Labor & Employment News

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Legislative Update - New California Labor and Employment Laws for 2015

By Addie Meyers*
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In 2014, Governor Brown signed a variety of employment-related measures. These bills became law on January 1, 2015, unless otherwise specified. These new measures will affect the day-to-day business of employers in 2015. The highlights for these new employment-related measures follow:

General Employment

AB 1522 (Gonzalez) - Paid Sick Days

California law provides various forms of leave (paid and unpaid) to employees. Prior to January 1, 2015, paid sick leave was not mandated. AB 1522 enacted the "Healthy Workplaces, Healthy Families Act of 2014," which now mandates paid sick leave, and applies to most California employers. The new paid sick leave law covers exempt and non-exempt employees (including part-time, per diem, and temporary employees). Specifically, the new law:

- Mandates that employers provide at least 24 hours of paid sick leave per year. This benefit will apply to California employees who work 30 or more days within one year from the commencement of their employment.
- Requires that employees accrue no less than one hour of sick leave for every 30 hours worked beginning on July 1, 2015, which employees are entitled to use beginning on the 90th day of their employment.
- Authorizes employers to limit the amount of sick leave used to 24 hours or 3 days in each year of employment, though employees may accrue up to 48 hours or 6 days. Accrued paid sick days generally carry over to the following year.
- Prohibits employers from discriminating or retaliating against employees who utilize paid sick leave.

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Harassment and Discrimination

AB 1443 (Skinner) - Harassment: Unpaid Interns

Long-standing California law strictly prohibits harassment and discrimination of employees, applicants, employment training applicants, and apprentices. These protections are applicable on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.

These protections have been extended to include individuals participating in an unpaid internship, volunteer opportunity, or other program that provides unpaid experience in a workplace or industry.

AB 2053 (Gonzalez) - Employment Discrimination: Education and Training: Abusive Conduct

Current law requires employers with 50 or more employees to provide training and education regarding sexual harassment to all supervisory employees. This training is to be a minimum of two hours and must be conducted within the first 6 months of an employee assuming a supervisorial position, and thereafter every two years.

This new law adds training on the prevention of abusive conduct to existing sexual harassment training requirements for supervisory employees. Abusive conduct is defined as malicious conduct that would reasonably be considered hostile, offensive, and unrelated to an employer's legitimate business interests.

AB 326 (Morrell) - Occupational Safety and Health: Reporting Requirements

Current law requires an employer to file a complete report of every occupational injury or illness of each employee to the Division of Occupational Safety and Health within the Department of Industrial Relations. Immediate reporting via telephone or telegraph is required for cases involving serious injury, illness or death of an employee.

Employers must now make immediate reports by telephone or email to the Division of Occupational Safety and Health for every case involving an employee's serious injury or illness or death.

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Contracting

AB 1897 (Hernandez) Labor Contracting: Client Liability

State law regulates the terms and conditions of employment and provides specific obligations for employers in California. Employers, for example, are prohibited from entering into a contract for labor or services if the employer knows or should know that there are insufficient funds available for the contractor to comply with existing labor and employment laws.

In a significant expansion of employer-based liabilities, employers who contract with labor contractors for employees will now share civil legal responsibility and liability for the payment of wages and the failure to obtain valid workers' compensation coverage for all workers who are supplied under the contract. Client employers are also prohibited from shifting legal duties and liabilities for workplace safety to the labor contractor. Employers and contractors are required to provide enforcement agencies and departments, upon request, with information and documentation of compliance with these provisions. Exemptions include nonprofit, labor, and motion picture payroll service organizations, as well as third parties engaged in employee leasing arrangements.

AB 2365 (Pérez) - Unlawful Contracts

Non-disparagement clauses are used in contracts to prevent individuals from making statements or taking any other action that can have a negative impact on the other party.

Responding to recent media reports identifying companies that were using non-disparagement clauses to silence unhappy customers, state law now prohibits a consumer goods or service contract from waiving a consumer's right to make any statement relating to their retail experience, and also prohibits a consumer from being penalized for making statements about their retail experience.

