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What's New? California's Major 2012 Employment Laws Affecting Private Sector Employers

By Christopher Cobey and Tomomi Glover

The members of the California State Senate and Assembly introduced 1,899 bills this year, and the legislature passed and sent to the governor 568 of them. On September 30, Governor Jerry Brown completed his work of signing or vetoing the bills presented to him.

The backdrop for this year's legislation production was the continuing recession. Next month's general election has among its 11 statewide ballot propositions two state tax increase proposals, as well as an initiative which, if enacted, would substitute for capital punishment life imprisonment without the possibility of parole. In San Jose, voters will be asked whether they wish to join at least 21 other California cities that have minimum wages higher than those required by the federal or state governments, and enact a city minimum wage starting at \$10 per hour.

Littler has already issued analysis of one major new law affecting employers, Assembly Bill (A.B.) 2674, in our ASAP, [What's In YOUR Personnel File? California Greatly Expands Employee Access And Creates Employer Penalties](#). In addition, Littler ASAPs are forthcoming concerning new restrictions on employer inquiries concerning applicants and employees' personal use of social media (A.B. 1844 and Senate Bill (S.B.) 1349), and amendments to California's False Claims Act (A.B. 2492).

The following is a summary of the fate of the remaining bills relating to California statutory employment law that were passed by the legislature this year. All legislation described here takes effect January 1, 2013, unless otherwise noted.¹

New Laws Applicable to Most or All California Employers

- The Fair Employment and Housing Act (FEHA) is amended to provide that, for purposes of the Act, the term "sex" also includes *breastfeeding or medical conditions related to breastfeeding*. The amended law states that the changes made by this bill to the above provisions are declaratory of existing law. (A.B. 2386; amended Government Code section 12926(q).)
- Adds "*religious dress practice*" and "*religious grooming practice*" as a belief or observance to existing protections against religious discrimination in the FEHA. The

¹ This review does not cover workers' compensation or unemployment insurance statutory developments. All legislation is available at www.leginfo.ca.gov.

amended Act directs “religious dress practice” to be broadly construed and “to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed.” The amended Act likewise directs that “religious grooming practice” be broadly construed “to include all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed.” In addition, an accommodation of an individual’s religious dress or grooming practice that would require that person to be segregated from the public or other employees is not a reasonable accommodation.

According to legislative committee reports on this bill, the source of this law is the Sikh Coalition. Members of the Coalition have reported experiencing discrimination based upon their turbans, beards, and unshorn hair. The new law requiring reasonable accommodation applies to religious artifacts and jewelry, which means that it may apply to the wearing of ceremonial swords and daggers (kirpans) by employees. (A.B. 1964; amended Government Code sections 12926 and 12940.)

An employee is deemed to suffer *injury* for purposes of Labor Code section 226(e) and (f) if an employer fails to provide a *wage statement*. In addition, for imposition of penalty purposes, an employee is deemed to suffer injury if an employer fails to provide accurate and complete information, as specified in items 1 through 9 of section 226(a), and the employee cannot “promptly and easily determine” from the wage statement alone the:

- amount of gross or net wages paid to the employee during the pay period or other specified information;
- deductions the employer made from the gross wages to determine the net wages paid to the employee during the pay period;
- name and address of the employer, or the legal entity which secured the services of the employer (such as a farm labor contractor); and
- name of the employee and only the last 4 digits of the employee’s Social Security number or an employee identification number.

(A.B. 1744, A.B. 2674, S.B. 1255; amended Labor Code section 226(e).)

- Clarifies that “commissions” requiring *written commission agreements* do not include short-term productivity bonuses such as are paid to retail clerks, temporary variable incentive payments that increase but do not decrease payment under the written contract, and bonus and profit-sharing plans, unless there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed. (A.B. 2675; amended Labor Code section 2751.)
- *Increases the fine* for any employer who willfully fails to pay, and has the ability to pay, a final court judgment or final order issued by the Labor Commissioner for all *wages due* to an employee who has been discharged or who has quit within 90 days of the date that the judgment was entered or the order became final. Employers that violate the statute are guilty of a *misdemeanor*. (S.B. 1144; amended Labor Code section 1197.2.)
- Amends California’s *False Claims Act* to conform to the federal False Claims Act. The new law defines the term “obligation” for purposes of these provisions and expands the definition of a claim. The amended law increases the civil penalty for each violation. Additionally, employees who themselves violate the Act can file suit against an employer based on the employee’s prohibited conduct, and be awarded a share of the proceeds of the action (however, courts can reduce the award based on the employee’s conduct).

The amended law provides specified relief to any employee, contractor, or agent that is, among other things, discharged, demoted, suspended, or in any other manner discriminated against in the terms and conditions of his or her employment because of certain acts done by the employee, contractor, or agent in furtherance of these provisions or to stop one or more violations, as specified. The new law modifies the statute of limitations of certain civil actions. (A.B. 2492; amended Government Code sections 12650-52 and 12654; section 12653 repealed and added, and added section 12654.5.)

- Specifies that *payment of a fixed salary to a nonexempt employee* provides compensation only for the employee’s regular, non-overtime hours, notwithstanding any “explicit mutual wage agreement” or other private agreement to the contrary. (A.B. 2103; amended Labor Code section 515; overturns *Arechiga v. Dolores Press*, 192 Cal. App. 4th 567 (2011).)

