California Legislative Developments

Wilson Turner Kosmo
LLP

A WBENC certified women-owned business representing companies throughout California

Business Litigation · Class Action · Employment Law · Product Liability
www.wilsonturnerkosmo.com

LEGISLATIVE RECAP

California's legislative session recently ended with a flurry of activity as Governor Jerry Brown signed and vetoed a number of bills before the September 30th deadline. As expected, this year's legislative session once again saw a number of new employment-related laws enacted, with most taking effect on January 1, 2015. While the new Paid Sick Leave law (AB 1522) and the law imposing joint responsibility for certain contractor obligations (AB 1897) dominated the headlines, there were a number of other significant new laws, including laws that will:

- amend the Fair Employment and Housing Act (FEHA) to prohibit discrimination or harassment against unpaid interns or volunteers (AB 1443);
- amend FEHA to prohibit discrimination against individuals with drivers licenses issued to undocumented workers (AB 1660);
- require employers discuss "abusive conduct" in sexual harassment training currently required under AB 1825 (AB 2053); and
- enact new regulations regarding "foreign labor contractors" who recruit foreign workers to California (SB 477).

However, Governor Brown once again vetoed a bill that would have imposed new limits on an employer's ability to advertise available positions (AB 2271), and a heavily-opposed bill that would have allowed employees to levy pre-judgment liens against employer property in wage disputes stalled late in the legislative session. Looking ahead, it remains to be seen whether these bills will resurface in 2015, or whether there will be "clean up" legislation introduced to answer some of the issues almost certain to arise with the Paid Sick Leave bill (AB 1522) since the Labor Commissioner will not be providing clarifying regulations.

On the municipal level, interim reports suggest that enough signatures have been gathered to force a city-wide referendum on San Diego's ordinance that would increase the minimum wage and require additional paid sick leave beyond that required under AB 1522. If a referendum occurs, this Ordinance would be stayed until at least mid-2016. In the interim, San Diego has enacted new "e-cigarette" limitations that take effect on October 16, 2015.

Listed below, largely by subject matter, are the state-wide employment-related bills that have been signed into law and will become effective January 1, 2015, unless otherwise noted. An update on several municipal-related developments (e.g., San Diego's Minimum Wage/Paid Sick Leave and E-Cigarette Ordinances) follows the state-level developments.

These legislative, as well as other significant judicial and agency developments, will be discussed at our annual Employment Law Seminar:
http://www.wilsonturnerkosmo.com/events/Employment_Law_Seminar/

NEW CALIFORNIA EMPLOYMENT LAWS ENACTED IN 2014

Employers Required to Provide Paid Sick Leave (AB 1522)

On September 10, 2014, Governor Jerry Brown signed the "Healthy Workplaces, Healthy Families Act of 2014" (AB 1522) making California the second state (Connecticut is the other) to require employers to provide paid sick leave. The law takes effect July 1, 2015, and implements a number of new Labor Code provisions (sections 245 *et seq*.) and will require employers to provide up to three days of paid sick leave each year.

California employers should begin learning the law's very detailed requirements and compare it against a similar ordinance already enacted in San Francisco to the extent they do business in San Francisco. Listed below is an initial review of this new law's numerous requirements. The full-text is available at: http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1501-1550/ab_1522_bill_20140904_enrolled.pdf.

The Law Applies to Almost All Employers, Regardless of Size

Likely one of the more controversial aspects of this new law is its scope. For instance, unlike Connecticut's Paid Sick Leave law, which applies only to employers with more than 50 employees and San Francisco's Paid Sick Leave Ordinance which exempts smaller employers from certain obligations, this new law applies to almost all employers regardless of size, many public employers, the state, and municipalities.

Notably, however, like many other recent Labor Code amendments, this law contains carve-outs for employees covered by collective bargaining agreements (CBAs) with certain provisions. Specifically, this law does not apply to employees covered by CBAs that expressly provide for the wages, hours of work, and working conditions of employees, as well as for paid sick days (with final and binding arbitration for any disputes regarding paid sick days), premium wage rates for all overtime, and a regular hourly rate of not less than 30 percent more than the state minimum wage.

Similarly, construction industry employees covered by a CBA with these provisions are not covered by this law if the CBA was entered into before January 1, 2015, or if the CBA expressly waives the requirements of this new law in clear and unambiguous terms.

Responding to the State of California's concern about costs, an amendment inserted at the eleventh-hour also exempts a provider of in-home supportive services under specified sections of the Welfare and Institutions Code.

Finally, certain individuals employed in the airline industry and covered by the federal Railway Labor Act are exempted provided they receive compensated time-off at least equal to this new law.

Accrual and Usage Rules

After July 1, 2015, employees who work in California for thirty or more days within a year from the commencement of employment will accrue paid sick leave at a rate of no less than one hour for every 30 hours worked. Exempt employees will be deemed to work 40 hours per week for accrual purposes, unless their normal workweek schedule is less than 40 hours, in which case they will accrue paid sick leave based upon their normal workweek.