Health Care Coverage

SB 1446 (DeSaulnier) Health Care Coverage: Small Employer Market

SB 1446 was an urgency statute that went into effect in July of 2014 when it was signed. It permits renewal of small employer (employers with fewer than 50 employees) health plans that fail to meet the requirements of the Affordable Care Act through the end of 2015 for group health insurance that was in effect on December 31, 2013, and was still in effect in July of 2014 when the law took effect.

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SB 1034 (Monning) Health Care Coverage: Waiting Periods

Under federal law, group health plans and insurance issuers are prohibited from applying a waiting period that exceeds 90 days. Current law in California allows group health plans and policies to apply waiting periods up to 60 days as a condition of employment, provided that the condition is applicable to all eligible employees and dependents.

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Health plans and health insurance policies in the group market are now prohibited from imposing waiting or affiliation periods in addition to the waiting period imposed by an employer. Group health plans or insurers are still permitted to administer a waiting period imposed by a plan sponsor or employer, though.

Employee Benefits

SB 1314 (Monning) - Unemployment Benefits

Under state law, the state Employment Development Department (EDD) considers the facts submitted by an employer to determine a claimant's eligibility for unemployment compensation benefits. An administrative law judge could reconsider an unemployment eligibility determination if an appeal is filed by either the claimant or the employer within 20 days after mailing the notice of a determination.

The deadline for filing an appeal has now been extended. Beginning on or after July 1, 2015, claimants and employers have 30 days to appeal an unemployment eligibility determination.

AB 1792 (Gomez) - Public Benefits: Reports on Employers

AB 1792, referred to by some as the public shaming law, requires the state Department of Finance to identify and compile an annual list of private employers with 100 or more employees who are enrolled in public assistance programs. The Department will send a list of the 500 employers in the State with the most employees who are enrolled in public assistance programs to the Legislature and will post the list (a "list of shame") on its website beginning in January of 2016, and continuing until January 1, 2020.

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Addie provides legislative lobbying and regulatory agency advocacy services to a diverse client base including nonprofit organizations, professional associations, business and trade associations, Fortune 500 corporations, and biotechnology research firms. In her role as a lobbyist, Addie works to influence policy-makers to change or not change the law, either at the legislative level or the regulatory level. A vital aspect of her job requires continuous monitoring and tracking of legislative proposals that impact how employers do business in California.

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FEB 2015

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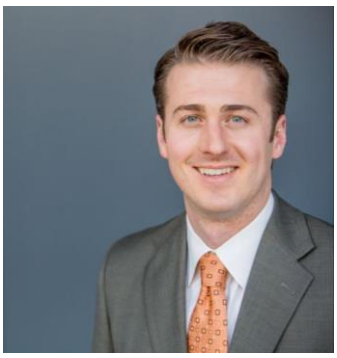
Employers may be liable for punitive damages up to $300,000 under Title VII, even when the jury only awards the employee $1 in nominal damages



By Samson R. Elsbernd
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Harassment, discrimination and retaliation can be costly for employers, even when employees do not suffer substantial injuries as a consequence of the conduct. Employees who sue their employers under Title VII for harassment, discrimination or retaliation are subject to its statutory caps on compensatory and punitive damages. The caps are based on the size of the employer, from 15 employees to more than 500 employees. When punitive damages are recoverable under state common-law claims, they must be proportional to the violation. However, a recent decision determined that proportionality does not need to be assessed for the statutory punitive damages caps established under Title VII.

