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In This Issue

Kalley Aman & Ruth Seroussi to speak at:

11th Annual HR in Hospitality Conference
March 27-29, 2017
Aria Resort Casino, Las Vegas, NV

Kalley Aman, Shareholder, and Ruth Seroussi, Of Counsel, in Buchalter's Los Angeles office, will speak at the 11th Annual HR Hospitality Conference regarding Individual Liability in Employment Law. For more information, please click here.

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New Labor Code Section Prevents Employers from Using Out-of-State Choice of Laws Provisions in Contracts with California Employees

Dylan W. Wiseman and Efrat M. Cogan

On September 27, 2016 Governor Jerry Brown signed a new law impacting the contract rights of California employees.

Labor Code Section 925 imposes new limits on contract provisions that seek to impose choice of law and venue provisions. It applies to employment contracts involving employees who primarily reside and work in California. For example, a Minnesota corporation cannot have an enforceable agreement, which applies Minnesota law, with an employee who primarily resides and works in San Francisco.

Under the law, employers may not condition employment upon agreeing to contract provisions that either:

(a) require employees to adjudicate claims arising in California outside of California; or

(b) deprive employees of the substantive protection of California law for claims arising in California.

In other words, as to employees primarily working and residing in California, employers may not require employees to agree to choice of law or venue provisions that require claims arising in California to be litigated in other states, or under another state's laws.

Foreign choice of law provisions were primarily used to try to circumvent California's long-standing prohibition on covenants not to compete, or to otherwise make the protections of California law unavailable to California workers. Section 925 should put an end to that practice.

By the terms of the new law, contracts that violate Section 925 are voidable at the request of the employee. The law provides that both injunctive relief and attorney's fees area available to enforce Section 925.

The law provides a single exception: it does not apply to any contract in which the employee is "in fact" individually represented by counsel in negotiating the venue and choice of law terms of the contract.

The law applies to employment contracts entered into, modified or extended after January 1, 2017. It is currently unclear what "extended" means, but we expect that at-will relationships which "extend" beyond January 1, 2017 will likely be encompassed by Section 925. Because employment contracts are constantly amended, updated, modified and extended, employers can expect that this law will ultimately apply to all of their contracts with California employees who primarily work and reside in California.

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Racial Strife in the Workplace - What's an HR Professional To Do? Managing Hostile Work Environment Claims Under Title VII

Robert Cooper

Consider the following. A client calls with an urgent problem: A white employee jokingly made a racial comment to an African-American employee, whom he thought was his friend and whom he wrongly assumed would not be offended. The comment was clearly overheard by several other employees. Understandably, the African-American employee was extremely offended and threatened the white employee verbally and physically, but was restrained. The African-American employee subsequently demands that the white employee be immediately terminated from his employment.

When racial strife occurs in the workplace among employees, employers and their HR professionals often feel compelled to take immediate and sometimes drastic measures, including termination, even on the basis of one comment by an employee taken perhaps out of context. While this approach is certainly understandable from an emotional perspective, it is not always the required choice of action. Employers and HR professionals must ask themselves: What does the law under Title VII really require of us in this situation? Does the situation above qualify as harassment?

Many would be surprised to learn that the standard for workplace harassment is a fairly high one and that employers confronted with the situation discussed above or one like it may have more options than they believe.

The U.S. Supreme Court has repeatedly pointed out that while Title VII prohibits the creation of a hostile work environment through harassment when based upon an individual's race, color, religion, sex or national origin, the law does not impose a "general civility code."[1] The discrimination and harassment laws do not reach "the ordinary tribulations of the workplace," such as, for example, sporadic use of abusive language or generally boorish conduct.[2] To be actionable, "behavior need not drive the victim from his or her job, but it must be of such severity or pervasiveness as to pollute the working environment, thereby alter[ing] the conditions of the victim's employment."[3] Whether an environment is "hostile" and "abusive" can be determined "only by looking at all of the circumstances [including] the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's performance."[4]

The employer's initial impulse in the above scenario might be to fire the employee who admittedly uttered the racial slur. But employment terminations, while sometimes straightforward, are often a "bank-shot in the corner pocket," and not at all one-dimensional. The legal issues in these scenarios are paramount, but employers must weigh all of the factors that may affect their workplace down the road.

