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## A Legislative El Niño for California?: New 2016 Employment Laws for the State's Private Sector Employers

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Experts are predicting a 95% chance of heavier-than-usual seasonal rainfall this year in Southern California based on the phenomenon known as "El Niño." Did the California Legislature and its Governor produce a comparable deluge of new employment laws for the state's private sector employees?

Not quite, but close. In its 2015 regular session, California's Legislature contemplated and, in some cases enacted, laws on subjects as diverse as drones, drought, doobies, and death. With a near-supermajority, the Legislature's Democrats passed the vast majority of bills they supported. This year, the Legislature sent more than 930 bills to the desk of fellow Democrat and Governor Edmund Gerald Brown, Jr. Brown signed more than 800 (86%) of the bills sent to him.

The new laws identified here all take effect on January 1, 2016, with the exception of the "urgency" laws that have already gone into effect since January 1, 2015.

### The Major New Laws<sup>1</sup>

These are the laws with the greatest employment-related implications for most or all of California's private sector employers.

Last year's Assembly Bill (AB) 1522 created California's **paid sick leave (PSL)** obligations for most California employers, with its provisions taking effect on July 1, 2015. Not surprisingly when an expansive new benefit is created, there are often fixes that have to be made to the original law. The **PSL fixes** made this year as an urgency enactment **effective July 13, 2015**, included requirements that:

- An employee must work for the same employer for 30 or more days within a year of the commencement of employment to be eligible to use PSL.
- Allow for alternative accrual methods for all leave banks.
- "Grandfather" in leave banks existing as of January 1, 2015.

<sup>1</sup> The text of all bills, along with their committee and floor reports, and votes, are available at <http://leginfo.legislature.ca.gov>.

- Allow employers with unlimited or undefined leave banks to indicate “unlimited” on the employee’s itemized wage statement.
- Allow employers to calculate the rate of pay for employees using any of three methods.
- Make other clarifications and exclusions from the PSL law, and delay its effective date for some employers.
- *(AB 304; amended Labor Code sections 245.5, 246, and 247.5; effective July 13, 2015 as an urgency measure).*<sup>2</sup>

California’s **equal pay** statute, first enacted in 1949, was significantly modified to lower the burden of proof for plaintiff’s claims, to greatly increase the burden of proof for an employer’s defenses, and to allow employees to ask other employees about the amount of their wages for the purpose of ascertaining whether there may be a factual basis for an equal pay claim. Governor Brown has referred to the new law as “the strongest equal pay law in the nation.” *(Senate Bill (SB) 358; amends Labor Code section 1197.5).*<sup>3</sup>

The Labor Code’s Private Attorneys General Act of 2004 (**PAGA**) has been amended to provide an employer with a limited **right to cure** a violation of failing to provide its employees with a **wage statement** containing the inclusive dates of the pay period and the name and address of the legal entity that is the employer. *(AB 1506; amends Labor Code sections 2699, 2699.3, and 2699.5; urgency measure effective October 2, 2015).*<sup>4</sup>

Employment **retaliation protections** are extended to an employee who is a **family member of a person who engaged in, or is perceived to have engaged in, legally protected conduct**. This bill also exempts household goods carriers from the client employer and labor contractor liability provisions in this law. *(AB 1509; amends Labor Code sections 98.6, 1102.5, 2810.3, and 6310).*

Employers are prohibited from retaliating or otherwise discriminating against an employee for requesting **accommodation of his or her disability or religious beliefs**, regardless of whether the accommodation request was ultimately granted. The new law is intended to clarify a portion of the holding in the published decision of *Rope v. Auto-Clor System of Washington, Inc.* 220 Cal. App. 4th 635 (2013). *(AB 987; amends Government Code section 12940).*

The **Labor Commissioner** is authorized to file a **lien on real estate, or a levy on an employer’s property, or impose a stop order on an employer’s business** in order to assist an employee in collecting **unpaid wages** where there is a **judgment against the employer**. Any employer, or individual acting on behalf of an employer, who violates any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or who violates other related provisions of law may be held liable as the employer for such violation. A bond of up to \$150,000 may be required of an employer who does not promptly pay a judgment for unpaid wages. *(SB 588; adds sections 690.020-690.050 to the Code of Civil Procedure; amends section 98 of the Labor Code, and adds sections 96.8, 238, 238.1, 238.2, 238.3, 238.4, 238.5, and 558.1).*