Employees will be entitled to use accrued paid sick days beginning on the 90th day of employment, after which they may use paid sick days as they are accrued. Employers will also have the discretion to lend paid sick days to an employee in advance of accrual, and employers cannot require employees to locate a replacement worker to cover days on which an employee uses paid sick days.

While accrued paid sick days shall carry over to the following year of employment, employers may limit an employee's use of paid sick leave to 24 hours or three days in each year of employment. However, no accrual or carry-over is required if the full amount of sick leave is received at the beginning of each year. An employer also has no obligation to allow an employee's total accrual of paid sick leave to exceed 48 hours or six days provided that an employee's rights to accrue and use paid sick leave under this section are not otherwise limited. This six-day accrual limit appears intended to ensure the employee has the full paid sick leave allotment both for the instant year and the beginning of the next year.

One of the bigger concerns about this proposed law was its potential impact on employers who already provide an equal amount of sick time or paid time off. New Labor Code section 246(e) addresses this concern by stating that an employer does not need to provide "additional" paid sick days if it meets certain requirements. Specifically, the employer is exempted from providing additional paid sick days if: (a) it has a paid leave policy or paid time off policy, (b) the employer makes available an amount of leave that may be used for the same purposes and under the same conditions as specified in this new law, and (c) the employer's policy does either of the following: (1) it satisfies the accrual, carry over and use requirements of this new law; or (b) it provides no less than 24 hours or three days of paid sick leave, or equivalent paid leave or paid time off, for employee use for each year of employment, calendar year or 12-month basis. Notably, unlike the exemptions provided to this entire new law for certain groups (discussed above), this particular exemption seems to apply only to the provision of "additional" time off, but does not exempt employers from other aspects of this new law (i.e., notices, posters, record-keeping, etc.).

Employers will not be required to compensate employees for unused sick days upon termination of employment, but they must reinstate the previously unused balance if they rehire the employee within one year. In that instance, the rehired employee shall be entitled to use those previously accrued and unused paid sick days and to accrue additional paid sick days upon rehiring.

Employees will be entitled to use paid sick time for preventive care for themselves or a family member, as well as for the diagnosis, care, or treatment of their or their family member's existing health condition. For purposes of this bill, "family member" means a (1) child (as defined), (2) parent (as defined), (3) spouse, (4) registered domestic partner, (5) grandparent, (6) grandchild, or (7) sibling. The employer shall also provide paid sick days for an employee who is a victim of domestic violence, sexual assault, or stalking, as discussed in Labor Code sections 230 and 230.1.

An employee may determine how much paid sick leave the employee needs to use, but an employer may set a reasonable minimum increment, not to exceed two hours, for the use of paid sick leave. In response to employer concerns that sick leave is more unpredictable than many other forms of leave (e.g., FMLA, etc.), this law requires employees to provide "reasonable" advance notification if the need for paid sick leave is foreseeable. Where the need for paid sick leave is unforeseeable, the employee shall provide notice of the need for leave as soon as practicable.

Employees using paid sick leave shall be compensated at the employee's normal rate during regular hours of work. If the employee in the 90 days of employment before taking accrued sick leave had different hourly pay rates, was paid by commission or piece rate, or was a nonexempt salaried employee, then the rate of pay shall be 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.

Notice, Posting and Record-Retention Rules

This law also furthers a recent trend of new California laws enacting substantive rights and imposing administrative responsibilities, although arguably in less expansive form due to last-minute amendments proposed by human resources organizations.

For instance, this law amends Labor Code section 2810.5 to require employers to provide written information at the time of hiring about this new paid sick leave entitlement. Specifically, this law requires that the notice employers have been required to provide since 2012 concerning pay-related information now must also include language advising employees of their right to accrue and use paid sick leave, their right to be free from retaliation, and their right to file a complaint. Fortunately, this particular Labor Code section generally requires the Labor Commissioner to develop a template employers may use, so presumably the Labor Commissioner will develop an updated form.

An employer will also be required to display, in a conspicuous place in each workplace of the employer, a poster notifying employees of these paid sick leave rights. The Labor Commissioner will be responsible for preparing this poster. Employers who willfully violate the posting requirements will be subject to a civil penalty of not more than $100 per offense.

Employers will also be required to provide employees with written notice identifying the amount of paid sick leave available, or paid time off an employee provides in lieu of sick leave, for use on either the employee's itemized wage statement required under Labor Code section 226 or in a separate writing provided on the designated pay date with the employee's payment of wages. An employee alleging failure to provide such notice shall be entitled to the penalties specifically enumerated under this law (discussed below) rather than under Labor Code section 226.

