A Timely Analysis of Legal Developments

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Following a summer of battles over the state budget, very few bills affecting private employers in California made it successfully out of the legislative process. The bills that were passed include, a new unpaid leave for Civil Air Patrol members, adjusted tax withholding requirements, laws affecting the alternative workweek arrangement and new industry specific laws regarding licensing and contracting requirements.

DYSFUNCTION JUNCTION: What the State Capital Produced for California Private Sector Employers in 2009

By Christopher E. Cobey

As presaged by its actions at the end of 2008, the California Legislature in 2009 was justifiably preoccupied with the State's worst economic crisis since the Great Depression. Legislative energies were focused on cobbling together a budget that could get the constitutionally-required two-thirds vote, when the majority party Democrats did not have a two-thirds majority of either legislative chamber.

The California budget is required by the state Constitution to be passed by July 1. In 2009, the budget was not passed by the Legislature and signed by Governor Arnold Schwarzenegger until late summer, several weeks past due. The delayed passage created a payment issue where instead of issuing checks drawn on the state treasury, warrants were issued that could be redeemed only after October 1 – in essence, promises to pay in the future when the state presumably had the money.

Unlike in his previous years as Governor, Schwarzenegger held back until the last possible day from signing or vetoing the nearly 700 bills put on his desk by the Legislature in their usual last-minute, end-of-session production. The Governor used the threat of his veto to attempt to coerce state legislators to commit to, if not enact, reforms the Governor sought concerning the management of California water resources. This year, the Governor vetoed roughly half of all bills passed by the Legislature on labor and employment law.[1] And, following the adjournment of the regular session of the Legislature last month, the Governor summoned the legislators to return to Sacramento for a special session on California's water woes.

The New Laws

The good news for California private sector employers is that there are few modifications necessary to their employee handbooks for 2010 based on what was enacted.

The new law, not previously reported by Littler,[2] potentially affecting the most California private sector employers, creates a right to an unpaid leave of absence for some employees who are members of the California Wing of the Civil Air Patrol. The new law,

which will appear as California Labor Code sections 1500-1507, requires that California companies employing more than 15 people must provide not less than 10 days per year of leave, beyond any leave benefits otherwise available, to employees who have been employed by that employer for at least 90 days immediately preceding the commencement of leave, who are volunteer members of the California Wing of the Civil Air Patrol, and who have been duly directed and authorized by a political entity that has the authority to authorize an emergency operational mission of the California Wing of the Civil Air Patrol, to respond to an emergency operational mission of the California Wing of the Civil Air Patrol (AB 485[3]). If your employee handbook or personnel policies enumerate available leaves, add this new leave to it. Other laws affecting California private sector employers and employees signed by the Governor:

- Require an applicant for licensure as a farm labor contractor, for registration as a garment manufacturer, for renewal or reinstatement of the license or registration, and for a change in key personnel, to submit a statement as to whether he or she has satisfied all requirements involving unpaid wages in a final court judgment, a final order issued by the commissioner, or an accord. The new law subjects any person who provides false information on the statement to a civil penalty (AB 854).
- Prohibit a person from engaging in an advance-fee talent representation service. The new law also imposes additional disclosure and contract requirements for a talent service, and makes a willful violation of its provisions a misdemeanor and subject to a civil action (AB 1319).
- Authorize the owner or operator of agricultural production, processing, and handling facilities, to designate a competent employee who is not required to be a certified competent conveyance mechanic to maintain and test the manlifts used at the facilities (SB 478).
- Extend the expiration date of Labor Code sections 2050-2068 governing car wash employers and employees from January 1, 2010, to January 1, 2014 (AB 236).

The new laws take effect on January 1, 2010.

The Vetoed Bills

As usual with a governor of one party and a legislature controlled by the other, the Governor exercised his veto prerogative to thwart many Democratic legislative initiatives. Probably the most significant veto victim was SB 242, which would have expanded the workplace protections and remedies available to California employees for speaking a language other than their own primary language, and would have provided additional legal remedies and penalties for violations of these rights. In his veto message on this bill, the Governor declared:

> "While no one should be treated differently based on their race or national origin, no single business can accommodate every language spoken in California. Unfortunately, under this measure, any business that treats customers differently because the business may not be able to effectively communicate with the customer could then be required to justify such disparate treatment in a court of law."