#### Other New Laws Affecting Most or All Private Sector Employers

The **Labor Commissioner** will have the authority to issue a citation to **enforce local minimum wage and overtime laws**, including against an employer or **person acting on behalf of an employer** for violations of existing law related to reimbursements for **expenses**. *(AB 970; amends Labor Code sections 558, 1197, 1197.1, and 2802).*

The duration of the **"disability benefit period"** is **extended** from 14 days to **60 days**. *(SB 667; amends, repeals, and adds sections 2608 and 2627 of the Unemployment Insurance Code).*

Beginning on January 1, 2017, an employer with 10 or more employees must file all reports and returns electronically, and remit all contributions for **unemployment insurance premiums by electronic funds transfer**, except as provided. Beginning on January 1, 2018, these electronic filing and fund transfer requirements will be extended to all employers. The bill would authorize the granting of a waiver from these

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2 For a full explanation of these changes, including recommendations, see Pamela Salgado, Adam Fiss and Michelle Falconer, *Paid Sick Time Law Developments in the State of California; Emeryville, California; Eugene, Oregon; and Bloomfield, New Jersey*, Littler ASAP (June 24, 2015).

3 For a full explanation of these changes, including recommendations, see Denise Visconti and Jennifer E. Savion, *California Passes Law Aimed to Bridge the Gender Wage Inequality Gap*, Littler Insight (Oct. 6, 2015). Littler will be presenting a one-hour webinar on this new law on Monday, October 19, at 10 a.m. PDT. To register, click [here](#).

4 For more on this additional benefit to employers, including recommendations, see Jim Hart, *Private Attorneys General Act (PAGA) Amended to Address Some Excesses*, Littler ASAP (Oct. 5, 2015).

requirements. The bill would impose a penalty of \$50 on those employers who fail to file a quarterly return electronically without good cause. (AB 1245; amends sections 1088, 1110, 1112, 1114, 13002, and 13021 of the Unemployment Insurance Code, and adds section 1112.1).

Two statutory provisions containing the **term "alien,"** used to describe any person who is not born in or a fully naturalized citizen of the United States, will be deleted from the Labor Code. (SB 432; deletes Labor Code sections 1725 and 2015).

### New Laws Affecting Some, But Not All, Private Sector Employers

The statutory requirements for **piece-rate compensation** are clarified, and an **affirmative defense** and **safe harbor** is provided for employers who, by December 15, 2016, fully compensate their specified employees for all under-compensated or uncompensated rest periods, recovery periods, or unproductive time between July 1, 2012 and December 31, 2015. (AB 1513; adds and repeals section 226.2 of, and repeals sections 77.7, 127.6, and 138.65 of, the Labor Code).<sup>5</sup>

The **Family School Partnership Act** is **expanded** to broaden the authorized reasons for which an employee can take job-protected **time off of work** without the fear of discrimination or discharge by allowing workers to take time off work to: (1) find, enroll, or re-enroll his or her child in a school or with a licensed child care provider, and (2) to address a child care provider or school emergency, as defined. (SB 579; amends Labor Code sections 230.8 and 233).

Certain **grocery stores** that are sold to another entity will have specified obligations to retain grocery workers for a limited period of time. (AB 359; adds Labor Code sections 2500-2522 [not inclusive]; AB 897; amends Labor Code section 2502 as added by Section 1 of Chapter 212 of the Statutes of 2015).<sup>6</sup>

The Legislature has reaffirmed the validity of Section 11(D) of Industrial Welfare Commission Wage Orders 4-2001 and 5-2001 addressing the **health care employee meal period waiver provisions** notwithstanding the provisions of Labor Code section 516. The effect of the bill is to attempt to negate the appellate court opinion of *Gerard v. Orange Coast Memorial Medical Center* 234 Cal. App. 4th 285 (2015), a decision now on appeal to the California Supreme Court. (SB 327; amends Labor Code section 516; **urgency measure effective October 5, 2015**).<sup>7</sup>

The **Motor Carrier Employer Amnesty** program applies to **port drayage companies** that voluntarily execute a settlement agreement with the Labor Commissioner related to misclassification of employees. (AB 621; adds section 2750.8 to the Labor Code, and adds sections 1160, 1162, and 1164 to the Unemployment Insurance Code).

The definition of an **"unlawful employment practice"** is expanded to prohibit an employer or any other person or entity from using the **E-Verify** system at a time or in a manner not required by federal law, or not authorized by a federal agency memorandum of understanding, to check the employment authorization status of an existing employee or an applicant who has not received an offer of employment. There is a **civil penalty of up to \$10,000 for each violation** of the provisions of the bill. (AB 622; adds Labor Code section 2814).

