

Client Alert

A report
for clients
and friends
of the firm November 2003

New California Employment Legislation

Summarized below are the new statutes that the California Legislature passed and Governor Gray Davis signed into law as of October 12, 2003. With some notable exceptions (indicated below), these new laws will become effective on January 1, 2004.

Discrimination and Harassment

Employer Liability for Non-Employee Sexual Harassment - AB 76 (Corbett)

Amends existing employment discrimination law to make employers responsible for sexual harassment by non-employees where the employer knows or should have known of the sexual harassment and fails to take immediate and appropriate corrective action. The employer must take reasonable steps to prevent the harassment from occurring. This bill resolves a conflict among California appellate courts and renders moot a case that was pending before the California Supreme Court.

Gender and Gender Identity Discrimination - AB 196 (Leno)

Expands the prohibition against sexual discrimination and harassment by including gender in the definition of sex. The bill reaffirms the right of employers to require employees to comply with reasonable workplace appearance, grooming, and dress standards consistent with state and federal law, provided that employees are allowed to appear or dress consistently with their gender identity.

Private Counsel Service of DFEH Complaint - AB 1536 (Goldberg)

Provides that where a person files a claim under FEHA and is represented by private counsel, the private counsel and not the DFEH is responsible for serving the complaint upon the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice. Additionally, service must now be completed within 60 days, rather than the 45 days required for service by the DFEH.

Employee Healthcare and Benefits

Mandated Healthcare Benefits - SB 2 (Burton)

Requires that employers with 20 or more employees in California provide healthcare for their employees by paying fees into a statewide insurance pool, except that employers who provide healthcare coverage directly will receive a credit against the fee. Additionally, large employers, defined as those with more than 200 employees in California, must provide healthcare for their employees' dependents. The Managed Risk Medical Insurance Board is authorized to determine the employers' fees for the statewide insurance pool. Additionally, employers can require their employees to contribute up to 20% of the fee assessed to the employer, with some exceptions. In order for an employee to qualify for coverage under the bill, the individual must work for at least 100 hours per month and must have worked for the employer for three months. The bill is effective for large employers as of January 1, 2006. The bill is effective for medium-sized employers (those with between 50 and 199 employees) as of January 1, 2007. Employers with 20 to 49 employees are exempt until a special tax credit of 20% of the net cost of the fee to the employer is enacted.

State Contractors: Non-Discrimination against Domestic Partners - AB 17 (Kehoe)

Prohibits a state agency from entering into a contract for the acquisition of goods or services in the amount of \$100,000 or more with a contractor who, in the provision of benefits, discriminates between employees with spouses and employees with domestic partners or between spouses and domestic partners of employees, except under specified circumstances. The bill enumerates when a contractor is not deemed to be in violation of its provisions. Additionally, the bill requires that every state contract subject to the bill contain a statement by the contractor certifying that the contractor is in compliance with the bill's provisions. Contractors who falsely certify compliance are subject to penalties. This bill applies to contracts executed on or amend-

ed as of January 1, 2007. If a contract is executed or amended prior to January 1, 2007 but has a duration of more than one year after January 1, 2008, then the bill's provisions apply to that contract on January 1, 2008.

“California Domestic Partner Rights and Responsibilities Act of 2003” - AB 205 (Goldberg)

Extends the rights, protections, benefits, and duties of marriage under statutory law, administrative regulations, court rules, government policies, common law and any other source of law to people registered as domestic partners. Additionally, former registered domestic partners and surviving registered partners will receive the same rights, protections, benefits and duties under the law that former spouses or widows and widowers receive. The bill defines domestic partners and lays out the requirements for establishing a domestic partnership in California. It also states that a legal union validly formed in another jurisdiction that is substantively equivalent to a domestic partnership will be recognized as a valid domestic partnership in California. In order to implement the rights of domestic partners under the bill, gender-specific terms referring to spouses in existing laws are to be construed to include domestic partners. The bill also addresses the conditions for termination of domestic partner relationships. The provisions of this bill will become effective as of January 1, 2005.

Unemployment and Disability Compensation: Family Temporary Disability Insurance - SB 727 (Kuehl)

Requires that the Employment Development Department (EDD) develop a certificate that an individual taking leave to care for a family member shall file, and requires that the certificate be within the knowledge of the physician or practitioner and be based on a physical examination and documented medical history of the family member. The bill allows an employer to require an employee to take up to two weeks of earned, but unused vacation leave prior to the employee's initial receipt of family temporary disability insurance benefits. Furthermore, the bill requires individuals to take the family temporary disability insurance leave (FTDI) concurrent with leave they are entitled to under the California Family Rights Act or the Family and Medical Leave Act. The bill also states that FTDI leave shall be known as Paid Family Leave. The act will become operative on January 1, 2004, except that benefits will be payable on or after July 1, 2004.

