuance of the citation or submitted a signed statement and supporting evidence within 10 working days after the date fixed for abatement showing that the violation has been fixed.

Also, AB 1634 generally prohibits a stay or suspension of an abatement requirement while an appeal or petition for reconsideration is pending in cases of serious, repeat

serious, or willful serious violations, unless the employer can demonstrate that a stay or suspension will not adversely affect the health and safety of employees.

B. Occupational Safety and Health Email Reporting

AB 326 allows employers to email their reports of a work-related serious injury, illness, or death to the Division of Occupational Safety and Health, as opposed to reporting the incident by telephone.

C. Hospital Workplace Violence Prevention Plans

SB 1299 requires the California Occupational Safety and Health Standards Board to adopt standards by January 1, 2016, that require specified types of hospitals, including general acute care hospitals or acute psychiatric hospitals, to adopt workplace violence prevention plans as part of the hospitals' injury and illness prevention plans.

D. Criminal History Information in Public Contracts

AB 1650 requires contractors that bid on state contracts involving onsite construction-related services to certify that they will not ask applicants for on-site construction-related jobs to disclose information concerning criminal history at the time of an initial employment application. The law does not apply if the position requires a criminal background check under state or federal law. Workers obtained through a union hiring hall pursuant to a collective bargaining agreement are also excluded.

V. Employee Benefits

A. Workers' Compensation Liens

AB 2732 clears up some issues with the 2012 workers' compensation reform legislation. First, it authorizes employees to pursue medical-legal expenses through the Workers' Compensation Appeals Board lien process. Second, it requires employers to reimburse lien filing or activation fees, plus interest. Third, the legislation clarifies that the existing law's prohibition against lien assignment applies only to liens filed prior to January 1, 2013.

B. Unemployment Insurance Updates

Three new laws impact unemployment insurance ("UI"):

- AB 1556 revises unemployment eligibility standards for unemployed individuals enrolled in training or education programs and extends a grace period for workers seeking to continue their UI claims.
- SB 1083 expands the definition of "practitioner" under the UI code to include physician assistants who have performed physical exams under the supervision of a physician and surgeon and allows physician assistants to certify an employee's disability for UI purposes, effective January 1, 2017.
- SB 1314 extends the deadlines for requesting reconsideration of a ruling determining eligibility for UI benefits and initiating an appeal to the California

Unemployment Insurance Appeals Board of an administrative law judge's decision from 20 days to 30 days, beginning July 1, 2015.

C. Health Care Enrollment

SB 1034 deletes certain provisions of California law related to waiting period limitations for health care coverage, and clarifies that waiting periods are governed by the 90-day period authorized under the federal Patient Protection and Affordable Care Act. The law prohibits a health care service plan or health insurer offering group coverage from imposing an additional waiting or affiliation period to any waiting period imposed by an employer and permits a health care service plan or health insurer offering group coverage to administer a waiting period imposed by a plan sponsor.

The law also requires employers that offer certain small market grandfathered plans to send notice to eligible employees or dependents who fail to enroll during an open enrollment period that he or she may be excluded from eligibility for coverage until the next open enrollment period.

What Employers Should Do Now

- Employers are strongly urged to review and update their handbooks, policies, and procedures in anticipation of the new laws. For example:
    - out-of-state employers should assess whether any of their workforce may be subject to the California sick leave requirements and make preparations for providing such benefits;
    - in-state employers should review current vacation/PTO and sick leave policies and make tweaks, as necessary, to comply with the new law. For example:
        - ensure part-time employees are afforded sick time;
        - ensure carry-over provisions are sufficient; and
        - ensure any sick time provided under the Act (i.e., at least 24 hours or three days) may be used to care for the expanded scope of family members;
    - emergency duty policies should be revised to address the new definition of "emergency rescue personnel"; and
    - employers may want to consider making mention of unpaid interns and volunteers in their EEO policies.
- Anti-harassment training should be updated to cover abusive behavior.
- New laws should be reviewed with human resources and supervisory personnel to ensure compliance.

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