New Labor Code section 247.5 also requires employers to retain, for at least three years (rather than the five years originally proposed), records documenting the hours worked, paid sick days accrued, and paid sick days used by each employee. These records may be inspected by the Labor Commissioner under Labor Code section 1174, or by an employee under Labor Code section 226. Troublingly, and in another example of a recent trend in California, this section provides that if an employer fails to maintain adequate records, it shall be presumed that the employee is entitled to the maximum number of hours accruable under this new article, unless the employer proves otherwise by clear and convincing evidence.

Retaliation Protections and Enforcement

This law also prohibits discrimination or retaliation against employees for using accrued sick days, or for filing a complaint regarding any sick day policy violation. However, similar to last year's protections against "immigration-related practices" (AB 263), this law creates a rebuttable presumption of unlawful retaliation if an employer takes an adverse employment action (including denying the right to use sick days) within 30 days of an employee: (1) filing a complaint with the Labor Commissioner or in court alleging violations of this article; (2) cooperating with an investigation or prosecution of an alleged violation of this article; or (3) opposing a policy, practice or act that is prohibited by "this article" of the Labor Code.

Under new Labor Code section 248.5, the Labor Commissioner may award reinstatement, back pay, and payment of sick days unlawfully withheld, plus the payment of an additional sum in the form of an administrative penalty to an employee whose rights were violated. Where paid sick leave is unlawfully withheld, the employee shall recover the dollar value of the paid sick days withheld, or $250 multiplied by three, whichever is greater, but not to exceed an aggregate penalty of $4,000. If a paid sick leave-related violation results in "other" harm to the employee or person, the administrative penalty shall include a sum of $50 for each day that the violation occurred or continued, not to exceed $4,000.

If the employer fails to promptly comply, the Labor Commissioner may take "appropriate" enforcement action to ensure compliance, including filing a civil action. In such instances, the violating employer may be ordered to pay to the State of California up to $50 for each day a violation occurs or continues.

Employees or other persons may report suspected violations to the Labor Commissioner, and to encourage such reporting, the Labor Commissioner may keep the reporting employee's identifying information confidential.

The Labor Commissioner or the Attorney General may also file a civil action in court against the employer or any person violating this article. The Labor Commissioner or Attorney General may recover appropriate legal and equitable relief, including reinstatement, back pay, the payment of sick days improperly withheld, and liquidated damages of $50 to each employee for each violation for each day, plus reasonable attorneys' fees and costs. (A provision authorizing employees to file civil actions was deleted by recent amendment while another amendment clarifies that these administrative actions would be maintained on "behalf of the aggrieved," suggesting any penalties would ultimately be awarded to the employee.) Subdivision (b) to Labor Code section 245 clarifies that the provisions of this new article "are in addition to and independent of any other rights, remedies or procedures under any other law."

Lastly, proposed section 249, subdivision (d), specifies this law establishes "minimum" requirements for paid sick days and does not preempt, limit or otherwise affect the applicability of any other law or ordinance that provides greater accrual of use of paid sick days.

FEHA to Prohibit Discriminating Against Employees Because of Drivers Licenses Issued to Undocumented Citizens (AB 1660)

In 2013, California enacted AB 60 which created new Vehicle Code section 12801.9 authorizing the Department of Motor Vehicles to issue an original driver's license to a person who is unable to submit satisfactory proof that the applicant's presence in the United States is authorized under federal law. AB 60 also amended the California Unruh Act (Civil Code section 51 *et seq.*) to prevent business establishments from discriminating against individuals who hold or present such driver's licenses.

This law amends the Fair Employment and Housing Act (FEHA, Government Code section 12940 *et seq.*) to prohibit discrimination against an individual because he or she holds or presents a drivers license issued under Vehicle Code section 12801.9, except as specified. It adds subdivision (v) to Government Code section 12926, specifying that national origin discrimination includes discrimination on the basis of possessing a driver's license issued under Vehicle Code section 12801.9. It also prohibits a governmental authority or its agent from discriminating against an individual because he or she holds or presents a specified license.

This law also makes corresponding amendments to Vehicle Code section 12801.9 to provide that it will be a FEHA violation to discriminate against a person holding or presenting a driver's license issued pursuant to that section. It also makes it a FEHA violation for an employer or covered person to require a person to present a driver's license, unless possessing a driver's license is required by the employer and the employer's requirement is otherwise permitted by law. This law specifies that Vehicle

Code section 12801.9 shall not be construed to limit or expand an employer's authority to require a person to possess a driver's license.

Notably, this law specifies that it does not affect an employer's rights or obligations to obtain information required under federal law to determine identity and authorization to work. It also provides that actions taken by an employer that are required by the federal Immigration and Nationality Act would not violate this law.

Lastly, it specifies that driver's license information obtained by an employer shall be treated as private and confidential, and exempt from disclosure under the California Public Records Act, and shall not be disclosed to any unauthorized person or used for any purpose other than to establish identity and authorization to drive.