In Arizona v. ASARCO LLC, 773 F.3d 1050 (9th Cir. 2014), a female employee filed federal claims against her former employer for sexual harassment under Title VII (federal law). The employer was a large employer with more than 500 employees. The employee prevailed on her sexual harassment claims. She apparently did not suffer a substantial compensable injury, so the jury awarded her nominal damages of $1 to formally recognize that she had been harassed. The jury also awarded her $868,750 in punitive damages, which the court reduced to $300,000 in accordance with the statutory cap under Title VII based on the size of the employer. The employer challenged the constitutionality of the award in light of the disparity between the nominal and punitive damage awards. The court of appeal upheld the award despite the disproportionality because it determined that Title VII sufficiently informs employers of the conduct that subjects them to punitive damages and the maximum amount of such damages - in this case, capped damages of $300,000 for an employer with more than 500 employees.

Employers should take all allegations of harassment, discrimination and retaliation seriously. If they have not already, employers should adopt and implement anti-discrimination and harassment policies. Employers also need to enforce their anti-discrimination and harassment policies, investigate complaints, and take prompt and effective remedial action when a violation occurs. While caps exist for punitive damages under federal law, punitive damages are not capped under California Law, the Fair Employment and Housing Act ("FEHA"). And whereas Title VII applies to employers with 15 employees, FEHA's discrimination and retaliation provisions apply to employers with just 5 employees, and its harassment protections apply to all employers, regardless of size.

DID YOU KNOW...

The FEHA imposes a continuing obligation on employers to communicate with employees or applicants to determine effective reasonable accommodations in response to a request for a reasonable accommodation (i.e., the interactive process). Employers may be liable if they are responsible for a breakdown in the interactive process. See, Swanson v. Morongo Unified Sch. Dist., 232 Cal. App. 4th 954 (2014).

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MAR 2015 **Labor & Employment News** *Vol. 18, No. 3*

Prompt payment of wages upon retirement? The decision is still out.

By Branden M. Clary
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Does an employee who retires quit? California employers are required to promptly pay final wages to employees when they "quit." Specifically, Labor Code section 202 provides that employees without a contract for a definite period are entitled to prompt payment of wages either within 72 hours of quitting or immediately upon quitting if they provide at least 72 hours advance notice of their intention to quit. Employers who fail to make prompt payment of wages are subject to waiting time penalties up to 30 days of wages. (Lab. Code § 203.)

In McLean v. State, 228 Cal. App. 4th 1500, 176 Cal. Rptr. 3d 734 review granted and opinion superseded, 338 P.3d 304 (Cal. 2014), the court of appeal concluded that an employee who "quits" includes an employee who retires. There, a state employee retired and separated from her employer on the same day that she retired. She did not receive her final wages on her last day of employment, nor did she receive them within 72 hours of that date. Her employer argued that Labor Code section 202 and 203 only applied to employees who "quit" as opposed to those who "retire," and that the distinction between a "quit" and a "retirement" was well-established in the civil service. The court of appeals disagreed; concluding that "quit" as used in Labor Code section 202 and 203 has one meaning for private and public employers, and includes employees who quit to retire.

That court of appeal decision is now being reviewed by the California Supreme Court. In the meanwhile, both private and public employers are still subject to Labor Code sections 202 and 203. Employers should be aware of the prompt payment requirements when employees resign, and the potential applicability of these requirements to employees when they retire. The decision will have a profound effect, particularly as employees of the baby-boomer generation begin to retire. It could also subject employers to potential actions by employees who have already retired for waiting time penalties if they did not receive timely payment of their final wages when they retired.

DID YOU KNOW...

Workers on a prevailing wage project are entitled to no less than the prevailing wage (i.e., a basic hourly rate). This requirement seeks to ensure that the winning bidder is not awarded the project by paying lower wages to workers than the other bidders. A court of appeal recently recognized that the second-place bidder can sue the winning bidder if the winning bidder only obtained the lowest bidder status because it did not pay workers the prevailing wage. See, Roy Allan Slurry Seal, Inc. v. Am. Asphalt S., Inc., No. B255558, 2015 WL 738675 (Cal. Ct. App. Feb. 20, 2015).

