Wilke Fleury

Labor & Employment E-Book

January - July 2016

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New California Employment Laws for 2016

By Shannon Smith-Crowley

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A number of employment-related bills came out of the 2015 California Legislative session. The following bills represent just a few summary highlights from the session.

Fair Pay Act

SB 358

The California Chamber of Commerce *supported* Senate Bill 358 (Senator Hannah-Beth Jackson), a bill to promote gender wage equity. The Fair Pay Act addresses two main issues - salary disclosure and how determinations of gender pay disparities are viewed.

Pursuant to the Act, employees cannot be punished for either revealing or discussing wages with other employees. The more significant change relates to the components used to determine whether a pay differential between employees of the "opposite sex" is justified or if it constitutes gender wage discrimination. While wage differentials based on seniority, merit or production remain acceptable, the "bona fide factor other than sex" exception has been tightened. The law now requires a comparison of persons doing "substantially similar" work, which means that different job titles and different work sites are less relevant in the evaluation of wage differentials. This will require many employers to reevaluate how they determine compensation throughout their company.

The onus will be on the employer to show there is a bona fide business necessity reason, other than sex, for paying a person of the opposite sex differently for substantially similar work. The employee then has the ability to void the employer's justification if the employee can show that an alternative business practice exists where a sex-based wage differential would not exist.

Time off

AB 304

The California mandatory paid sick leave law (the Healthy Workplaces, Healthy Families Act of 2014) went into effect on January 1, 2015. Accrual under the law was delayed, and did not begin until July 1, 2015. AB 304 (Gonzalez) was an urgency measure amending the sick leave law and changing various requirements, including accrual methods. The amendment provides clarification regarding which workers are covered, how the paid time off is accrued, and protections for employers that already provided paid sick leave before January 1, 2015.

AB 987

Employers generally must make reasonable accommodations for the religious beliefs and/or any disability of their employees pursuant to the Fair Employment and Housing Act (FEHA). AB 987 (Levine) codifies that employers may not discriminate or retaliate against employees for making a request for an accommodation due to religion or disability, even if the request is not granted.

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SB 579

SB 579 (Jackson) requires that employers with 25 or more employees (at the same location) allow an employee time off (up to 8 hours in any calendar month) to find, enroll or re-enroll their child in school or day care, or to participate in activities of the school or day care, or to deal with a child care or school emergency.

Wage and Hour

AB 970

AB 970 (Nazarian) expands the Labor Commissioner's authority by authorizing the Labor Commissioner to investigate and, upon a request from the local entity, to enforce local laws regarding overtime hours or minimum wage provisions (e.g., city minimum wage ordinances setting the minimum wage for workers in that city higher than the State minimum wage) and to issue citations and penalties for violations, except when the local entity has already issued a citation for the same violation.

AB 1506

Employee wage statements must contain certain information under California law. Statements that fail to include all the required information have subjected employers to increasingly frequent lawsuits by employees under the Private Attorney General Act (PAGA). PAGA permits employees to pursue such violations on behalf of the State. AB 1506 (R. Hernandez) amends PAGA to allow employers to correct wage statements that do not contain the inclusive dates of the pay period and/or the name and address of the employer, which are statutorily required to appear on the wage statements. In order to fix the omission(s), employers must provide three years' worth of fully-compliant wage statements for each pay period.

SB 327

SB 327 (E. Hernandez) responds to a recent appellate court decision and clarifies that health care employee meal period waiver provisions in existing Industrial Welfare Commission wage orders have been valid and enforceable since October 1, 2000 (e.g., health care employees can waive 1 of their 2 meal periods when their shifts are longer than 12 hours).

AB 622

E-Verify is an internet-based system for employers to check the employment authorization status of their employees. AB 622 (R. Hernandez) prohibits employers from using E-Verify in a manner inconsistent with federal law and creates financial civil penalties for employers who maliciously use E-Verify against their workforce.

Shannon Smith-Crowley
Legislative Advocate

Shannon Smith-Crowley is an attorney and has been a registered lobbyist in California for over 15 years. On behalf of her clients, Shannon attained a series of legislative successes. She helped develop California law that requires maternity coverage in all health insurance policies, well before the enactment of similar provisions in the Affordable Care Act. She worked on bills creating California's public umbilical cord blood banking program, which provides unique material for lifesaving stem cell transplants and groundbreaking biomedical research. She contributed to bills allowing HIV+ men to safely create families using Assisted Reproductive Technologies. Most recently she played a pivotal role in developing the Modern Family Act, protecting the rights of intended parents, donors and surrogates.