FEHA Protections for Unpaid Interns and Volunteers (AB 1443)

This law amends the FEHA in response to several court rulings in other jurisdictions suggesting interns or volunteers are not "employees" for purposes of harassment and discrimination laws. For instance, it amends Government Code section 12940(c), which prohibits discrimination in apprentice training programs, to also preclude discriminating on the basis of any legally protected classification (e.g., race, religion, disability, etc.) in an unpaid internship or another limited duration program to provide unpaid work experience for that person.

It also amends subsection (j) to prohibit harassment against unpaid interns or volunteers because of a legally protected classification. Lastly, it extends the existing religious belief accommodation requirements to unpaid interns and volunteer workers.

AB 1825 Training to Include Prevention of "Abusive Conduct" (AB 2053)

In 2004, California enacted AB 1825, which requires employers with more than 50 employees to provide at least two hours of sexual harassment training for supervisors located in California. Under Government Code section 12950.1, employers must provide this training within six months of an employee's assumption of a supervisory position, and once every two years thereafter.

Reflecting a recent trend targeting "workplace bullying," this law amends section 12950.1 to require this harassment training also include the prevention of "abusive conduct." Newly proposed subsection (g)(2) defines abusive conduct 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." It further specifies that such abusive conduct "may include repeated infliction of verbal abuse, such as the use of 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." However, this law specifies that "a single act shall not constitute abusive conduct, unless especially severe and egregious."

Notably, this law only requires such "abusive conduct" prevention training occur within the already required AB 1825 harassment training, and it does not otherwise amend the FEHA to prohibit "abusive conduct" unrelated to an already protected criterion. However, this law does not specify how much of the AB 1825 training much address workplace bullying, nor does it provide specific guidance on what must be included in the training.

Sexual Harassment Training for Farm Labor Contractors (SB 1087)

California presently has detailed laws regulating "farm labor contractors" (FLC) and the procedures for them to obtain the requisite licenses. (*See* Labor Code section 1682 *et seq.*) This law amends numerous provisions relating to FLCs generally, including several specific provisions to address concerns about wide-spread sexual abuse of female migrant farm workers recently detailed in the documentary "Rape in the Fields."

First, this law prohibits the Labor Commissioner from issuing a FLC license to any person who, within the preceding three years, has been found by a court or an administrative agency to have committed sexual harassment of an employee. It also prohibits an FLC license from being issued to any person who, within the preceding three years, employed any supervisory employee he or she knew or should have known had been found by a court or an administrative agency within the preceding three years of his or her employment with the applicant to have sexually harassed an employee. However, the employer will be deemed not to have knowledge of harassment by any supervisory employee if that supervisory employee executes a Labor Commission form averring that the person has not been found to have committed sexual harassment within the preceding three years. This particular provision shall not take effect until the Labor Commissioner prepares and posts on its website this attestation form.

In addition to denying an FLC license, the Labor Commissioner may revoke, suspend, or refuse to renew an FLC license if either of the above-mentioned criteria exists.

This law also requires that the mandatory written examination portion of the licensing process cover laws and regulations concerning workplace sexual harassment, and that the annual mandatory eight hours of educational classes be increased to nine hours, and include at least one hour of sexual harassment training.

An applicant for an FLC license must also execute written statements that the Labor Commissioner shall provide attesting that their employees have received sexual harassment prevention training. Supervisory employees must receive two hours of training each calendar year, while non-supervisory employees must be trained at time of hire and every two years. The sexual harassment training requirements are very similar to the currently-required AB 1825 training for private employers, including that the FLC maintain these harassment training records for three years.

Secondly, this law increases the ability of the Division of Labor Standards Enforcement (DLSE) to enforce applicable laws. Accordingly, it increases funding for FLC enforcement and verification, and aims to increase bonding requirements, increase wage and hour reporting, and increase penalties for violations.

"Client Employers" to Share Certain Legal Responsibilities with Labor Contractors (AB 1897)

Labor Code section 2810 previously prohibited a person or entity from entering into a contract or agreement for labor or services with specified types of contractors (e.g., construction, farm labor, garment, janitorial, security guard, or warehouse contractor) if the person or entity knows or should know that the contract or agreement does not include funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws. Citing a concern about protecting workers in the "subcontracted economy," this law enacts a new section, Labor Code section 2810.3, requiring a "client employer," as defined to share with the labor contractor legal responsibility and liability for certain obligations.

Specifically, client employers will share with the labor contractor all civil legal responsibility and civil liability for workers supplied by that labor contractor for: (1) the payment of wages; and (2) the failure to secure valid workers compensation coverage. Despite this shared responsibility, a worker or their representative cannot file a civil action against the client employer until after providing thirty days notice of violations of any shared obligations. This law prohibits the client employer or the labor contractor from taking any adverse action against any worker for providing notification of violations or filing a civil action.

