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Client Alert

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Ringing in the New Year: A Summary of New Employment Laws for 2015

Robert S. Cooper, Esq.

With the use of more than a few pens, the Governor of California has enacted more than 50 new laws related to employment, some of which affect all employers, and others that affect only specific industries. Unfortunately for California employers, these new laws continue the trend in California of placing additional burdens and new potential penalties on employers, while granting additional rights to employees. While most of these laws go into effect on January 1, 2015, some already went into effect during 2014, and a few do not take effect until July 2015, or later. This is a brief synopsis of the new employment laws that we believe are the most likely to affect your businesses.

Mandatory Paid Sick Leave

In what is the most talked about new law (AB 1522), effective July 1, 2015, all employers, large and small, will be required to provide three paid days of sick leave to all exempt and non-exempt employees (including full-time, part-time, temporary and seasonal employees) who work in California for at least 30 days. Employees will be entitled to use accrued sick days beginning on the 90th day of their employment. Employers may choose between using an accrual method, in which an employee accrues paid sick days at a rate of one hour for every 30 hours worked, beginning at the commencement of employment, or a lump-sum method, in which the employer simply provides three days of paid sick leave at the beginning of each anniversary year. The law expands the definitions of family members on behalf of whom an employee may use a sick day to provide care, and it also requires employers to note the amount of the sick leave available as a line item on each paycheck, or in a separate writing. Additionally, effective January 1, 2015, employers must post the new requirements in the workplace, and provide written notice to new employees at the time of hire. The new law does not require the employee to provide any medical certification, and it contains stiff penalties for employers who deny the required paid sick leave days. Regardless of whether an employer is already providing three or more paid sick leave days, all employers need to be aware of this new law and its complex requirements.

Paid Family Leave

This law, initially enacted in 2002, gives employees a right to be paid a certain amount through the California Employment Development Department (the "EDD") when they take a leave of absence to care for a seriously ill family member, including a child, spouse, or registered domestic partner, or to bond with a newborn. The new law passed in 2014 (SB 770) expands the list of qualified family members to include a parent-in-law, grandparent, grandchild or sibling. The law is somewhat misnamed, since it does not give employees a right to be paid by their employer for time off, but merely permits them to apply to the state for benefits.

Time off for Crime Victims Crime, Stalking and Emergency Responder

Three other new laws provide protections from discharge to employees who are victims of certain specified crimes, including domestic violence and sexual assault (SB 288), stalking (SB 400), or who perform emergency duty as a volunteer firefighter, reserve police officer or emergency rescue personnel (AB 2536).

Heat Illness Recovery Periods

Last year, Labor Code Section 226.7 (the meal and rest break law) was amended to add recovery periods of at least five minutes when requested by employees on hot days. The law provides that an employer who does not provide an employee with such a recovery period must pay the same premium penalty that exists for failing to provide a meal or rest break, which is one additional hour of pay for each workday that either a meal, rest, and now a recovery period, was not provided. The new law (SB 1360), which goes into effect on January 1, 2015, clarifies that recovery periods, like rest breaks, are *paid* breaks. (Meal breaks may still be unpaid.) Note that California's current heat illness prevention regulations (California Code of Regulations, title 8, Section 3395) require

companies to provide workers with cool-down periods of at least five minutes in the shade when they feel the need to do so to protect themselves. It should be noted that the regulations apply only to employers with "outdoor places of employment," but no definition of outdoor places is provided. Thus, it remains uncertain whether the law will apply to truck drivers or warehouse workers who offload goods, restaurant workers who cover outside areas, or others who spend part of the work day outdoors. Moreover, the law may be subject to abuse, because there is no specified limit to how many recovery periods may be requested per day.

Minimum Wage

The minimum wage in California was raised to $9/hour effective July 2014. Effective January 1, 2016, the minimum wage will be raised to $10/hour. This is important not only to companies that employ lower-wage workers, but also because it affects the standard for exempt status. For example, in order to be exempt from being paid overtime under the executive, administrative and professional exemptions, he employee must be paid at least twice the minimum wage per month. This means that effective in July 2014, the minimum annualized exempt salary rose from approximately $33,280 to $37,440. In 2016, the minimum salary to be considered an exempt employee will rise to $41,600.