The number of Medi-Cal beneficiaries in an employer's workforce that **triggers** the obligation of an employer not to discriminate or retaliate against an employee who enrolls in a public assistance program and not to refuse to hire a beneficiary for reason of being enrolled in a public assistance program pursuant to **Government Code section 13084(h)(1)** is standardized at **100 beneficiary employees**. (AB 145; amends Unemployment Insurance Code section 1096; **urgency measure effective September 30, 2015**).

AB 525 would significantly alter the current franchisee-franchisor relationship, especially regarding the options and remedies available to the franchisee for the nonrenewal of a **franchise**. (AB 525; amends and repeals eight sections of the Business and Professions Code).

The standards for the maintenance and training requirements for placement of **automated external defibrillators** (AEDs) in commercial buildings now allow for **qualified immunity** from civil liability for the selection, installation, placement, and use of AEDs in those facilities. (SB 658; amends Health and Safety Code sections 1714.21 and 1797.196).

<sup>5</sup> For a full explanation of these changes, including recommendations, see Richard H. Rahm and Angela J. Raforth, *California Governor Signs AB 1513, Severely Limiting Piece-Rate Compensation But Throwing a Liability Life Raft to Employers*, Littler Insight (Oct. 12, 2015).

<sup>6</sup> In an unusual August 17 signing message for AB 359, Governor Brown noted there were certain ambiguities in the bill that he expected would be clarified by the Legislature in a bill sent to him before the regular session ended on September 11. In response, AB 897 was transformed into a "gut-and-amend" bill (removing the all contents of an existing bill and replacing the contents with completely different provisions) to correct what the Governor saw as an ambiguity, rocketed through the normal legislative process, bypassing committees, and was passed by the Legislature 13 days after it was amended.

<sup>7</sup> This version of the bill was created by the gut-and-amend process on September 4, and passed the Legislature seven days later, on the last day of the session.

California professional sports enterprises that include the use of **professional cheerleaders** should be prepared to treat them as employees, not independent contractors, in 2016. (AB 202; adds Labor Code section 2754.)

**Pedicab** businesses might have the option of allowing **alcohol** to be served and consumed on board, if their employees are properly trained. (SB 530; amends sections 467.5 and 23229, repeals section 21215.2, and adds sections 21215-21215.2, of the Vehicle Code).

### State Government Contractors, Public Works, and Prevailing Wages

The definition of "**public works**" is expanded to include the hauling and delivery of **ready-mixed concrete**, provides that the entity hauling or delivering ready-mixed concrete shall be considered a subcontractor solely for the purposes of a specified chapter of the code, and provides that the bill applies to public works contracts that are awarded on or after July 1, 2016. (AB 219; adds Labor Code section 1720.9).

The sunset date on the exemption that allows **volunteers** to perform work on **public works** projects and not be paid the prevailing wage is extended from January 1, 2017, to January 1, 2024. (AB 327; amends Labor Code section 1720.4).

School districts entering into certain school building lease contracts are now required to use a "**skilled and trained workforce**," as defined by this statute. Additionally, school district governing boards are prohibited from using lease-leaseback or lease-to-own contracts with any entities unless the entity provides to the governing board an enforceable commitment that the entity and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project or contract that falls within an **apprenticeable occupation in the building and construction trades**. (AB 566; amends Education Code section 17406, adds Education Code section 17407.5, and amends Public Contract Code section 20111.6).

The definition of "**public work**," for purposes of **prevailing wage law**, is expanded to include any construction, alteration, demolition, installation, or repair work done under private contract on a **general acute care hospital**, with a limited exception for rural general acute care hospitals, when the project is paid for in whole or in part with the proceeds of conduit revenue bonds issued by a public agency. (AB 852; adds Labor Code section 1720.7).

The conditions supporting when the building and construction trades' needs justify a **new apprenticeship program** are revised to require a showing that existing apprenticeship programs do not have the capacity, or neglect or refuse, to dispatch sufficient apprentices to a public works site. This deficiency on the part of the existing apprenticeship program can be demonstrated by a **sustained pattern of unfilled requests** by a qualified employer. (AB 1308; amends Labor Code section 3075).