This law also prohibits client employers from attempting to contract around these provisions, such as by shifting these responsibilities solely to the labor contractor, but the employer and labor contractor may contract regarding certain remedies, including indemnification for the other party's violations of this section. However, this law prohibits a client employer from shifting to the labor contractor any legal duties or liabilities to provide a safe workplace with respect to workers supplied by the labor contractor.

As with the new Paid Sick Leave law (AB 1522), one of the more controversial aspects of this law is its scope. As noted above, California has already enacted additional protections (e.g., Labor Code section 2810) against specific industries with documented histories of violations involving contracted labor. This new law, however, dramatically expands the scope of industries affected, and requires employers to navigate a maze of defined terms, some of which are included below, while it also exempts certain specified groups from its coverage.

For purposes of this law, "client employer" is defined as a business entity, regardless of form, that obtains or is provided workers to perform labor or services within the usual course of business from the labor contractor. "Client employer" does not include: (a) a

business entity with a workforce of less than 25 workers, including those hired directly by the client employer and those obtained from or provided by, any labor contractor; (b) a business entity with five or fewer workers supplied by a labor contractor or labor contractors to the client employer at any given time; or (c) the state or any political subdivision of the state of California.

Subsection (p) to section 2810.3 also delineates specific instances where liability may not be imposed against certain client employers, including certain motor carriers, non-motor carriers (as specified), cable operators and motor clubs (as specified). Section 2810.3 also will not impose individual liability on a homeowner for labor or services performed at the home, nor shall it impose liability on an employer for the use of a bona fide independent contractor.

"Labor" will have the same definition as under Labor Code section 200, meaning any labor, work or service rendered or performed under contract, subcontract, partnership, station plan or other agreement if the labor to be paid for is performed personally by the person demanding payment. However, "worker" only applies to non-exempt employees.

"Labor contractor" means an individual or entity who supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business. However, it does not include: (a) a bona fide non-profit community-based organization that provides services to workers; (b) a bona-fide labor organization or apprenticeship program; (c) a motion picture payroll services company; or (d) a third-party who is a party to an employee leasing arrangement, as defined and with certain exceptions.

"Usual course of business" is defined as the regular and customary work of a business, performed within or upon the premises or worksite of the client employer.

This law also requires a client employer or labor contractor to provide to a requesting enforcement agency or department, and make available for copying, information within its possession, custody or control required to verify compliance with state laws. This does not require the disclosure of any information that is not otherwise required to be disclosed by employers upon request by a state enforcement agency or department.

Rest and Recovery Periods Count as Hours Worked (SB 1360)

Labor Code section 226.7 presently precludes employers from requiring employees to work during any meal, rest, or recovery period, and to pay an additional hour of pay at the employee's regular rate of pay for each workday a meal, rest, or recovery period is missed. (In 2013, California enacted SB 435 adding the language regarding "recovery periods" to the then-existing version of section 226.7.) Responding to concerns that employers were not sure if rest or recovery periods needed to be paid, this law amends section 226.7 to specify that rest or recovery periods required under state law shall be counted as hours worked for which there shall be no deduction from wages. The law's

proponents state that this language was mistakenly omitted from SB 435 during the 2013 legislative session.

This law specifically states it is declarative of existing law, and therefore is immediately effective and applies retroactively.

Time Off for Emergency Rescue Personnel (AB 2536)

Labor Code section 230.3 prohibits an employer from discharging or in any manner discriminating against an employee for taking time off to perform emergency duty as a volunteer firefighter, reserve peace officer, or emergency rescue personnel. Section 230.3 previously defined "emergency rescue personnel" to include an officer, employee, or member of a political subdivision of the state, or of a sheriff's department, police department, or a private fire department. This law expands this definition of "emergency rescue personnel" to include an officer, employee, or member of a disaster medical response entity sponsored or requested by the state.

It also requires an employee who is a health care provider (as defined by the Business and Professions Code) to notify their employer at the time they become designated as an emergency rescue personnel, and when the employee is notified that they will be deployed because of that designation.

Longer Statute of Limitations for Recovering Liquidated Damages for Unpaid Wages (AB 2074)

California law permits an employee to pursue a civil action to recover unpaid wages or compensation, and Labor Code section 1194.2 permits a successful employee to also recover liquidated damages equal to the unpaid wages plus interest in civil actions regarding minimum wage violations. Responding to recent cases suggesting that actions for recovery of penalties must be filed within one year, whereas actions to recover unpaid wages have a three-year statute of limitations, this law amends section 1194.2 to specify that the statute of limitations to pursue liquidated damages is the same as in an action for wages from which the liquidated damages arise.

The "Child Labor Protection Act" (AB 2288)

Known as the Child Labor Protection Act of 2014, this law enacts a new Labor Code provision (section 1311.5) to provide additional remedies for violations of California's laws regarding employment of minors. For instance, the statute of limitations for claims related to the employment of minors shall be tolled until the individual allegedly aggrieved by the unlawful employment practice reaches 18 years of age. This law specifies that this provision is declarative of existing law, meaning it applies retroactively.