First, the legal issue: In the above scenario, the person who uttered the racial slur, mistakenly thinking he knew his friend and co-worker well enough to do so, almost certainly did not break the law. It was certainly bad judgment, but as we have seen, one offensive utterance with no intent to discriminate does not violate the discrimination laws. However, when reviewing the scenario above, the offended party who threatened violence most likely has broken the law.

Second, it is important for employers to weigh risks associated with certain actions. For instance, what is the likelihood that the terminated employee could come back at the company with a wrongful termination lawsuit? In this case, not likely, especially if both employees were hired on an at-will basis. But certainly that is an issue to consider in any termination where fairness is an issue. Although a zero tolerance policy toward racial or other ill-motivated harassment is a good idea, the company in this situation was not under any legal compunction to fire the employee who made the isolated remark. Nevertheless, there is more to think about.

Third, the employer must consider decisions independently of employees' demands. In this situation, the offended employee insisted that his co-worker's employment be terminated immediately. There is certainly a temptation to give into such a demand, to "buy the company's peace" with respect to this employee. However, this effort at appeasement of an employee's demand seldom appeases, but instead could embolden the employee with a sense of his own influence. Although it may seem self-evident, an employer should always make decisions regarding adverse employment actions independently of employees' demands, except with respect to separating employees in a harassment scenario.

Nevertheless, although the employee would most likely not be found to have legally created a hostile work environment, his colossally bad judgment in misreading his co-worker and making such an offensive comment in front of other employees likely merits his termination.

Finally, consideration must be given of what to do with the alleged "victim" who threatened his co-worker with violence. He should, at a minimum, be severely reprimanded, and if any prior instances of violence or threatened violence had existed, the employer should terminate his employment immediately. Regardless of how offensive any comment may have been, violence in the workplace is never appropriate or permissible and is legally far more significant than a "mere offensive utterance." Violence or threatened violence are far too risky for any employer to tolerate, as the repercussions can far exceed "offending" a co-worker.

And there you have it, a bank-shot in the corner pocket.

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Five tips on controlling property taxes for hotels - before and after acquisition

Douglas John

Hotels are generally recognized as one of the highest taxed real estate assets. A property's return on investment can be significantly impacted by real and personal property taxes. One recent study estimated that property taxes account for 40% of a hotel's cost of occupancy. Still, property taxes are not always a high priority for owners and this can be a very costly mistake. Below are five tips for controlling property taxes on a hotel.

Tip One: Do Your Due Diligence

Property taxes are a significant variable in an acquisition, and can be tricky for underwriting an asset. Thus, owners should always understand what implications the purchase will have on the hotel's future property tax liability before acquiring or investing in a hotel. It means researching historical tax rates and assessments of comparable properties in the area. It also means understanding the local assessment office's valuation methodology and reassessment cycle. For instance, how will the sales price affect the assessor's valuation of the property? With major renovations or new construction, what is the timing of supplemental assessments? Understanding the local reassessment cycle — many take place annually, while some can be every three, four or even eight years — can have a very large tax impact on a property. To accurately budget for property tax expenses, an owner must educate themselves about the property tax system in a state and how that tax system is implemented in the local jurisdiction.

Tip Two: Look for Errors and Opportunities

Local assessing authorities are charged with assessing hundreds of thousands of parcels. Inevitably, there are errors made in the county's property records. A careful review of those records is important. For instance, the assessor's records may reflect mistakes in the building's total square footage, age, hotel occupancy (limited service, full service) as well as many other key characteristics. Correcting these mistakes for a newly constructed or a recently acquired hotel may significantly reduce a property's long-term tax liability. In addition, many jurisdictions provide taxpayers specific protest avenues to correct these common mistakes that may have existed on the tax roll for years.