Statute of Limitations For Recovery of Liquidated Damages

AB 2074 sets forth a new law (although it states that it is a clarification of existing law) providing a statute of limitations of three years to recover liquidated damages for minimum wage violations, which is the normal time frame of the underlying wage violations themselves, rather than the limitations period for a case solely involving penalties.

Abusive Conduct Training

AB 2053 requires that employers add "'abusive conduct" training to the already mandated sexual harassment training of supervisors that has been required since 2006. 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 the employer's legitimate business interests." Note that this is only a training requirement at this point, and that the Fair Employment and Housing Act (FEHA) for harassment has *not* been amended to prohibit abusive conduct. However, what this most likely signals is that the legislature will soon alter the FEHA harassment standard to include so-called "abusive conduct." When this change comes, it will be significant, since current law limits harassment to conduct connected to the employee's protected status, i.e., race, gender, national origin or sexual orientation. The new law will remove harassment from the restraints of these protected categories, and potentially make "mean bosses" liable for their conduct, opening up the harassment law considerably.

Unpaid Intern Protection

AB 1443 has amended the Fair Employment and Housing Act (FEHA) to provide unpaid interns and individuals in limited duration programs with the same protections as employees from discrimination, harassment and retaliation in the workplace. Employers must also tread cautiously in the use of unpaid interns because there is a very limited ability for employers to use this category, and there have been a growing number of class actions challenging the use of unpaid interns.

Liability With Labor Contractors

This controversial new law creates Labor Code section 2810.3, which provides that a company that uses temp staffing firms or other "labor contractors" is now fully liable for all wage-and-hour and safety issues, and for failure to obtain workers' compensation insurance, even if the violation was caused by the labor contractor. Under this law, the company is directly responsible for any errors regarding overtime or other wage issues if the work took place on its premises, regardless of the fact that it was the labor contractor's employee. This new law is controversial because it eliminates a company's defense in litigation that it is not liable for wage or workplace safety violations by its staffing agency or other labor contractor, absent a finding of joint employer status. This could result in claims against a company even

where it had no way of knowing that its labor contractor was committing the particular violation. One positive note: although the law prohibits any contractual attempts to avoid this direct liability, it does not prevent companies that use temp staffing firms or other labor contractors from having an indemnity provision with the staffing firm or other labor contractor. Companies will want to make sure that any labor contractors with whom they work are adequately insured, and that they are fully indemnified in their staffing agreements. There are limited exemptions to this law, such as companies that have a workforce of fewer than 25 employees, or that use five or fewer workers from a labor contractor at any given time.

Foreign Labor Contractors

SB 477 puts substantial new burdens on foreign labor contractors who recruit foreign workers for work assignments in California. It requires, among other things, that foreign labor contracting companies meet registration, licensing and bonding requirements by 2016, and it establishes penalties and allows civil actions if employers use non-registered foreign labor contractors.

Protections for Undocumented Workers

*Driver's Licenses Begin to be Issued January 1, 2015

Last year, the California legislature enacted AB 60, which provided undocumented workers with the opportunity to obtain special California driver's licenses, effective January 1, 2015. Under the bill, undocumented workers 16-years and older can receive driver's licenses if they complete driver's education and training, and also pass California's written and driving tests. The law authorizes the DMV to issue a driver's license to a person who is unable to submit satisfactory proof that the applicant's presence in the U.S. is authorized under federal law. Undocumented workers will receive a license that states "Driving Privileges Only," meaning that it cannot be used as a form of identification to obtain employment, board an airplane, open a bank account or receive other public benefits. The licensed drivers will be required to have automotive insurance, as with all other drivers.