This law also authorizes individuals who are discriminated or retaliated against because they filed a claim alleging a child labor violation to receive treble damages in addition to

any other legal remedies available. Lastly, while Labor Code section 1288 presently identifies certain "classes" of violations resulting in statutorily-enumerated penalties, this law imposes a civil penalty of $25,000 to $50,000 for each violation involving minors less than 12 years of age.

Penalties for Minimum Wage Violations to Include Waiting Time Penalties (AB 1723)

Labor Code section 1197.1 previously enumerated various statutory penalties against employers who fail to pay the legally-required minimum wage. Specifically, it authorized employees to recover a civil penalty (as specified), restitution of wages, and liquidated damages. While the Labor Code previously provided three mechanisms to pursue such violations (e.g., through a "Berman Hearing" before the Labor Commissioner, through a civil action, or through a Labor Commissioner citation), section 1197.1 initially authorized waiting time penalties under section 203 only for the first two mechanisms (i.e., not for Labor Commissioner citations). This law amends section 1197.1 to harmonize these three recovery mechanisms and authorize waiting time penalties in all three scenarios if an employer failed to timely pay wages of a resigned or discharged employee.

Waiting Time Penalties for Final Wage Violations for Unionized Theatrical Employees (AB 2743)

While Labor Code section 201 sets forth the general rule regarding the payment of final wages, the Labor Code also enumerates alternative final pay rules for particular industries due to the unique nature of those industries. Labor Code section 203, which authorizes waiting time penalties for failure to comply with these final pay rules, generally cross-references both section 201 and these more specific final pay statutes. However, and likely due to a legislative drafting error, Labor Code section 203 did not previously cross-reference section 201.9, which governs final pay for employees at live theatrical and concert events that are subject to a collective bargaining agreement. This law amends section 203 to include section 201.9 as one of the specific final pay statutes to which waiting time penalties apply if final wages are not paid in accordance with the applicable Labor Code section.

Prevailing Wage Determinations (SB 266)

This law is intended to address concerns that the lengthy delays in determining whether a project is a public work for prevailing wage purposes potentially negatively impacts workers' abilities to pursue wage-related claims through the Labor Commissioner. Accordingly, it amends Labor Code section 1741.1 to require the body awarding the public work contract to furnish, within 10 days after receipt of a written request from the Labor Commissioner, a copy of the valid notice of completion for the public work, or a document evidencing the awarding body's acceptance of the public work on a particular date, whichever occurs later.

It also requires the awarding body to notify the appropriate office of the Labor Commissioner if, at the time of receipt of the Labor Commissioner's written request, there has been no valid notice of completion filed by the awarding body in the office of the county recorder and no document evidencing the awarding body's acceptance of the public work on a particular date. If the awarding body fails to timely furnish the Labor Commissioner with the applicable documents, this law requires that the period for service of assessments be tolled until the Labor Commissioner's receipt of the applicable document.

Although this bill was originally introduced as "urgency" legislation, meaning it would have applied retroactively, this language was omitted during final amendments so it will now take effect on January 1, 2015.

Foreign Labor Contractor Requirements to Combat Human Trafficking (SB 477)

To address human trafficking concerns, this law expands and strengthens the regulations of "foreign labor contractors" who recruit foreign workers to relocate to California. Notably, "foreign labor contracting activity" is specifically defined as "recruiting or soliciting for compensation a foreign worker who resides outside of the United States in furtherance of that worker's employment in California, including when that activity occurs wholly outside the United States."

Notably also, in response to employer-provided concerns that led to the vetoing of a similar bill last year (SB 516), this definition states "'[f]oreign labor contracting activity' would not include the services of an employer, or employee of an employer, if those services are provided directly to foreign workers solely to find workers for the employer's own use." However, in exchange for this general exemption for direct recruiting activities, California employers who use foreign labor contractors will be prohibited from using contractors not registered with the Labor Commissioner. They will also be required to disclose which employees are working with the contractor, and are required to consent to California's jurisdiction in the event of a future suit.

"Foreign labor contractors" covered by this law must register with the Labor Commissioner by July 1, 2016, and pay a registration fee set by the Department of Industrial Relations to support the ongoing costs of the program. These contractors must also post a surety bond between $25,000 and $150,000 before the Labor Commissioner can renew or register a foreign labor contractor. Such contractors must also disclose specified information to foreign workers, in a language they can comprehend, regarding the terms and conditions of the proposed work in California. This law also authorizes civil penalties of $1,000 to $25,000 for violations of these provisions, and allows an aggrieved person or the Labor Commissioner to seek injunctive relief.

"Immigration-Related" Retaliation Protections Clarified (AB 2751)

This "clean up" law makes relatively-minor changes to several measures enacted last year to protect immigrant workers against unlawful retaliation. For instance, in 2013,

California enacted AB 263 and SB 666 which, in turn, enacted Labor Code section 1019 prohibiting employers from engaging in various "immigration-related practices" against persons who had exercised certain rights protected under state labor and employment laws. These prohibited "immigration-related practices" included threatening to file or filing a false police report. This law expands this particular provision to also include the threatening to file or the filing of a false report or complaint with any state or federal agency, not just the police.