Tip Three: Investment Market Value Does Not Necessarily Equate to Property Tax Value

Even if an investor believes the assessor's valuation is reasonable based on their understanding of investment market value, the hotel may still be overvalued. This is because investment market value as commonly understood differs from property tax value. Appraisals completed for financing or due diligence purposes measure the value of the total assets of the hotel as an operating business. On the other hand, market value for property tax purposes is limited to just the value of the real estate. Most states prohibit taxing a hotel as a going concern, meaning intangible value attributable to a brand, licenses, trained workforce, proprietary technology such as reservation systems, hotel management, and franchise agreements must be excluded from the assessor valuation. The Appraisal Institute and other authorities have long recognized the existence of intangible value in hotels, which by some measures can account for 20% - 30% of a hotel's total value. To obtain a true property tax value for the real estate, the income attributable to personal property and intangible property must be excluded.

For example, in a decision that has implications beyond California, the California Court of Appeals in SHC Half Moon Bay, LLC v. County of San Mateo, 226 Cal.App.4th 471 (2014) recognized that the assessor's failure to exclude all the intangible value violated California law. SHC Half Moon Bay purchased the Ritz-Carlton Half Moon Bay Hotel for approximately $124 million. The purchase price included the total assets of the business. The assessor deducted the value of the personal property and reduced the value to $117 million. SHC challenged the San Mateo's assessment asserting the intangible value was $16 million. The Court of Appeals held that the assessor's valuation methodology of accounting for intangible value by deducting management and franchise fees from the cash flow was legally flawed. The assessor's method, which is typically used by assessing authorities nationwide, did not fully account for the existence of intangible assets. The lesson from SHC is not just that the assessor must identify and exclude all intangible value but also that sales price does not necessarily equate to market value for property tax purposes.

Tip Four: Real Estate Transfer Taxes

Investors acquiring a hotel should also be aware of whether a real property transfer tax applies. Currently, thirty-five jurisdictions levy a tax on the transfer of real property but there is little uniformity among jurisdictions. The first step is to determine whether a hotel transaction is subject to a real property transfer tax and, if so, what type of property is subject to the tax. In most states, transfer tax only applies to the transfer of real estate. Hotels, of course, involve the sale of substantial non-real estate items. Investors should consider conducting a purchase price allocation to segregate the real property, tangible personal property, and intangible personal property. With careful planning transfer taxes can be minimized. It is also critical to understand the local jurisdiction's reporting requirements, audit procedures, and, if necessary, the process for obtaining refunds where the property's value has been misreported.

Tip Five: Understand the Assessment Laws and Procedures in the Jurisdiction

To take advantage of the opportunities to lower property taxes, investors must understand how and when they can appeal. Every state has a process for disputing a property's valuation and filing a formal appeal. However, property tax appeal procedures vary greatly from jurisdiction to jurisdiction, can be difficult to navigate, and often require perseverance. Among other things an investor needs to know are the methods used by assessors to derive the initial value, when values are annually noticed, the deadlines to appeal, where to file an appeal, what evidence is necessary to be successful on appeal, and what rights a taxpayer may have when appealing to court. Owners unfamiliar with the deadlines, procedures, and understanding of the valuation methods used to arrive at their assessment can easily miss an opportunity to reduce their property's valuation. Thus it is always prudent to review a hotel's property tax value annually to maximize their chances for success.

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Another Year, Another Set of Laws: What California Employers Should Know

Paul L. Bressan and Louise Truong

In keeping with California's reputation of being an employee-friendly state, Governor Brown has enacted a number of laws, most of which go into effect on January 1, 2017 (unless specified otherwise below), that place additional burdens on employers, while granting additional rights to employees. Additionally, federal agencies have promulgated new regulations and have issued opinions that also will affect employers' responsibilities. This is a brief synopsis of the new employment laws that we believe are the most likely to affect your businesses.

Amendments to the Fair Pay Act

Last year, one of the most notable laws to pass was the Fair Pay Act ("FPA"), which prohibits employers from paying an employee of one sex less than an employee of the opposite sex for "substantially similar work when viewed as a composite of skill, effort, and responsibility under similar working conditions."

