Proskauer

California Employment Law Notes

October 2016

Newly Enacted California Statutes

Minimum Wage Increases

As of January 1, 2017, businesses with 26 or more employees must pay a minimum wage of $10.50 per hour; the rate increases to $15.00 per hour in 2022. Smaller businesses (with 25 or fewer employees) will be required to pay the higher rates starting in 2018. Future increases in the minimum wage will be automatically linked to increases in the consumer price index. (SB 3.) Note also that a number of counties and municipalities (including Los Angeles, San Francisco, Emeryville and Mountain View) have legislated their own scheduled increases in the minimum wage. In addition, the United States Department of Labor has increased the salary and compensation levels necessary for employees to be exempt from the federal Fair Labor Standards Act (eff. Dec. 1, 2016). (81 FR 32391.)

Equal Pay Act Expanded

In 2015, the Legislature enacted significant amendments to California's Equal Pay Act (Labor Code § 1197.5) to address gender wage inequality. This year, the Legislature enacted additional amendments to the statute prohibiting wage inequality based upon race or ethnicity for substantially similar work. (SB 1063.) Additionally, the Legislature enacted a further amendment specifying that an employee's prior salary cannot, by itself, justify any disparity in compensation. (AB 1676.)

No Disclosure Of Juvenile Criminal History Required(Including Rape And Murder)

This bill prohibits an employer from asking an applicant for employment to disclose, or from utilizing as a factor in determining any condition of employment, information concerning or related to an arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while the person was subject to the process and jurisdiction of juvenile court law. "Adjudication" includes the crimes of murder, arson, rape, kidnapping, torture, carjacking, aggravated mayhem and discharge of a firearm. (AB 1843.)

California Employees Guaranteed Access To California Law And Forum

This bill applies to contracts entered into, modified, or extended on or after January 1, 2017 and prohibits an employer from requiring an employee who primarily resides and works in California, as a condition of employment, to agree to adjudicate outside of California a claim (in either litigation or arbitration) arising in California or deprive the employee of the substantive protection of California law with respect to a controversy arising in California. The bill makes any provision of a contract that violates these prohibitions voidable, upon request of the employee, and requires a dispute over a voided provision to be adjudicated in California under California law. The bill specifies that injunctive relief is available as a remedy and authorizes a court to award reasonable attorney's fees. The bill exempts a contract with an employee who was represented by legal counsel. (SB 1241.)

All-Gender Restrooms

Commencing March 1, 2017, all single-user toilet facilities in any business establishment, place of public accommodation, or government agency must be identified as all-gender toilet facilities. (AB 1732.)

Pay Stub Reform For Exempt Employees

Employees who are exempt from minimum wage and overtime requirements are not required to have the number of total hours worked tracked and logged on an itemized wage statement. (AB 2535.)

Notification Regarding Earned Income Tax Credit Expanded

Employers that are required to notify their employees of their eligibility for the federal Earned Income Tax Credit also must notify employees that they may be eligible for the California Earned Income Tax Credit; the bill also updates the content of the notice that must be provided to employees. (AB 1847.)

Bond Required To Challenge Labor Commissioner Rulings

An employer seeking a writ of mandate contesting the Labor Commissioner's ruling regarding the failure to pay minimum wage must post a bond with the Labor Commissioner in an amount equal to the unpaid wages assessed under the citation, excluding penalties. The bond must be issued in favor of the unpaid employee, and the proceeds of the bond, sufficient to cover the amount owed, would be forfeited to the employee if the employer fails to pay the amounts owed within 10 days from the conclusion of the proceedings. (AB 2899.)

Domestic Worker Bill Of Rights Made Permanent

The Domestic Worker Bill of Rights, which regulates the hours of work of domestic work employees who are personal attendants and provides an overtime compensation rate for those employees and which was scheduled to be repealed on January 1, 2017, will remain the law in California. (SB 1015.)