Section 1019 also authorizes the court to order, upon application of a party or upon its own motion, the appropriate government agencies to suspend certain business licenses held by the violating party for prescribed periods based on the number of violations. These amendments clarify that the licenses to be affected would be "specific to the business location or locations where the unfair immigration-related practice occurred," rather than potentially state-wide.

Last year's bills also added subsection (b)(3) to Labor Code section 98.6 to authorize a $10,000 penalty against an employer per employee for each violation. Since last year's amendment did not specify to whom this penalty would be awarded, this new law specifies these penalties shall be "awarded to the employee or employees who suffered the violation."

In 2011, AB 22 enacted Labor Code section 1024.5 limiting an employer's ability to use consumer credit reports, and in 2013, AB 263 enacted Labor Code section 1024.6 prohibiting employers from retaliating against employees who update their "personal information." Because AB 263 did not define "personal information," this law further amends section 1024.6 to specify that employers may not discharge or discriminate against employees who update their personal information "based on a lawful change of name, social security number or federal employment authorization document." Responding to employer concerns, these amendments also specify that "an employer's compliance with this section shall not serve as the basis for a claim of discrimination, including any disparate treatment claim."

Expedited Workers' Compensation Proceedings Involving Illegally Uninsured Employers (AB 1746)

California's Workers' Compensation system requires the administrative director to establish a priority conference calendar for cases in which the employee is represented by an attorney and the disputed issues are employment or injury (as specified). This law amends Labor Code section 5502 to require that cases in which the employee is or was employed by an illegally uninsured employer and the disputed issues are employment or injury (as specified), be placed on this priority conference calendar.

Employers May Report Workplace Injuries via Email Rather than Telegraph (AB 326)

Although Labor Code section 6409.1 has long required employers to immediately notify the Division of Occupational Safety and Health of an employee's serious injury, illness or death, this section had not been updated recently, and so it required the employer to provide this notice via telephone or telegraph. This new law amends section 6409.1 to enable the employer to make such reports via telephone or email, and deletes language authorizing the use of a telegraph.

Unemployment Insurance Eligibility for Training Periods (AB 1556)

While California's Unemployment Insurance Code prohibits an unemployed individual from being disqualified for benefits solely because he or she is a student, it previously contained no similar protection for individuals who commence a training or education program. This law addresses this omission by adding section 1253.92 to the Unemployment Insurance Code to preclude unemployed individuals who are meeting specified requirements and applying for continued unemployment compensation from being scheduled for an eligibility determination for a week in which they commenced or are participating in a training or education program under specified conditions.

While Unemployment Insurance Code section 316 previously required that standard information employee pamphlets be printed in English and Spanish, this law requires these pamphlets to be printed in English and the seven other most commonly used languages amongst participants in unemployment and disability insurance programs. It also requires the EDD to ensure its website provides information about unemployment insurance benefits in the seven languages, other than English, most commonly used by unemployment insurance applicants and claimants.

Expanded Deadlines to Appeal Employment Development Department Determinations (SB 1314)

This law amends multiple Unemployment Insurance Code sections to extend, beginning July 1, 2015, the deadline from 20 days to 30 days to appeal or seek reconsideration of various Employment Development Department (EDD) determinations. For instance, it amends section 1328 to extend the deadline to challenge an EDD determination regarding the eligibility for unemployment insurance benefits to 30 days. It also amends Unemployment Insurance Code section 1334 to extend the period before an administrative law judge determination is final from 20 to 30 days, unless a further appeal is initiated to the California Unemployment Insurance Appeals Board.

Changes in Abatement Period Pending Appeal for Serious Violations (AB 1634)

Presently, the Division of Occupational Safety and Health (DOSH) may issue a citation or notice of proposed penalty to an employer it determines to be in violation of safety-related laws, and this citation shall identify a period to abate (i.e., to fix) the alleged violation. The employer may appeal the citation to the Occupational Safety and Health Appeals Board (OSHAB), and there is presently no requirement to fix the violation while the appeal is pending.

This law amends Labor Code sections 6319, 6320 and 6625 to prohibit DOSH from granting, for serious violations, a proposed modification to civil penalties for abatement or credit unless the employer has abated the violation, as specified, or has submitted a statement to DOSH in accordance with existing law and some newly-adopted deadlines and documentation guidelines. This law also generally prohibits the stay or suspension of an abatement order affirmed by a decision or order during the pendency before the OSHAB of a petition for reconsideration of a citation for a violation that is classified as a serious violation, a repeat serious violation, or a willful serious violation. This law would authorize the OSHAB to stay or suspend abatement, upon petition by the employer, only if the employer demonstrates that a stay or suspension will not adversely affect employee health or safety.