SB 1063 expands the FPA to prohibit pay differentials based on race or ethnicity as well. Accordingly, Labor Code Section 1197.5 has been amended to prohibit California employers from paying an employee of one race or ethnicity less than an employee of another race or ethnicity for "substantially similar work when viewed as a composite of skill, effort, and responsibility under similar working conditions." Section 1197.5 authorizes employers to pay employees of different races or ethnicities who do substantially similar work differently where the employer is able to demonstrate that the wage differential is based upon a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or upon a bona fide factor other than race or ethnicity, such as education, training, or experience. However, the FPA specifically emphasizes that such a bona fide factor (1) may not be based on or derived from a race- or ethnicity-based differential in compensation, (2) must be job related with respect to the position in question, and (3) must be consistent with a "business necessity." This defense will not apply if the employee is able to show that "an alternative business practice exists that would serve the same business purpose without producing the wage differential."

AB 1676 also amends Section 1197.5 to prohibit employers from considering prior salary as the sole justification for any disparity in compensation. Employers are not prohibited from inquiring into prior salary history, but employers are prohibited from using that information to justify a wage differential between men or women, or between persons of different race or ethnicity, who perform substantially similar work.

Choice of Law and Forum Provisions in Employment Contracts

SB 1241 adds Section 925 to the Labor Code and provides that for employment contracts entered into, modified, or extended on or after January 1, 2017, employers cannot require an employee who primarily resides and works in California, as a condition of employment, to adjudicate employment disputes outside of California or deprive the employee of the substantive protection of California law with respect to a controversy arising in California. Agreements in violation of this bill are voidable by the employee and an employee also may be entitled to attorneys' fees for enforcing rights under Section 925.

Section 925, however, does not apply to an employment contract where the employee is individually represented by an attorney who is negotiating the terms of the contract. Furthermore, Section 925 does not affect employment agreements already in effect.

Notice to Employees of Rights Concerning Domestic Violence, Sexual Assault, and Stalking

Labor Code Section 230 prohibits California employers with 25 or more employees from discriminating or retaliating against employees who are victims of domestic violence, sexual assault, or stalking for taking time off from work for specified purposes.

AB 2337 amends Section 230.1 and requires employers to inform their employees of these existing rights. The notice must be provided to employees upon hire and upon employee request. The Labor Commissioner has until July 1, 2017 to develop the form notice for employers to provide to their employees. Employers are not required to provide this notice to their employees until the Labor Commissioner posts the form publicly.

PAGA Amendments

SB 836 amends the Labor Code Private Attorneys General Act of 2004 ("PAGA") to provide the Labor and Workforce Development Agency ("LWDA") with increased oversight over PAGA actions and more opportunity for involvement in an attempt to reduce unnecessary PAGA litigation and lower the costs of doing business in California. The changes to PAGA are as follows:

- The LWDA now has 60 days to review PAGA notices. It previously had 30 days.
- An employee may not file a civil action against an employer until 65 days after sending notice to the LWDA. It previously was 33 days.
- The LWDA may extend its deadline to issue citations up to 180 days.
- The LWDA must be provided with a proposed PAGA settlement at the same time the settlement is submitted to the court for the court's approval.
- A copy of the court's judgment and any other order that awards or denies PAGA penalties must be provided to the LWDA within 10 days.
- PAGA notices and PAGA cure notices by employers must be submitted to the LWDA online.
- PAGA notices must be accompanied by a $75.00 filing fee.

Minimum Wage and Related Matters

SB 3 amends Section 1182.12 of the Labor Code and provides a six-step annual statewide increase of the current minimum wage of $10.00 per hour to $15.00 per hour. Starting January 1, 2017, California employers with 26 or more employees will have to pay their employees a minimum wage of $10.50 per hour. By January 1, 2022, their employees will have to earn a minimum wage of $15.00 per hour.

For California employers with 25 or fewer employees, the minimum wage increases will be delayed one year. Accordingly, in January 1, 2017, small employers may continue to pay their employees a minimum wage of $10.00 per hour. By January 1, 2023, their employees will have to earn a minimum wage of $15.00 per hour.

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In the cities of Los Angeles, Santa Monica, and Pasadena, starting on July 1, 2017, the minimum wage will increase to $12.00 per hour for employers with 26 or more employees and $10.50 per hour for employers with 25 or fewer employees. In the City of San Diego, on January 1, 2017, the minimum wage will increase to $11.50 an hour. In San Francisco, on July 1, 2017, the minimum wage will increase to $14.00 per hour. Certain other California cities also have minimum wage increase requirements.