*New Law Adds Protections for Undocumented Workers Who Receive Driver's Licenses

AB 1660 provides expanded protections for undocumented workers who are issued AB 60 driver's licenses, making it a violation of the California Fair Employment and Housing Act (FEHA) for an employer or other covered entity to discriminate against an individual because he or she holds or presents a driver's license issued under AB 60, or to require a person to present a driver's license, except as specified. This bill amends the FEHA to add that it constitutes national origin discrimination to discriminate against a person holding an AB 60 driver's license. The bill also clarifies 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. AB 1660 also provides that it is a violation of FEHA for an employer to require a person to present a driver's license, unless possessing a driver's license is (1) required by law; or (2) required by the employer and the employer's requirement is otherwise permitted by law.

*Further Protection of Undocumented Workers

AB 2751 amends the recent bill, AB 263, which had prohibited employers from retaliating against undocumented workers. The new law, AB 2751, limits the prior law to some extent, but also 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. Current law had extended this protection only to reports filed with the police. The new bill continues to prohibit an employer from discriminating against or retaliating against an employee who updates his or her personal information based on a lawful change of name, social security number, or federal employment authorization documents. The law protects workers who update their records based upon lawful changes to immigration-related information, regardless of whether the employee previously had submitted false information.

Prohibition of Discrimination Against Public Assistance Recipients and the Posting of Lists

This new bill not only prohibits companies from discharging or in any other manner discriminating or retaliating against an employee who enrolls in a public assistance program, or from refusing to hire such persons, but it also empowers the State Departments of Health Services and Finance, and the EDD, to create and publicly post lists of employers in the state that employ 100 or more beneficiaries of public assistance. This may potentially subject such employers to protests, shame and ridicule or even civil actions. The apparent theory behind the law is that the low wages paid by these employers are leaving workers with no choice but to also obtain public assistance. The EDD's report must also include the average cost of benefits provided to the employer's workers, as well as the average cost of CalFresh benefits such families are provided. The law will expire in 2020 unless it is extended before that time.

Pre-Dispute Arbitration Agreements Prohibited With Respect to Certain Civil Rights Claims

California Civil Code Sections 51-51.9 prohibit discrimination and harassment in connection with providing goods and services based upon specified protected categories, including sex, race, color, religion, ancestry, national origin, disability or medical condition, or the perception of these categories by another person. AB 2617 amends Civil Code sections 51.7, 52 and 52.1 by prohibiting businesses from requiring an individual to agree in advance to arbitrate or waive the right to file a claim for an alleged violation of these civil rights statutes, as a condition of receiving or contracting for goods or services. The new law also requires that any agreement to arbitrate or to waive a legal right, made in accord with a dispute under these statutes, be made knowingly and voluntarily, in writing, and expressly not as a condition of providing or receiving goods and services. The new law applies to all contracts for goods and services entered after January 1, 2015. Note that AB 2617 does *not* apply to employment contracts or employment relationships, for which such waivers are currently enforceable under U.S. Supreme Court and California precedent, but this new law could be a precursor to future attempted legislative action precluding pre-dispute arbitration agreements and waivers in the employment context.

Cal-OSHA—Expanded Protections for Serious Violations/Abatement Required During Appeal

AB 1634 creates limitations on the California Division of Occupational Safety and Health (DOSH)'s ability to modify penalties for Cal-OSHA violations that are designated as "serious," and it also mandates that employers abate any work hazard that is the subject of a "serious violation" citation, even though the citation is on appeal.

Reporting Serious Injury, Illness or Death by Email

AB 326 pertains to the requirement that serious workplace injuries, illness or death be reported immediately to Cal-OSHA. Historically such reporting could be made by telephone or *telegraph*. The new law updates reporting requirements to permit reporting serious workplace injuries, illness or death via email.

Hospitals—Workplace Violence Protection Plans Required by 20166

SB 1299 required Cal-OSHA to adopt standards by January 1, 2016 that would 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. The new law is aimed at protecting health care workers employed in these specified hospitals from violence by patients.

Employers should audit their current policies and practices, and make any necessary changes to ensure that they are in compliance with these new laws.

Robert Cooper is Assistant Chair of the Firm's Labor & Employment Practice Group, a member of the Firm's Litigation Practice Group and a Shareholder in the Los Angeles office. He can be reached at 213.891.5230 or rcooper@buchalter.com.