Life Insurance: Corporate-Owned Policies - AB 226 (Vargas)

Provides that an insurer may not issue or deliver a life insurance policy (known as a corporate-owned life insurance policy) that is purchased by a California employer and that designates the employer as the beneficiary of an insurance policy, which insures the life of a California resident

who is a current or former employee of the employer. However, the bill includes an exception for policies that insure the life of a current or former exempt employee. The bill defines an exempt employee as an administrative, executive, or professional employee who is exempt under California's wage and hour laws (Cal. Lab. Code § 515). The bill states that prohibited policies that are purchased on or after January 1, 2004 are void. A corporate-owned life insurance policy purchased prior to January 1, 2004, will become void on the next premium date on or after January 1, 2009, but no later than January 1, 2010. Lastly, a corporate-owned insurance policy purchased prior to January 1, 2004, that insures the life of a nonexempt employee will remain valid after January 1, 2004, so long as no further premium payments are made after January 1, 2004.

Working Conditions in Specific Industries

Wholesale Baking Industry - AB 330 (Parra)

Exempts employees in the wholesale baking industry from the meal period requirements under California law. In particular, the bill exempts employees in the wholesale baking industry who are subject to an Industrial Welfare Commission Wage Order and who are covered by a valid collective bargaining agreement that provides for a 35-hour workweek consisting of seven-hour days, payment of 1 and ½ the regular rate of pay for time worked in excess of seven hours per day, and a rest period of not less than 10 minutes every two hours.

Car Washing and Polishing - AB 1688 (Goldberg)

Regulates the car washing and polishing industry by providing specific recordkeeping requirements that employers must implement with regard to wages, hours, and working conditions. Additionally, employers of car washers must register annually with the Labor Commissioner and pay a specified registration fee. The bill has a sunset provision, whereby it is repealed on January 1, 2007, unless a later enacted statute deletes or extends that date.

Labor Code Violations

Penalties for Labor Code Violations Doubled - AB 276 (Koretz)

Increases the penalty from \$50 to \$100 for first violations and from \$100 to \$200 for subsequent, willful, or intentional violations where an employer fails to pay wages or unlawfully withholds wages. Additionally, where an employer pays less than the minimum wage the employer is subject to a civil penalty of \$100 for each underpaid employee for each pay period.

“Bounty-Hunter” Provision - SB 796 (Dunn)

Provides a civil cause of action to employees whose employers have violated the Labor Code if the Labor and Workforce

Development Agency or its departments, divisions, commissions, boards, agencies or employees do not bring an action. The bill allows employees who bring a civil cause of action to collect 25% of the penalties for violations of the Labor Code. Additionally, the employee would be authorized to recover reasonable attorney's fees and costs. This provision does not limit an employee from pursuing other remedies available under state or federal law.

Recovery of Attorney's Fees - AB 223 (Diaz)

Provides that an employee is successful in an appeal of the Labor Commissioner's decision regarding a wage claim so long as the employee recovers a judgment in his or her favor (which the bill states is an amount greater than zero). This bill overturns the holding in *Smith v. Rae-Venter Law Group*, 29 Cal. 4th 345 (2002), which held that the appealing party is unsuccessful unless the court judgment is more favorable to the appealing party than the Labor Commissioner's award. It is important to determine whether a party that has appealed a Labor Commissioner's award is successful because a party who is unsuccessful in his or her appeal is responsible for paying the other party's costs and reasonable attorney's fees.

Contracts for Labor or Services - SB 179 (Alarcon)

Imposes liability and civil penalties on any person or entity that enters into a labor contract for construction, farm labor, garment, janitorial, or security guard services when the person or entity knows or should know that the contract does not provide sufficient funds to allow the labor contractor to comply with all applicable laws or regulations governing the labor or services to be provided. The bill establishes a rebuttable presumption that a person or entity entering into such a contract for labor or services does not violate the bill's provisions if the contract or a material change to the contract meets certain requirements. The bill does not apply to persons or entities that execute a collective bargaining agreement covering the workers employed under the contract. Additionally, the bill provides a civil cause of action for employees who have been injured as a result of a violation of a labor law or regulation in connection with the performance of the contract.

Leaves and Time Off

Victims of Crime: Work Absences for Judicial Proceedings - SB 478 (Dunn)

Requires employers to allow an employee who is the victim of a crime, as defined, or certain persons who are related to a crime victim, to be absent from work in order to attend judicial proceedings related to the crime. Before the employee may be absent from work, the employee must give the employer a copy of the notice of each scheduled proceeding unless advance notice is not feasible. When

advance notice is not feasible, the employee may, within a reasonable time after the absence, provide the employer with documentation evidencing the judicial proceeding. The employee may elect to use available accrued paid vacation time, personal leave time, sick leave time, compensatory time off or unpaid leave time.

Minors' Artistic Employment Contracts

Minors: Artistic Employment Contracts - SB 210 (Burton)

Defines the gross earnings of a minor who has worked as an actor, dancer, musician, comedian, stunt person, voice-over artist or other entertainment performer as the total compensation payable to the minor under the contract or, if the minor's services are being rendered through a third-party individual or personal services corporation (a loan-out company), the total compensation payable to that third party for the minor's services. Furthermore, the bill limits the amount of a minor's gross earnings that may be placed in a trust account, known as the Coogan Trust Account, to 15%. The bill requires an employer to forward funds set aside for the minor to The Actor's Fund of America in the event that the minor's parent, guardian, or trustee fails to follow the required procedures for setting up the trust.