'Pluming' the Line between Wage Orders

By Stephen L. Ramazzini

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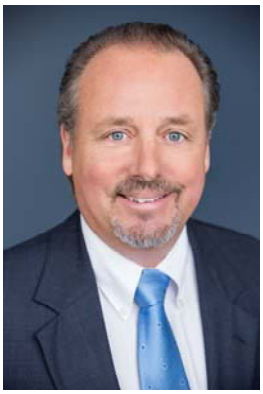

In 1916 the Industrial Welfare Commission ("IWC") began issuing its first industry and occupational wage orders that eventually fixed for each industry minimum wages, maximum hours of work, and conditions of labor. Occasionally, more than one wage order will apply, though frequently, only one wage order applies to a business as determined by the main purpose of the business. Although the IWC was defunded and disbanded in 2004, its 17 wage orders are still in effect and enforced.

In *Bains v. Department of Industrial Relations* (Cal. Ct. App., Feb. 16, 2016) 16 Cal. Daily Op. Serv. 1713, two Sutter County prune growers argued that Order 14 (pertaining to "harvesting") applied exclusively to their employees, while the employees argued that Order 14 and Order 13 (pertaining to "processing for market") applied. The overtime provisions were more generous to employees under Order 13. For example, under Order 14 employees only received overtime for work in excess of 10 hours, while under Order 13, employees received overtime for work in excess of 8 hours. The Appellate Court held both Orders apply at different times. Specifically, the court found the harvesting ends (Order 14), and the processing begins (Order 13) after the prunes were transported from the orchards to the fixed drying sheds. Put simply, employees involved in harvesting the prunes were subject to Order 14 and earned overtime later than employees involved in processing the prunes, who were subject to Order 13 and earned overtime earlier.

Selecting the appropriate wage order(s) is important. Employers who get it wrong and apply the wrong wage order to their employees may not pay their employees correctly. This mistake could subject them to significant penalties and back pay when caught, and may even make them responsible for the employees' attorney fees to recoup the unpaid or underpaid wages. Additionally, employers have a posting obligation, and must post the applicable wage order(s) in the workplace. As a result, employers should verify that they are using the appropriate wage order, particularly if their business conducts a variety of operations.

DID YOU KNOW...

Sometimes a worker may be considered the employee of more than one person or entity at the same time in what is called a joint employment relationship. In this situation, each of the "employers" is individually and jointly responsible for compliance with employment laws with respect to the worker. The federal Wage and Hour Division recently released guidance on joint employment relationships, which may be accessed using the following link:http://www.dol.gov/whd/regs/compliance/whdfs35.htm

Simply Sex? Distinguishing between sex, gender, gender identity, and gender expression.

By Samson R. Elsbernd

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The Fair Employment and Housing Act ("FEHA") makes it an unlawful employment practice to discriminate, harass, or retaliate against employees based on a protected class. FEHA also requires that employers take all reasonable steps to prevent and remedy illegal discrimination and harassment in the workplace. The FEHA regulations were recently amended, effective April 1, 2016, and clarify that taking all reasonable steps includes an affirmative duty to develop a written harassment, discrimination, and retaliation prevention policy that lists the protected classes. Some of the protected classes need little explanation (race, religious creed, national origin), but others, like "sex," "gender," "gender identity," and "gender expression," are not so straight-forward.

There is a difference between sex, which is determined at birth (e.g., male or female), and gender, which is an individual's sense of self, but the distinction is blurred by the legal definition of the terms under FEHA. FEHA defines "sex" to include pregnancy, childbirth, breastfeeding, and medical conditions relating to those conditions. FEHA also defines "sex" to include "gender," including "gender identity" and "gender expression." Consequently, discrimination based on gender, gender identity or gender expression would also constitute discrimination based on sex. On the other hand, discrimination based on sex may or may not also constitute discrimination based on gender, gender identity, or gender expression.

Gender identity and gender expression are different, too. Under FEHA "gender identity" means "a person's identification as male, female, a gender different from the person's sex at birth, or transgender." "Gender expression" means "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." In other words, an employee's gender expression may or may not match the employee's gender identity. For example, an employee whose birth sex is male and identifies as female may present at work as female or as male. How that employee presents at work (as male or as female) does not affect the employee's gender identity as female.