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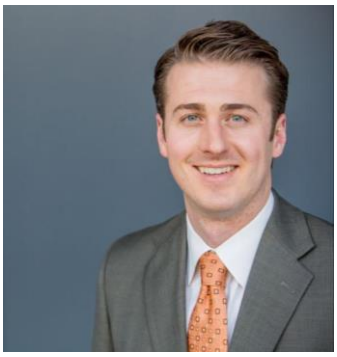
APR 2015 **Labor & Employment News** *Vol. 18, No. 4*

What you need to know about the new Sick Leave Law



By Samson R. Elsbernd
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The California Healthy Workplaces/Healthy Families Act of 2014 has been operative since January 1, 2015 even though employees have not yet begun to accrue sick leave pursuant to the law. Employees will only begin to accrue sick leave pursuant to the law on **July 1, 2015**.

The California Healthy Workplaces/Healthy Families Act of 2014 requires that employers, subject to very limited exceptions, provide paid sick leave to their employees. The new law covers exempt and non-exempt (including part-time, per diem, and temporary) employees. Employees who have worked in the State for 30 or more days within a year from the start date of their employment will accrue paid sick leave at the rate of one hour for every 30 hours worked, and may use their accumulated leave beginning on the 90th day of employment.

Paid Sick Leave law went into effect on January 1

Since January 1, California employers have been obligated to post the Labor Commissioner's Healthy Workplaces/Healthy Families Act poster in a conspicuous location in the workplace. The information about the new law is also contained in the revised Notice to Employee, which is the Labor Commissioner's form for newly hired non-exempt employees that contains employment-related information, such as pay rates and entitlement to sick leave. Employers have been using this revised form for non-exempt employees who are hired after January 1, 2015. As to non-exempt employees hired pre-January 1, 2015, employers already provided written notice of the sick leave law information on a revised Notice to Employee or in another writing, or will provide such notice by July 8, 2015, depending on date of implementation of their policy or the new law's requirements.

Employees begin to accrue sick leave pursuant to the Paid Sick Leave law on July 1

Starting July 1, employees will accrue paid sick leave either pursuant to the Healthy Workplaces/Healthy Families Act only or pursuant to employer sick leave policies. Employees who simply accrue paid sick pursuant to the minimum requirements of the new law will accrue approximately 8 days (69 hours) of paid sick leave each calendar year, with accrued, unused paid sick leave carrying over to the following year.

Conversely, employees may accrue paid sick leave pursuant to employer sick leave or paid time off (PTO) policies. Employers, through sick leave or PTO policies, may cap the accrual and use of paid sick leave available to their employees pursuant to the Healthy Workplaces/Healthy Families Act. For example, company paid sick leave policies may limit full-time employees to using 3 days (24 hours) of paid sick leave in each year of employment. Accrued but unused paid sick leave must carry over from year to year unless employers simply advance the full 3 paid sick days at the beginning of each year. Employers may cap total accrual of paid sick leave at 6 days (48 hours).

Before employers simply fall back on their written paid sick leave or PTO policies, though, they should ensure that those policies satisfy the accrual, carryover, and use requirements of the Healthy Workplaces/Healthy Families Act. In other words, employer policies must meet the minimum requirements of the new paid sick leave law, and if they do, then employers do not have to provide additional sick leave. If they do not, employers must either modify their polices or allow their employees to accrue paid sick leave pursuant to the new law. Of course, employer policies may also exceed the minimum legal requirements of the new law.

Finally, employers should also be aware that the new law imposes record keeping requirements concerning sick leave, including requiring employers to provide written notice of the amount of sick leave available on the employee's itemized wage statement or in another writing, and to maintain records concerning sick leave for 3 years.

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MAY 2015 **Labor & Employment News** *Vol. 18, No. 5*

Arbitration can proceed in accordance with a provision in an employment application even though the arbitration policy incorporated into that application does not apply

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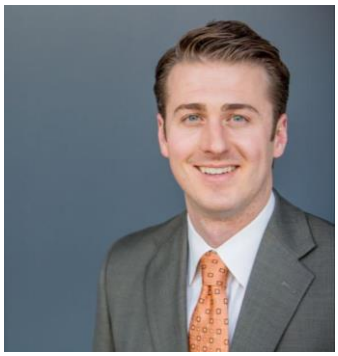

Employers frequently require employees to agree to arbitrate employment-related disputes as a condition of employment, or of continued employment. The California Arbitration Act (CAA) supplies default procedures for arbitration. Arbitration can proceed in accordance with other procedures, but only if employers can demonstrate that their employees agreed to them.