Workers' Compensation

Unreasonable Delay in Providing Medical Treatment - AB 1557 (Vargas)

Provides that an employee shall not be entitled to an increase in compensation for unreasonable delay in the provision of medical treatment for periods of time necessary to complete a utilization review process. However, an employee will not be precluded from an increase in compensation when an employer has unreasonably delayed medical treatment due to an unreasonable delay in completion of the utilization review process. Generally, under California law, when payment of workers' compensation has been unreasonably delayed or refused the full amount of the award shall be increased by 10%.

Supplemental Job Displacement Benefits - AB 227 (Vargas)

Provides that if an employee's injury causes permanent partial disability and the injured employee does not return to work for the employer within 60 days of the termination of temporary disability indemnity payments, the employee shall receive a supplemental job displacement benefit. The supplemental job displacement benefit is to be in the form of a nontransferable voucher for education-related retraining or skill enhancement or both, at state approved or accredited schools. This provision applies to injuries occur-

ring on or after January 1, 2004. However, an employer will not be liable for supplemental displacement job benefits if the employer offers modified work or alternative work that meets certain conditions under the bill and the employee rejects the work.

Utilization Review Systems - SB 228 (Alarcon)

Requires all employers to adopt utilization review systems for workers' compensation claims. A utilization review means a review prospectively, retrospectively, or concurrently of treatment recommendations by physicians. The bill also authorizes labor-management agreements between a private employer or group of employers, that meet certain requirements, and a recognized or certified exclusive bargaining representative that establish a dispute resolution process instead of a hearing before the Workers' Compensation Appeals Board. The administrative director of the Division of Workers' Compensation must authorize the agreement. This provision will apply to all industries, except the construction industry. The bill also reduces the time employers have to pay medical bills for injured employees from 60 days to 45 days from the date of receiving a billing statement. Penalties for late payments will be increased from 10% to 15%.

Anti-Spam Legislation

Privacy: Unsolicited Commercial E-Mail Advertising - SB 186 (Murray)

Prohibits a person or entity in California from initiating or advertising in unsolicited commercial e-mail advertisements. The bill also prohibits a person or entity located outside of California from initiating or advertising in unsolicited commercial e-mail advertisements to a California e-mail address. Additionally, it is unlawful for a person or entity to collect e-mail addresses or register multiple e-mail addresses for the purpose of initiating or advertising in unsolicited commercial e-mail advertisements from California or to an e-mail address in California. Furthermore, the bill authorizes recipients of e-mail that violates the bill, the electronic service provider, or the Attorney General to bring a cause of action to recover actual damages. Prevailing plaintiffs are also entitled to reasonable attorney's fees and costs. The bill requires advertisements that are sent pursuant to a preexisting or current business relationship, and therefore exempted under the bill, to provide the recipient with the ability to opt out.

Anti-SLAPP Legislation

SB 515 (Kuehl)

Provides that civil actions brought solely in the public interest or on behalf of the general public are not subject

to the California Anti-SLAPP law, provided that the actions meet certain conditions. In particular, the plaintiff in the action must not seek greater relief than that sought for the general public or the class in which the plaintiff is a member, and private enforcement must be necessary but places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter. Additionally, for the Anti-SLAPP law not to apply, the civil action must, if successful, enforce an important public right and confer a significant benefit on the general public or a large class of persons. The bill also provides that if a trial court denies a motion to strike pursuant to this section, the appeal provisions in the Anti-SLAPP law do also not apply to the action.

Reporting Obligations of Publicly Traded Companies

New Corporate Self-Reporting Obligations - SB 523 (Escutia)

A publicly traded corporation or limited liability company is liable for a civil penalty of up to \$1 million where the corporation or limited liability company has knowledge of internal misconduct, as defined in the legislation, on the part of an officer, director, manager, or agent and fails to notify the Attorney General or the appropriate governmental agency and its shareholders or members and investors in writing within 30 days of learning of the misconduct. The publicly traded corporation or limited liability company can avoid the penalty if it abates the misconduct before the 30-day reporting period ends. Only the Attorney General or a district or city attorney may bring an action under this new legislation.

Whistleblower Legislation

Whistleblower Protection - SB 777 (Escutia)

Extends whistleblower protection to employees who report violations of a state or federal rule or who refuse to participate in an activity that would result in a violation of or noncompliance with a state or federal statute, rule, or regulation. This protection is also extended to employees who exercised whistleblower rights in their former employment. Additionally, the legislation prohibits employers from retaliating against an employee for exercising these rights. It also adds an additional civil penalty for employers that are corporations or limited liability companies of up to \$10,000 for each violation of the new legislation. Furthermore, the legislation requires the California Attorney General to establish a whistleblower hotline, and employers will be required to display a list of specified employee rights under the whistleblower laws, along with the telephone number of the whistleblower hotline.

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