The new regulations also define "transgender," which means "a person whose gender identity differs from the person's sex at birth." The employee in the example, therefore, would be a transgender employee because the employee's gender identity (female) is different from the employee's birth sex (male). Additionally, keep in mind that sexual orientation (e.g., heterosexuality, homosexuality and bisexuality), which is another protected class under FEHA, is not connected to an employee's gender. This means that employees whose gender differs from their birth sex may be heterosexual, homosexual, or bisexual just like employees whose gender identity is the same as their birth sex.

At a minimum, employers should ensure that they have written harassment, discrimination, and retaliation prevention policies. Employers should also educate their employees about the differences between the various protected classes, such as sex, gender, gender identity, and gender expression. In addition to written harassment, discrimination, and retaliation prevention policies, employers might also consider stand-alone gender policies that answer common questions concerning gender non-conforming employees, and that provide guidance concerning the procedures to change names on employment records, the pronouns to use to refer to employees, the use of restrooms, employee privacy, dress codes and health benefits. Employers may also consider workplace transition plans to guide them when employees transition from one gender to another in the workplace.

California's $15 Minimum Wage Increase

By Bianca Watts

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On April 4, 2016, Governor Jerry Brown signed California Senate Bill 3 ("SB 3"), which will gradually raise the State minimum wage to $15 per hour. The State's current minimum wage is $10 per hour.

SB 3 provides six annual increases to the current minimum wage for employers with 26 or more employees. Beginning on January 1, 2017, the minimum wage will increase to $10.50. In 2018, the minimum wage will increase to $11 and then increase by $1 each year until 2022, when the minimum wage will be $15. Employers with 25 or fewer employees will have an additional year to implement each of the increases. In other words, the State minimum wage will not begin to increase for these smaller employers until January 1, 2018.

The Governor may pause scheduled increases based on certain economic conditions. However, the Governor may only pause the scheduled increases a maximum of two times. Once the $15 wage has been reached, the Department of Finance will annually increase the minimum wage for the following year based on statistics from the U.S. Bureau of Labor Statistics.

Many employers will need to significantly adjust their compensation and benefits structures in light of the new law. Of course, the increased minimum wage will affect overtime and double-time. It will also affect exempt employee salaries because exempt employees under California law generally must earn a salary that is at least twice the State's minimum wage for full-time employment. This means that under the current $10 per hour minimum wage, exempt employees must earn an annual salary of $41,600. Under the $15 per hour minimum wage, the minimum annual salary for exempt employees jumps to $62,400.

Finally, employers should bear in mind that cities and counties may have their own minimum wages that are higher than the State minimum wage (e.g., Berkeley, Emeryville, Los Angeles, Mountain View, Oakland, Palo Alto, Richmond, Sacramento, San Jose, San Francisco, Sunnyvale.) As a result, employers should determine whether another minimum wage applies, and pay their employees according to the higher applicable minimum wage.

VLOG:

We just released our first VLOG, or video blog, on labor and employment news and updates. The first VLOG in the series is on sex, gender, gender identity, and gender expression, and the requirement to list all the FEHA protected classes (including sex, gender, gender identity, and gender expression) in employer discrimination, harassment and retaliation policies.

To watch the VLOG:

https://www.youtube.com/watch?v=b5aCWDN3Ras

Employees Earning Less than $47,476 Will be Subject to Overtime

By Samson R. Elsbernd

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Employers do not have to pay overtime to executive, administrative and professional employees who qualify for exemption as exempt employees. Generally, exempt employees must meet both a duties test and a salary test under applicable law. The federal Fair Labor Standards Act ("FLSA") currently has a lower salary test than California law, so California employers commonly follow the California salary test to determine if their employees will meet the salary test for exempt employees because compliance with the higher California salary requirement will comply with the salary requirement under the FLSA. However, the new federal overtime rule increases the minimum salary for exempt employees, and will soon be higher than the California minimum salary for exempt employees.

The new federal overtime rule does not change the federal duties test for exemption from overtime. It only affects the salary test. Beginning on December 1, 2016, the minimum annual salary for exempt employees under the FLSA will be $47,476, and will be adjusted automatically every three years beginning on January 1, 2020. Contrast this with the California minimum annual salary for exempt employees, which is currently $41,600. Even with California's new State minimum wage law, California's minimum annual salary for exempt employees is not anticipated to exceed the FLSA minimum annual salary until the State minimum wage increases to $12 per hour, which is not scheduled to occur until January 1, 2019 for employers with 26 or more employees (or January 1, 2020 for employers with 25 or fewer employees).