In-Home Supportive Services Workers Entitled To Paid Sick Leave

This bill, on and after July 1, 2018, entitles a provider of in-home supportive services who works in California for 30 or more days within a year from the commencement of employment to paid sick days. The bill requires the State Department of Social Services, in consultation with stakeholders, to convene a workgroup to implement paid sick leave for in-home supportive services providers and to issue guidance in that regard by December 1, 2017. (SB 3.)

Immigration-Related Protections Expanded

This bill makes it unlawful for an employer to request more or different documents than are required under federal immigration law, to refuse to honor documents tendered that on their face reasonably appear to be genuine, to refuse to honor documents or work authorization based upon the specific status or term of status that accompanies the authorization to work, or to reinvestigate or reverify an incumbent employee's authorization to work. (SB 1001.) Existing law requires each state or local government agency or community action agency, or any private organization contracting with a state or local government agency, that provides specified employment services to post in a prominent location in the workplace a notice stating that only citizens or those persons legally authorized to work in the United States will be permitted to use the agency's or organization's employment services that are funded by the federal or state government. This bill (AB 2532) repeals that requirement.

DFEH May Receive And Prosecute Complaints From Victims Of Human Trafficking

The Department of Fair Employment and Housing (the "DFEH") can receive complaints from victims of human trafficking, and the agency is authorized to investigate, prosecute, mediate, conciliate and bring civil actions on behalf of such victims. (AB 1684.)

New California State Contractor Requirements

This bill requires a person that submits a bid or proposal to, or otherwise proposes to enter into or renew a contract with, a state agency with respect to any contract in the amount of $100,000 or more to certify, under penalty of perjury, at the time the bid or proposal is submitted or the contract is renewed that it is in compliance with the Unruh Civil Rights Act and the California Fair Employment and Housing Act, and that any policy that it has adopted against any sovereign nation or peoples recognized by the government of the United States, including, but not limited to, the nation and people of Israel, is not used to discriminate in violation of the Unruh Civil Rights Act or the California Fair Employment and Housing Act. (AB 2844.)

Actors' Online Age Disclosures Restricted

This bill prohibits a commercial online entertainment employment service provider that enters into a contractual agreement to provide specified employment services to an individual paid subscriber from publishing information about the subscriber's age in an online profile of the subscriber and would require the provider, within five days, to remove from public view in an online profile of the subscriber certain information regarding the subscriber's age on any companion Internet Web site under the provider's control if requested by the subscriber. (AB 1687.)

Paid Family Leave Benefits Increased

Beginning January 1, 2018, the amount of paid family leave benefits increases from 55 percent of earnings to 60 or 70 percent of earnings, depending on the employee's income (subject to a maximum weekly benefit limit). In addition, the current seven-day waiting period to receive benefits is eliminated. (AB 908.)

New Notice Regarding Domestic Violence, Sexual Assault And Stalking Protections

Existing law prohibits an employer from discharging or in any manner discriminating or retaliating against an employee who is a victim of domestic violence, sexual assault, or stalking for taking time off from work for specified purposes related to addressing the domestic violence, sexual assault, or stalking. This bill requires employers to inform each employee of his or her rights established under those laws by providing specific information in writing to new employees upon hire and to other employees upon request. The bill also requires the Labor Commissioner, on or before July 1, 2017, to develop a form an employer may elect to use to comply with these provisions and to post it on the commissioner's Internet Web site. Employers are not required to comply with the notice of rights requirement until the commissioner posts the form. (AB 2337.)

Settlement Provisions Limiting Disclosure Of Information Regarding Sex Offenses Are Prohibited

A provision within a settlement agreement that prevents the disclosure of factual information that establishes a cause of action for civil damages for a felony sex offense; an act of childhood sexual abuse; an act of sexual exploitation of a minor; or an act of sexual assault against an elder or dependent adult that is entered into on or after January 1, 2017 is void as a matter of law and against public policy. An attorney's failure to comply with the requirements of this section by demanding that a provision be included in a settlement agreement that prevents the disclosure of such factual information as a condition of settlement, or advising a client to sign an agreement that includes such a provision, may be grounds for professional discipline and the State Bar of California shall investigate and take appropriate action in any such case brought to its attention. (AB 1682.)