The "**Clean Energy and Pollution Reduction Act of 2015**" generally requires that the electricity generated and sold to retail customers from renewable energy sources increase to 50% per year by December 31, 2030. Among other amendments to various sections of California law, this bill amends the Labor Code to specifically redefine the work subject to California's prevailing wage law. Now, construction, alteration, demolition, installation, or repair work on the **electric transmission system** located in California constitutes a public works project, subjecting these projects to prevailing wage requirements. (SB 350; amends Labor Code section 1720, among many other sections of the Health and Safety Code, Public Resources Code, and Public Utilities Code).

**Attorneys' fees** need not be awarded to the party who prevails in **an action to compel or prohibit the disclosure of petroleum refinery turnaround information** by the Division of Occupational Safety and Health. A **petroleum refinery employer**, or a person **requesting the disclosure** of turnaround information, may intervene in an action to prohibit or compel the disclosure of the turnaround information. (SB 421; amends Labor Code section 7873.)

A new statute **prohibits** a state agency from entering into contracts for the acquisition of goods or services of \$100,000 or more with a contractor that discriminates between employees on the basis of **gender identity** in the provision of benefits. (SB 703; adds Section 10295.35 to the Public Contract Code).

## The Ones That Didn't Make It (But May Make a Legislative Return in 2016)

Vetoed by the Governor:

The most significant bill vetoed was an attempt to **prohibit the use by employers of pre-dispute binding arbitration agreements** for most employment disputes. Labeled as one of the Cal Chamber's "job killers," the bill was sponsored by the California Labor Federation. In an unusually lengthy veto message,<sup>8</sup> Governor Brown cited existing case law protections for the arbitral process, the preemptive effect of the Federal Arbitration Act, the fact that both the California and U.S. Supreme Courts have taken a deferential attitude towards arbitration, and concluded that a "blanket ban" on this kind of arbitration at this time was not justified. (*AB 465; would have created Labor Code section 925*).

The Governor also rejected a proposed prohibition on employers directly or indirectly asking job applicants for their **salary history**, including compensation and benefits. (*AB 1017; would have added Labor Code section 432.3*).

The proposed amendments to the California Family Rights Act (**CFRA**) to **expand various provisions** of law related to unpaid family and medical leave were likewise not approved. The amended statute would have redefined the term "child" to include a biological, adopted, or foster son or daughter, a stepchild, a legal ward, a son or daughter of a domestic partner, or a person to whom the employee stands in *loco parentis*, and removed the restriction on age or dependent status. The amended statute would have expanded the definition of leave for caring for persons with a serious health condition to also include leave to care for a grandparent, grandchild, sibling, or domestic partner who has a serious health condition. Finally, the amended statute would have included a parent-in-law in the definition of "parent." (*SB 406; would have amended Government Code section 12945.2*).<sup>9</sup>

A bill passed the Legislature that would have prohibited permanent disability apportionment of **worker's compensation** benefits if **pregnancy or menopause** were contemporaneous with the injured worker's claimed injury. The bill would also have required that the impairment rating for **breast cancer** not be less than the comparable impairment rating for prostate cancer. (*AB 305; would have amended section 4663 of, and added section 4660.2 to, the Labor Code*).

The Governor vetoed a proposed statutory definition for a "**de minimis**" **public subsidy** that would not have triggered the requirements of prevailing wage law (*AB 251; would have amended Labor Code section 1720*).

A bill was proposed that would have extended some of the protections of the Fair Employment and Housing Act (FEHA) to certain **reserve peace officers**, including reserve city police officers and reserve county sheriffs. (*AB 272; would have amended Penal Code section 830.6*).<sup>10</sup>

A proposed **expedited process** for the enforcement of monetary penalties ordered by the **Agricultural Labor Relations Board** (ALRB) and a requirement that agricultural employers post a **bond** if they wished to appeal a final order in the amount equal to the economic value of the monetary penalties also did not become law. (*AB 561; would have amended section 1149 of, and added sections 1149.3 and 1162 to, the Labor Code*).

A law that would have **prohibited** employers from publishing an advertisement or announcement for a job that includes a provision stating or indicating **that an unemployed person is not eligible**, or from asking an applicant to disclose the applicant's **employment status** until the employer has determined that he/she meets the minimum employment qualifications for the position was not signed. (*AB 676; would have added Labor Code section 432.4*).<sup>11</sup>

The **Equal Pay for Equal Work Act of 2015** would have required an employer with 100 or more employees in the state and a contract of 30 days or more, prior to becoming a contractor or subcontractor with the state, to submit a **nondiscrimination program** to the Department of Fair Employment and Housing (DFEH) and to submit periodic reports, no more than annually, of its compliance with that program. This bill was not signed into law. (*AB 1354; would have amended Government Code section 12990*).