Workplace Violence Prevention Plans for Hospitals (SB 1299)

The California Occupational Safety and Health Act of 1973 imposes safety responsibilities on employers and employees, including the requirement that an employer establish and maintain an effective injury prevention program. This law enacts Labor Code section 6401.8 requiring the Occupational Safety and Health Standards Board, by July 1, 2016, to enact standards obligating specified types of hospitals (e.g., acute care, acute psychiatric) to adopt a workplace violence prevention plan as part of the hospital's injury and illness prevention plan. However, certain state-operated hospitals are exempted from these requirements.

Arbitration Agreements Involving Civil Rights Claims Invalidated (AB 2617)

Employers often utilize arbitration agreements regarding employment disputes for various reasons, including to more expeditiously resolve such disputes, to lower the costs of such disputes, and to avoid the potential for runaway jury verdicts. This law amends Civil Code sections 51.7, 52, and 52.1 to prohibit businesses from requiring an individual to waive certain rights under the Ralph Civil Rights Act or the Bane Civil Rights Act, including pursuing a civil action or contacting state agencies such as the Department of Fair Employment and Housing. It also prohibits businesses from refusing to contract with individuals who refused to waive such legal rights. This law applies to any contracts entered into, modified, or extended after January 1, 2015.

Since this bill singles out arbitration agreements in potential contravention of the Federal Arbitration Act, it will likely be judicially challenged so employers should stay monitor further developments.

Retaliation Protections for Employees Enrolled in the Medi-Cal Program (AB 1792)

Citing the impact poorly-paid employees have on the state budget, this law requires, until January 1, 2020, the Employment Development Department (EDD) to collaborate with other specified state agencies to publish a list of employers with employees that are

enrolled in the Medi-Cal program. The EDD's report will also determine and publish the total average cost of state and federally-funded benefits provided to each identified employer's employees. This law defines "employer" to mean an organization "that employ[s] 100 or more beneficiaries of the Medi-Cal program."

This law also adds Government Code section 13084 prohibiting employers from: (1) discharging, discriminating, or retaliating against an employee who enrolls in Medi-Cal; (2) refusing to hire a beneficiary of Medi-Cal; or (3) disclosing to any person that an employee receives or is applying for Medi-Cal, unless authorized by state or federal law.

MUNICIPAL DEVELOPMENTS

An Update on Efforts to Stay San Diego's Minimum Wage and Paid Sick Leave Ordinance Until at Least June 2016

As discussed in prior newsletters, this summer the San Diego City Council made national headlines when it overrode Mayor Kevin Faulconer's veto of an ordinance to increase the minimum wage and to require paid sick leave for employees working within the City of San Diego (adding Article 9, Division 1, sections 39.0101 through 39.0115, to Chapter 3 of the San Diego Municipal Code). Quickly summarized, this ordinance would increase San Diego's minimum wage to $9.75 on January 1, 2015 (compared to $9.00 in California), and increase it to $10.50 on January 1, 2016 and to $11.50 on January 1, 2017, with automatic CPI-based increases annually starting January 1, 2019. It would also require employers provide forty hours annually of paid sick leave, thus exceeding the twenty-four hours now required for other California employers.

However, preliminary news reports suggest the San Diego business community has obtained the signatures needed to require a city-wide referendum on this ordinance. If a sufficient number of signatures survive presently-ongoing challenges, this referendum likely would not occur until June 2016, effectively staying this ordinance until at least that point. A final decision by the San Diego Registrar of Voters is expected shortly on whether or not the effort to force a city-wide referendum has succeeded, so San Diego-area employers will want to stay tuned.

City of San Diego Ordinance Regulating the use of Electronic Cigarettes

On September 16, 2014, the San Diego City Council approved the final passage of an ordinance regulating the use of electronic cigarettes or "vaping." Taking effect on October 16, 2014, the ordinance amends the San Diego Municipal Code to regulate the use of electronic cigarettes in the same manner as the use of traditional cigarettes. Vaping is now prohibited wherever smoking is currently prohibited within the City of San Diego. This includes all enclosed places of employment unless exempted or allowed by a police permit (e.g., electronic cigarette retailers or vaping lounges, among others).

Where no smoking signs are required by law, they must now also prohibit vaping, and suggested verbiage is: "No smoking and no use of electronic cigarettes except in

designated areas." If an employer has a designated outdoor smoking area per California state law, it may also choose to include vaping. Such signage should substantially read as follows: "Designated area for smoking and the use of electronic cigarettes." The employer may also choose to allow vaping only (and not smoking) in an area where the law allows designated smoking areas.

A person who violates the ordinance by smoking or vaping in a posted "no smoking" or "no electronic cigarette" area is guilty of an infraction and may be fined in an amount between $10 and $100, while an employer who knowingly permits a violation is guilty of a misdemeanor.