The increases in the state minimum wage are important not only to companies that employ lower-wage workers, but they also affect the standard for exempt status under California law. Specifically, in order to be exempt from being paid overtime under the executive, administrative and professional exemptions, an employee must be paid at least twice the state minimum wage per month. Thus, in 2017, the minimum annual salary for an employee to be considered an exempt employee in California will rise to $43,680.

With respect to certain computer software employees, the overtime exemption in Labor Code Section 515.5 will require them to receive a minimum of $42.35 per hour, or a salary of $88,231.36 per year, effective January 1, 2017. For licensed physician or surgeons, the overtime exemption will require them to receive the minimum annual salary or a minimum hourly pay of $77.15 per hour, effective January 1, 2017.

Federal Judge Blocks Department of Labor's Overtime Rule:
On Tuesday, November 22, 2016 a federal judge in the U.S. District Court for the Eastern District of Texas issued a nationwide preliminary injunction against enforcement of the Department of Labor's ("DOL") final rule that would have expanded overtime protections to certain executive, administrative and professional employees who previously were exempt from overtime requirements. Specifically, the DOL's rule, which was scheduled to go into effect on December 1, would have raised the required salary level for the exemption from $23,660 per year to $47,476 per year, with an index for future increases.

In issuing the preliminary injunction, the judge held that the DOL's rule exceeded the agency's authority because it effectively created a salary test for determining which "white collar" workers are entitled to the overtime exemption. According to the court, this was contrary to the intent of Congress as expressed in the Fair Labor Standards Act, which defines the overtime exemption in relation to the "duties" performed by the employee, which do not include a minimum salary level.

Accordingly, federal law now remains unchanged, and provides that an employee will qualify for an exemption as an executive, administrative or professional employee if he or she earns a salary of at least $23,660 per year and satisfies the duties test. As noted above, however, California employers must pay their exempt employees a minimum of $43,680 per year starting January 1, 2017.

Bond Requirements for Appealing Wage Violations
AB 2899 amends Section 1197.1 of the Labor Code. Under AB 2899 if an employer wishes to appeal a decision by the Labor Commissioner that the employer has violated California wage and hour laws, the employer must post a bond, in favor of the unpaid employee, with the Labor Commissioner in an amount equal to the unpaid wages assessed under the citation, such as minimum wages, liquidated damages, and overtime compensation owed. Furthermore, if the employer fails to pay the amounts owed within 10 days from the conclusion of the proceedings, the bond will be forfeited to the employee.

Paid Sick Leave under California Law
Back in July 2015, California implemented the Healthy Workplace Healthy Family Act that required employers to provide employees with paid sick leave. California's Division of Labor Standards Enforcement ("DLSE") recently issued an opinion letter regarding the calculation of paid sick leave for employees who are paid by commissions and exempt employees who are given an annual, non-discretionary bonus. Although DLSE Opinion letters are not legally binding, they do provide persuasive authority and are good guides for employers.

The DLSE opines that employers must calculate paid sick leave for employees who are paid by commission in one of the following manners: (1) the regular rate of pay for the workweek in which the employee uses paid sick time, regardless of whether the employee actually works overtime in that workweek, or (2) 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.

With respect to calculating paid sick leave time for exempt employees, the opinion letter states that a non-discretionary bonus is not factored into the payment of paid sick leave. Instead, the employee "would be paid for an amount of pay which equals his or her regular salary for the sick day."

California Cities' Paid Sick Leave Policies
Since the enactment of the Healthy Workplace Healthy Family Act, a number of cities in California have followed suit with their own local ordinances of paid sick leave requirements that are even more generous to employees than state law.

Employees in the city of Los Angeles are entitled to take up to 48 hours of paid sick leave time per year. Employers can implement either the accrual method or the front load method. Under the accrual method, employees who work for employers with 26 or more employees should have begun accruing on July 1, 2016 or their date of hire, whichever is later. Employees who work for employers with 25 or fewer employees do not begin accruing sick leave until July 1, 2017 or their date of hire, whichever is later. If an employer uses the front load method, there is no "use it or lose it" allowed like there is under California law. Instead, in Los Angeles, unused sick leave carries over to year to year, although employers may cap this accrual at 72 hours.