Indoor Heat Illness Regulations Mandated

This bill requires by January 1, 2019 that the Division of Occupational Safety and Health propose to the Occupational Safety and Health Standards Board for the board's review and adoption, a heat illness and injury prevention standard applicable to workers working in indoor places of employment. (SB 1167.)

Clarification Regarding The Use Of Smart Phones While Driving

A handheld wireless telephone or electronic wireless communications device may be operated in a manner requiring the use of the driver's hand while the driver is operating the vehicle only if both of the following conditions are satisfied: (1) The handheld wireless telephone or electronic wireless communications device is mounted on a vehicle's windshield in the same manner a portable Global Positioning System (GPS) is mounted or is mounted on or affixed to a vehicle's dashboard or center console in a manner that does not hinder the driver's view of the road; and (2) The driver's hand is used to activate or deactivate a feature or function of the handheld wireless telephone or wireless communications device with the motion of a single swipe or tap of the driver's finger. (AB 1785.)

Additional Workplace Smoking Restrictions

This bill expands the prohibition on smoking in a place of employment to include an owner-operated business. It also eliminates most of the specified exemptions that permit smoking in certain work environments, such as hotel lobbies, bars and taverns, banquet rooms, warehouse facilities, and employee break rooms. (ABX2-7.)

New Case Law

Employer Is Not Liable For $885,000 In Damages Caused By Off-Duty Employee *Jorge v. Culinary Inst. of Am.*, 3 Cal. App. 5th 382 (2016)

Leopoldo Jorge, Jr., sued Almir Da Fonseca and his employer, the Culinary Institute of America, for injuries Jorge sustained when he was struck by a car driven by Da Fonseca. Da Fonseca, who is employed as a chef instructor for the Institute, had finished his shift and was driving home in his own car at the time of the accident. A jury found that Da Fonseca was negligent and that he was acting within the scope of his employment when he injured Jorge and awarded Jorge $885,000. The Institute filed a motion for judgment notwithstanding the verdict, which the trial court denied. The Court of Appeal reversed the judgment and the order denying the Institute's motion, holding that pursuant to the "going and coming rule" the Institute was not liable for the accident because Da Fonseca was not acting within the scope of his employment when he was driving home; the Court rejected Jorge's claim that the Institute required Da Fonseca to use his personal vehicle for work purposes especially during his ordinary commute home.

Employer Did Not Misappropriate Name And Likeness Of Employee *Local TV, LLC v. Superior Court*, 3 Cal. App. 5th 1 (2016)

Kurt Knutsson, a technology reporter who created "Kurt the CyberGuy" video segments for use on television news programs and station websites, sued Local TV for the use by its stations of CyberGuy material. Although Knutsson had entered into a written agreement pursuant to which the CyberGuy material was distributed to the websites of various television stations, Knutsson alleged misappropriation of his name and likeness; Local TV claimed that Knutsson had consented to the use. The trial court denied Local TV's motion for summary judgment, but the Court of Appeal granted Local TV's petition for a writ of mandate, holding that Knutsson had consented to allow Local TV to use the CyberGuy material in the manner in which it had used it.

Supervisor's Wrongful Termination Claim Was Not Preempted By The NLRA

Dang v. Maruichi Am. Corp., 207 Cal. Rptr. 3d 658 (Cal. Ct. App. 2016)

Khanh Dang sued his former employer for wrongful termination in violation of public policy, claiming that Maruichi had discharged him for engaging in concerted activity relating to unionizing efforts. The trial court granted Maruichi's motion for summary judgment on the ground that it lacked jurisdiction because Dang's claim was preempted by the National Labor Relations Act ("NLRA"). The Court of Appeal reversed, holding that the discharge of a supervisor based on his participation in union or concerted activity is not unlawful under federal law because supervisors (unlike employees) are not protected by section 7 of the NLRA; further, section 8 of the Act could not have been violated because Dang's termination did not interfere with the employees' section 7 rights. Therefore, a finding of "*Garmon* preemption" was not warranted, and the employer's motion should have been denied.

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