Other veto casualties, which may well re-appear in future legislative sessions, were those on:

- Employment agreements. AB 335 would have established a rebuttable presumption that a choice of law or choice of forum provision in an employment agreement, handbook, or other statement of an employer's policies was unconscionable, violated the public policy of the state, or would be void, if the provision required an employee or job applicant to arbitrate or litigate a claim outside of California that arose from employment or conduct in this state or would have deprived the employee or applicant of the protection of California law for such a claim. As he did last year, Schwarzenegger vetoed this bill, commenting in his veto message: "...this bill would discourage out-of-state and multinational employers from hiring California-based workers and potentially contribute toward the growing problem of unemployment. Additionally, the bill is unnecessary because courts are already well equipped to determine when a choice of law or choice of forum provision in a private contract should be enforced in consideration of all applicable circumstances."

- Payroll records in DLSE proceedings. AB 527 would have permitted a presumption that all payroll records relating to a claim or complaint be presumed false if the Labor Commissioner found that there was a pattern of falsification of the payroll records submitted for any pay period relating to any claim or complaint brought pursuant to the Labor Commissioner's authority.
- *Ledbetter v. Goodyear*.[4] AB 793 would have expanded opportunities for claims and increased damages for persons alleging denial of equal pay based on gender. The Governor's veto message called the bill "unnecessary" in light of subsequent federal legislation, and added: "...as drafted, this measure is far more expansive than the federal law and could pose unreasonable and unlimited liability for California employers."
- Indoor heat standards. AB 838 would have required the Occupational Safety and Health Standards Board, by July 1, 2011, to adopt a standard for controlling the risk of occurrence of heat illness where employees work indoors.
- Employer's use of credit reports. AB 943 would have prohibited an employer, with the exception of certain financial institutions, from obtaining a consumer credit report for employment purposes, with two limited exceptions.
- E-Verify. AB 1288 would have prohibited the state, or a city, county or special district, from requiring an employer other than one of those government entities to use an electronic employment verification system except when required by federal law or as a condition of receiving federal funds.
- OSHA findings and reports. AB 1561 would have expanded the basis for workplace citations by OSHA and would have required more detailed reports of OSHA's investigations and analyses to the Legislature.
- Garnishment. AB 1562 would have prohibited an employer from terminating an employee because garnishment of the employee's wages has been threatened or the employee's wages have been subjected to garnishment for the payment of five or fewer judgments at any one time.
- DLSE investigation and enforcement. AB 1563 would have increased the DLSE's responsibilities concerning its investigations of suspected violations by employers, to report on its investigations, and would have required the division to make a record of its reasons supporting its decision to either file or not file a legal action.

In July 2009, the Governor vetoed SBX3 17, which would have imposed two new independent contractor withholding mandates: a three percent across-the-board withholding requirement on payments to resident independent contractors and seven percent for non-resident independent contractors.

The 2009 session of the Legislature initiated several bills addressing meal and rest breaks, alleged violations of which have led to a major wave of class action suits in California state and federal courts. None of the legislative proposals on this topic even made it out of one house of the Legislature this year.

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[1] The Governor's veto rate of all end-of-the-year legislation sent to his desk was 33%.

[2] *See* Littler ASAP articles, *Cash-Strapped California Adjusts Tax Withholding Requirements - A Concern for All California Employers and Workers* (Sept. 2009) and *California Enacts New E-Discovery Rules that Mirror Federal Court E-Discovery Rules - with One Exception* (July 2009); see also *Requirements for Use of Alternative Workweek in California Eased Slightly* (Feb. 2009) at Littler's Wage & Hour Counsel Blog.

[3] Texts of the final and preceding versions of all bills, and committee reports on those bills which were scheduled for committee hearings and floor votes, are available at www.leginfo.ca.gov.

[4] *See* Littler ASAP article, *Paycheck Rule Revived for Pay Discrimination Claims with Signing of the Lilly Ledbetter Fair Pay Act* (Jan. 2009).