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8 Available for review at: <https://www.gov.ca.gov/news.php?id=19165>.

9 The Governor's veto message stated that the bill had the potential of creating an anomaly in connection with the Family and Medical Leave Act to allow 24 weeks of leave in a twelve-month period. Veto message available at <https://www.gov.ca.gov/news.php?id=19165>.

10 The bill passed both houses and committees by a combined vote of 151-0, and had no known opposition.

11 In his veto message, the Governor noted: "This bill is substantially similar to the bill I vetoed last year. Nothing has changed..."



### *Not Passed by the Legislature:*

A bill to increase the **statewide minimum wage** to \$11 per hour starting January 1, 2016, and \$13 per hour starting July 1, 2017; beginning in January 1, 2019, the minimum wage would have been increased annually based on inflation as measured by the California Consumer Price Index (CCPI) did not pass. (SB 3; would have amended Labor Code section 1182.12).<sup>12</sup>

The **Double Pay on the Holiday Act of 2015**, which failed passage in the Assembly, would have required that hourly employees scheduled to work on a specified holiday be paid at least twice their regular rate of pay for all hours worked on a “family holiday.” (AB 67; would have added Labor Code section 511.5).

The **Fair Scheduling Act of 2015**, which is based on San Francisco’s similar enactment of a year ago,<sup>13</sup> was introduced by the author of the San Francisco law, who was subsequently elected to the Assembly. The bill would have required employers of hourly employees to provide advance notice of scheduled shifts and, if the shifts needed to be changed close to the shift date, for the employees affected by the shift change to receive additional pay because of the change. (AB 357; would have added sections 518 and 519 to the Labor Code, and amended section 11320.31 of the Welfare and Institutions Code).

### Looking Ahead: the 2016 Legislative Session and Elections

The 2016 session will begin in earnest in January 2016. At that point or over the course of the year, different leaders will assume leadership of the two parties in each house of the Legislature. At the general election in November 2016, California voters will select a replacement for U.S. Senator Barbara Boxer, as well as all members of the State Assembly, and half those of the State Senate – and also select a new U.S. President.

At this writing, more than 80 initiatives have been submitted to the Attorney General’s office for approval to begin collecting signatures to qualify them to be placed on next year’s general election ballot. Ten of these relate to relaxing restrictions on the possession, use and cultivation of marijuana. One of these would prohibit an employer from testing an applicant or employee to detect marijuana use. At least one would change the state’s minimum wage.

### What California Private Sector Employers Should Do Now

1. Update employee handbooks and, if necessary, policies and procedures, reflecting the legislative changes concerning paid sick leave modifications, and the basis for compensating similar positions (which could be scrutinized as part of an equal pay claim).
2. Consider revising handbook and policies and procedures to reflect 2015 major case holdings, as described in Littler’s 2015 publications available at [www.littler.com](http://www.littler.com).
3. Advise supervisors of the new laws, their responsibility to know these new laws, and their responsibilities to administer policy in conformity with the new laws, including the highly restricted use of E-Verify, the expanded scope of unlawful retaliation against employees who are family members with employees who engaged in protected activities, and new prevailing wage requirements for work performed on public works projects (if applicable to your enterprise).
4. Contact employment counsel with any questions about the new laws mentioned in this Insight.

Littler Shareholder and Workplace Policy Institute’s Co-Chair Michael J. Lotito and Littler Knowledge Management Attorney Christopher E. Cobey will discuss these new laws, and the legislative prospects for 2016, in a one-hour webinar on Tuesday, October 13, beginning at 11 a.m. PT. Register [here](#).

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<sup>12</sup> Indexing is no guarantee that a given minimum wage will increase every year. The city of San Jose, California, announced on October 1, 2015, that its minimum wage for 2016 would not increase, because the consumer price index used in its ordinance decreased by 0.3% from August 2014 to August 2015 (a drop attributable to declining gasoline prices). Most minimum wage ordinances provide only for annual possible increases – not decreases.

<sup>13</sup> See Michael Brewer, Christopher E. Cobey, and Jason E. Shapiro, *San Francisco Ordinance Imposes New Burdens on ‘Formula’ Retail Employers*, Littler ASAP (Dec. 9, 2014).