In Cruise v. Kroger Co., 233 Cal.App.4th 390 (2015), an employee sued her employer in state court following her termination, and the employer moved to compel arbitration. The employee initialed an arbitration provision in the employment application when she applied for employment. That provision incorporated the employer's arbitration policy, which was found in the employee handbook. The trial court denied the employer's motion to compel arbitration, and the court of appeals reversed. The court of appeals determined that the provision in the employment application sufficiently expressed an agreement to arbitrate employment disputes. But, arbitration would proceed pursuant to the rules of the CAA, not the procedures in the arbitration policy, because the employer failed to establish that the employee agreed to be governed by those procedures. The arbitration policy was undated, unsigned, not attached to the employment application and was not given to the employee at the time she applied for employment.

Agreements to arbitrate employment related disputes do not have to be long but they must express an agreement to arbitrate. They may even be enforced when they are only signed by the employee, for example, when they are part of an employment application on the employer's company letterhead and the arbitration provision declares the employer's intent to be bound by it. Employers who desire procedures for arbitration that diverge from the CAA must ensure that the agreement to proceed by such procedures is clear and lawful, and should require their employees to affirmatively indicate their agreement, such as through their signature on any documents that are part of the agreement to arbitrate.

DID YOU KNOW...

Certain wage orders allow employees in the health care industry to voluntarily waive one of their two meal periods on shifts longer than 8 hours. However, they cannot waive their second meal period if their shift is longer than 12 hours. Gerard v. Orange Coast Memorial Center, 234 Cal.App.4th 285 (2015).

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Inability to Work under a Particular Supervisor Because of Stress Associated with the Supervisor's Standard Oversight is Not a Disability under FEHA

By Branden M. Clary
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The California Fair Employment and Housing Act ("FEHA") protects employees from employment discrimination based on mental disability. "Mental disability" is broadly defined under FEHA, and includes mental disorders and conditions that limit major life activities, like working. This is broader than the federal Americans with Disabilities Act, which requires that mental impairments "substantially limit" major life activities. Still, not all mental impairments rise to the level of a "mental disability" under FEHA.

In Higgins-Williams, No. C073677, 2015 WL 3451590 (Cal. Ct. App. May 26, 2015), an employee was diagnosed by her physician as suffering from anxiety and stress due to her normal interactions with her supervisor and the human resources department. The employer was aware of the diagnosis and granted the employee leaves of absence, including leave under the FEHA as a disability accommodation. The employer eventually terminated the employee when she failed to provide information as to when she could return to work or that additional leave would effectuate her return, and the employee sued alleging various causes of action, including disability discrimination. The trial court granted the employer's motion for summary judgment on all causes of action and the court of appeals affirmed, largely because an inability to work under a particular supervisor because of anxiety and stress related to the supervisor's standard oversight of job performance is not a mental disability recognized under the FEHA.

This case reaffirms that while FEHA's definition of "mental disability" is broad, it is not limitless. Other impairments that are not considered mental disabilities include "sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs." (Gov. Code section 12926(j)(5).) This case is also a good reminder for employers that a leave of absence may be a reasonable accommodation. However, an employer does not have to wait indefinitely for an employee's return.

DID YOU KNOW...

It is unlawful for an employer to willfully misclassify an individual as an independent contractor. (Lab. Code § 226.8.) This prohibition applies to the employer making the misclassification, and to any joint employer who is aware that the co-employer has willfully misclassified their joint employees. Noe v. Superior Court, No. B259570, 2015 WL 3463006, at 1 (Cal. Ct. App. June 1, 2015).