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Starting January 1, 2017, employees in the City of Santa Monica who work for employers with 26 or more employees can accrue up to 40 hours of paid sick time. For employees who work for employers with 25 or fewer employees, they can accrue up to 32 hours of paid sick time. Unlike California law, there is no annual use cap placed on accrued leave. Furthermore, Santa Monica does not have the option of the front load method that is allowed under California law.

In San Diego, effective July 11, 2016, employers must either allow employees to accrue up to 80 hours of sick leave at any one time, or front load 40 hours of paid sick leave to employees at the beginning of each year. If an employer uses the accrual method, the employer can cap the use of paid sick leave at 40 hours per year.

In San Francisco, the city amended its Paid Sick Leave Ordinance to include protections for employees that largely parallel California law, effective January 1, 2017. Although employees still are entitled to accrue up to 72 hours of paid sick leave, San Francisco employers now have the option of the front load method. However, any upfront allocation shall be treated as an advance on paid sick leave to be accrued. In other words, accrual of paid sick leave would temporarily halt and the employee would not continue to accrue paid sick leave until after the employee has worked the number of hours necessary to have accrued the upfront allocation amount, at which point the employee would then resume accruing paid sick leave.

Overtime Laws for Agricultural Workers

Agricultural workers are currently entitled to overtime compensation if they work more than 10 hours in a day or 60 hours in a week.

Amending Section 554 of the Labor Code and adding Section 857 to the Labor Code, AB 1066 removes the exemption regarding hours, meal breaks, and other working conditions relating to agricultural workers and creates a schedule that would phase in new overtime requirements for agricultural workers. Specifically, AB 1066 provides that beginning January 1, 2019, employers with 26 or more employees must pay their agricultural workers overtime pay for all time worked over 9 ½ hours in one day or 55 hours in one workweek. In 2020, agricultural workers will be entitled to overtime pay after 9 hours worked in one day or 50 hours worked in one workweek. In 2021, overtime pay must be paid after 8 ½ hours worked in one day or 45 hours in one workweek. Finally, in 2022, agricultural workers will be entitled to overtime pay for all time worked over 8 hours a day or 40 hours a workweek.

For employers with 25 or fewer employees, they have an additional three years to comply with the new overtime requirements. Accordingly, the 2019 pay rate that applies to larger employees will start applying to smaller employees on January 1, 2022.

Itemized Wage Statements

AB 2535, which revises Labor Code Section 226, alters reporting requirements and clarifies that itemized wage statements do not need to report total hours worked for employees who are "exempt from the payment of minimum wage and overtime."

Labor Commissioner's Increased Authority

Labor Code Section 98.7 currently provides that an employee who believes that he or she has been discharged or discriminated against for engaging in protected conduct may file a complaint with the Labor Commissioner.

AB 2261 amends Labor Code section 98.7 to provide that the Labor Commissioner may independently investigate an employer it suspects to have discharged or discriminated against an employee in violation of any law under the jurisdiction of the Labor Code. The Labor Commissioner also can independently issue citations or bring a civil action against an employer for Labor Code violations. Therefore, the Labor Commissioner no longer has to wait for an individual to come forward with his or her own claim to go after an employer for violations of the Labor Code.

All Gender Bathrooms

Taking effect on March 1, 2017, AB 1732 requires all single-user toilet facilities in any business establishment, place of accommodation, or government agency to be identified as all-gender toilet facilities. It defines "single-user toilet facilities" as those with no more than one water closet and one urinal that have a locking mechanism controlled by the user.

Unfair Immigration-Related Practices

SB 1001 expands the prohibitions regarding unlawful immigration-related practices. SB 1001 adds Section 1019.1 to the Labor Code and explicitly prohibits an employer from: (1) requesting more or different documents than are required under federal law for work authorization verification purposes, (2) refusing to honor documents tendered that on their face reasonably appear to be genuine, (3) refusing to honor documents or work authorizations based upon the specific status or term of status that accompanies the authorization to work; or (4) attempting to reinvestigate or re-verify an incumbent employee's authorization to work using an unfair immigration-related practice. SB 1001 further permits an applicant or employee suffering from an unlawful immigration-related practice to file a complaint with the Labor Commissioner and the Labor Commissioner may impose a penalty of up to $10,000 per violation.