Employers will need to review the salaries of their exempt employees and determine whether they will meet the higher FLSA salary test for employees subject to it. For those that do not, employers will need to determine whether to increase their salaries in order to maintain their exempt status. Employers can continue to pay employees on a salary basis after December 1, even if that salary is less than $47,476, but employees with salaries below $47,476 will be nonexempt employees, and therefore, entitled to overtime. Alternatively, employers can pay formerly exempt, newly nonexempt employees on an hourly basis. Most California employers will need to pay hourly employees according to California's minimum wage ($10 per hour, increasing to $10.50 per hour for employers with 26 or more employees on January 1, 2017), not the federal minimum wage ($7.25 per hour).

VLOG:

In the next video blog, or VLOG, in the series, Samson Elsbernd discusses the federal overtime rule that goes into effect on December 1, 2016. Employees subject to the federal salary test will need to earn a minimum salary of $47,476 in order to continue being exempt from overtime.

To watch the VLOG: https://www.youtube.com/watch?v=6U6BNhTsubw

Sexual Harassment Investigation: Protecting the Attorney-Client Privilege

By Stephen L. Ramazzini
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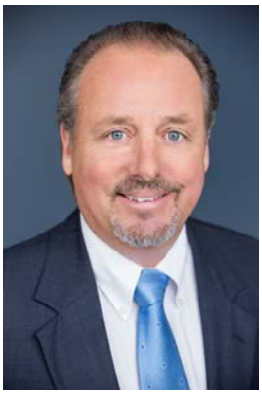

When an employer retains an outside attorney to conduct a sexual harassment investigation, is that attorney's ultimate report protected by the attorney-client privilege? If you thought yes would be the obvious answer, you would be mistaken as to the obvious part. It took the intervention of the state Supreme Court in Waters v. City of Petaluma before yes became the answer.

In City of Petaluma v. Superior Court (Cal. Ct. App., June 8, 2016, No. A145437) 2016 WL 3568106, Andrea Waters (Waters) began working as a firefighter and paramedic for the City of Petaluma (City). Waters claimed she was immediately subjected to harassment and discrimination, and filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC). The City retained outside counsel to investigate the charge. While counsel agreed to use its employment law and investigation expertise to assist the City, only the City Attorney would advise on how to respond to Waters's EEOC complaint. Within this construct, outside counsel eventually generated a written report ("the Report").

Waters eventually filed a lawsuit, and sought the Report. The City objected based on the attorney-client privilege. In overruling the City's objection, the trial court found the City had waived the objection in various ways, including that the terms of outside counsel's engagement specified that it would not render legal advice. The City sought review of this decision by the appellate court, which initially affirmed the trial court. The City then sought review of that ruling by the Supreme Court, which ordered the appellate court to look again. This time, the appellate court saw it differently.

The initial inquiry, the appellate court noted, should focus on the "dominant purpose of the relationship" between attorney and client, not on the purpose served by a particular communication. If a court determines that communications were made during the course of an attorney-client relationship, the communications, including any reports of factual material, would be privileged even if the purpose of retaining the lawyer was to secure legal services and not advice per se.

In this instance, the City retained outside counsel to provide a legal service because it was hired to act as an attorney in bringing legal skills to assist the City in developing a response to Waters's EEOC complaint and the anticipated lawsuit. Outside counsel was not merely a fact finder whose sole task was to gather information and transmit it to the City. Rather, the dominant purpose of outside counsel's representation was to provide professional legal services to the City Attorney so that it, in turn, could advise the City on the appropriate course of action.

Does the Waters decision help employers when they retain a lawyer to investigate a harassment claim? This time the obvious answer is yes if the employer retains counsel for the dominant purpose of securing legal services or advice.

VLOG:

In the next video blog, or VLOG, in the series, Bianca Watts discusses the California minimum wage law that will gradually increase to $15 per hour by 2022 or 2023, depending on the size of the employer. The next scheduled increase will go into effect on January 1, 2017.

To watch the VLOG:

https://www.youtube.com/watch?v=kOL8qqG7svw