Juvenile Criminal History

Currently, an employer is prohibited from considering certain information for employment purposes, such as information relating to (i) an arrest or detention that did not result in conviction or (ii) a conviction that has been judicially dismissed or ordered sealed.

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AB 1843 amends Labor Code Section 432.7 by further prohibiting employers from making inquiries about juvenile convictions, or taking into consideration any information related to an arrest, detention, processing, diversion, supervision, adjudication or court disposition that occurred while the person was subject to the process and jurisdiction of juvenile court law, when making an employment decision. The bill also excludes from the Labor Code's definition of "conviction" the adjudication by a juvenile court or any other court order or action taken with respect to a person who is under the process or jurisdiction of a juvenile court.

AB 1843 does specify an exception that health facility employers may inquire about an applicant's juvenile crimes if a juvenile court made a final ruling or adjudication that the applicant committed a felony or misdemeanor relating to sex crimes or certain controlled substance crimes within five years prior to applying for employment.

Workers' Compensation
AB 2883 revises Labor Code sections 3351 and 3552 to require most officers, directors, and partners of corporations, limited liability companies, and partnerships to be covered under the employers' workers' compensation policy. They no longer may declare that they are not "employees" under the Labor Code for purposes of workers' compensation coverage.

Heat-Related Illness and Injury
Under SB 1167, Cal-OSHA is directed to adopt a standard to protect the health and safety of indoor workers from heat-related illness and injury. Cal-OSHA will begin the rulemaking process in 2017 and is required to submit a proposal to the Cal-OSHA Standards Board by January 1, 2019. SB 1167 is not specific as to what types of workplaces this standard will cover, and it potentially could affect all indoor workplaces, including air-conditioned offices.

Protection from Disability Access Lawsuits for Small Businesses
SB 269 makes changes to the Unruh Civil Rights Act and is intended to reduce frivolous disability access lawsuits filed against small businesses. SB 269 amends Section 55.53 of the Civil Code and states that a small business, which is a business with 50 or fewer employees, will have 15 days to correct certain technical violations from the date of the service of the lawsuit or alleged violation. These technical violations range from exterior and interior signage to the color of parking lot striping. If the technical violations are corrected in timely fashion, a plaintiff will not be eligible for monetary damages. Because this was an "urgency" bill, the new law took effect immediately on May 10, 2016, when Governor Brown signed it into law.

Paid Family Leave Expansion
California's State Disability Insurance ("SDI") program provides partial wage replacement benefits to employees who are unable to work because of pregnancy or illnesses and injuries unrelated to their job. The Paid Family Leave Program portion of the SDI program provides partial wage replacement benefits to employees who are unable to work because of the need to care for a seriously ill child, spouse, parent, or domestic partner, or to bond with a newborn or newly adopted or foster care-placed child. Under existing law, California's Paid Family Leave Program entitles employees to receive up to 6 weeks of wage replacement benefits when taking time off work to care for specified persons (e.g., child, spouse, parent) or to bond with a minor child within one year of the birth or placement of the child in connection with adoption or foster care.

AB 908 amends Section 2655 of the Unemployment Insurance Code and on January 1, 2018, AB 908 increases the wage replacement rate under California's Paid Family Leave Program from 55% to (i) 70% for those who earn less than one-third of the California average weekly wage, and (ii) 60% for those who earn one-third or more of the California average weekly wage. The new bill also eliminates the 7 day waiting period for benefits.

Starting in January 1, 2017, employers in the City of San Francisco with 50 or more employees will be required to provide supplemental compensation so that employees are paid 100% of their normal wages for 6 weeks when they use California paid family leave benefits for new child bonding. For example, if an employee currently receives 55% of his or her wages from worker-funded state disability insurance, San Francisco mandates that employers make up the 45% difference. For claims beginning on or after January 1, 2018, the maximum weekly benefit increases to either 60% of weekly wages for higher-income workers or 70% of weekly wages for lower-income workers under state law. Therefore, an employer's supplemental compensation obligation will decrease to 40% or 30% depending on the wage level of the employee. Employers with 35-49 employees, will be required to start providing supplemental compensation on July 1, 2017. Employers with 20-34 employees will be required to start providing supplemental compensation on January 1, 2018. The new ordinance does not apply to employers with 19 or fewer employees.

EEO-1 Form Requirements
The U.S. Equal Employment Opportunity Commission ("EEOC") requires employers with 100 or more employees and federal contractors with 50 or more employees to submit an EEO-1 report each year to the EEOC. Employers currently provide numeric information on the form regarding the gender, race, and ethnicity of employees by job category.

The EEOC has revised its EEO-1 form to require employers to submit more detailed information as to pay data with respect to gender, race and ethnicity that is based on W-2 information for the 2017 calendar year, with the first report under the new format due March 31, 2018. The EEOC intends to use the new data to assess allegations of pay discrimination and to "compile and publish aggregate data that will help employers in conducting their own analysis of their practices."

Increased Whistleblower Protections
The Securities and Exchange Commission ("SEC") has issued six-figure fines to employers this past year because of provisions in severance agreements that the SEC deemed to discourage whistleblowing by current and former employees.

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Another Year, Another Set of Laws: What California Employers Should Know

Paul L. Bressan and Louise Truong

Specifically, the SEC found that certain common provisions in severance agreements that require employees to waive the right to any monetary recovery based on a charge filed with a government agency necessarily include restrictions on an employee's ability to recover a monetary bounty for providing information to the agency, and therefore violate the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). Even if a severance agreement explicitly states that the employee is not prevented from communicating with government agencies, the SEC still believes that requiring an employee to waive a monetary award defeats the purpose of the Dodd-Frank Act and will impede whistleblower activity.

Similarly, the Federal Occupational Safety and Health Administration ("OSHA") recently published new guidelines relating to settlement agreements for whistleblower claims. OSHA is responsible for reviewing settlement agreements between complainants and employers reached during an OSHA investigation. The new guidelines OSHA released are meant to address "gag" provisions in settlement agreements that OSHA believes discourage whistleblowing or participation in an OSHA investigation.

Going forward, OSHA will not approve settlement agreements of whistleblower actions that:

- Restrict the employee's ability to provide information to the government, participate in investigations, file a complaint, or testify in proceedings based on the employer's past or future conduct;
- Require an employee to notify his or her employer prior to filing a complaint or voluntarily communicating with the government regarding the employer's past or future conduct;
- Require an employer to affirm that he or she has not previously provided information to the government or engaged in other protected activity, or to disclaim any knowledge that the employer has violated the law;
- Require an employee to waive his or her right to receive a monetary award from a government-administered whistleblower award program for providing information to a governmental agency;
- Require an employee to remit any portion of such award to the employer; or
- Mandate liquidated damages that are overtly disproportional.

If OSHA comes across a settlement agreement for a whistleblower action with any of the above provisions, OSHA will ask the parties to remove the offending provision(s) and/or to add the following language prominently positioned within the settlement:

"Nothing in this Agreement is intended to or shall prevent, impede or interfere with complainant's non-waivable right, without prior notice to Respondent, to provide information to the government, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA, or to receive and fully retain a monetary award from a government-administered whistleblower award program for providing information directly to a government agency."

Vetoed Bills

In addition to the bills that were signed into law by Governor Brown, there were a number of bills that were vetoed by Governor Brown, the most notable of which is SB 654.

SB 654 would have added a new section to the Fair Employment Housing Act that created a new protected leave of absence for employers with 20 or more employees. Specifically, employees who have worked for at least 12 months and 1250 hours would have been entitled to an additional six weeks of unpaid, job-protected, parental leave within the first year of a child's birth, adoption or foster care placement. Governor Brown explained that he vetoed the bill because of his concern about the "impact of this leave particularly on small businesses and the potential liability that could result."

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

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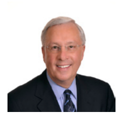

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