- The *wage garnishment* law is amended to increase the amount of wages exempt from garnishment from the federal standard (the lesser of 25% of an individual's weekly disposable earnings or the amount by which the individual's disposable earnings for the week exceed 30 times the federal minimum hourly wage) to a new higher California standard (the lesser of 25% of an individual's weekly disposable earnings or the amount by which the individual's disposable earnings for the week exceed 40 times the California minimum hourly wage). New definitions and formulas are also provided to determine "disposable earnings." (A.B. 1775; amended Code of Civil Procedure sections 706.011 and 706.050.)
- Substitutes the term "*intellectual disability*" for "mental retardation" in many statutes in ten codes. (A.B. 2370, S.B. 1381; multiple statutes.)
- Establishes the California Secure Choice Retirement Savings Trust Act, which creates the *California Secure Choice Retirement Savings*. The new law requires eligible employers, as defined, to offer a payroll deposit retirement savings arrangement so that eligible employees, as defined, could contribute a portion of their salary or wages to a retirement savings program account in the California Secure Choice Retirement Savings Program, as specified. The bill requires eligible employees to participate in the program, unless the employee opts out of the program, as specified. (S.B. 1234; new Government Code sections 20139, 100000-100044; new Unemployment Insurance Code section 1088.9.)
- As part of the governor's cost-cutting *reorganization*, the *Fair Employment and Housing Commission* has been *eliminated*, and its powers and duties transferred to a new Fair Employment and Housing Council within the Department of Fair Employment and Housing (DFEH). The Council will consist of seven members appointed by the governor and will have the power to issue regulations. The DFEH will now be able to directly bring civil actions, after first engaging in mandatory dispute resolution provided at no cost to the parties involved. In such civil actions, the court is now authorized to award to the DFEH reasonable attorney's fees and costs, including expert witness fees. (Governor's Reorganization Plan 2; among others, new Government Code section 12907, amended Government Code sections 12903-06, 12925, 12930, 12935, 12961, 12964-65, 12973, 12983; repealed Government Code sections 12967-70, 12972, 12987.)
- Existing law prohibits a person from *driving a motor vehicle while using an electronic wireless communications* device to write, send, or read a text-based communication, except as specified. The new law removes that prohibition if the person is using an electronic wireless communications device that is specifically designed and configured to allow voice-operated and hands-free operation to dictate, send, or listen to a text-based communication, and it is used in that manner while driving. (A.B. 1536; amended Vehicle Code section 23123.5.)

New Laws Applicable to Employers in Specific Professions or Industries

- Requires medical certification of an *infant performer* before a work permit may be issued. (A.B. 2396; amended Labor Code section 1308.10.) Another new law establishes a program to be administered by the Labor Commissioner that enables a minor's parent or guardian, prior to the first employment of a *minor performer* and under specified conditions, to obtain a temporary permit for the employment of a minor. (A.B. 1401; amended Labor Code section 1308.5.) A third new law prohibits a person, except a person licensed as a *talent agent* and other specified persons, from representing or providing specified services to artists who are minors, under 18 years of age, unless he or she submits to the Labor Commissioner an application for a Child Performer Services Permit and receives that permit. The new law requires the Labor Commissioner to set a filing fee to be paid by the applicant to the commissioner at the time the application for the permit is filed. Upon receiving the application and filing fee and determining from the information provided by the Department of Justice that the applicant is not required to register as a sex offender, the commissioner shall issue a Child Performer Services Permit to the applicant. The new law requires the applicant to renew the permit on a biennial basis. (A.B. 1660; new Labor Code sections 1706-1706.5.)
- Increased employer payment contribution that results in a lower hourly straight time or overtime wage is not considered to be a violation of the applicable *prevailing wage* determination so long as specified conditions are met. (A.B. 2677; amended Labor Code section 1773.1; new Labor Code section 1773.8.)

- For *temporary services employers*, except certain security services companies, a new law requires that *itemized wage statements*, in addition to existing requirements in Labor Code section 226, include the rate of pay and the total hours worked for each temporary services assignment. Also requires covered temporary services employers to include in their *Wage Theft Notice*, in addition to existing requirements in Labor Code section 2810.5, the name of the legal entity for whom the employee will perform work, the physical address of its main office, the mailing address of its main office (if different), and its telephone number. (A.B. 1744, A.B. 2674, S.B. 1255; new Labor Code section 226.1; amended Labor Code sections 226 and 2810.5.)
- Adds *warehouse contractors* to the list of specified contractors (construction, farm labor, garment, janitorial, or security guard) to which prohibitions in Labor Code section 2810 apply. Specifically, persons or entities may not enter into an *agreement for labor or services* from the specified contractors where the person or entity knows or should know that the agreement does not include *funds sufficient to comply with applicable laws or regulations*. Also requires that, on the request of the Labor Commissioner, the person or entity that entered into the agreement provide the Labor Commissioner a copy of the agreement and other related documentation. (A.B. 1855; amended Labor Code section 2810.)
- A violator of the requirement that a *farm labor contractor* be licensed will be subjected to citations issued by the Labor Commissioner and civil penalties that increase as the number of citations for violations increase. The new law provides that the civil penalties collected under the above-described provisions shall be deposited into the Farmworker Remedial Account and be available, upon appropriation by the legislature, for purposes of regulating farm labor contractors. (A.B. 1675; amended Labor Code section 1683.)
- A new law authorizes the California Department of Motor Vehicles to waive the driving skills test required by federal regulations for a *commercial motor vehicle driver* with military commercial motor vehicle experience who is currently licensed with the United States Armed Forces at the time of his or her application for a commercial driver's license, and whose driving record in combination with his or her driving experience meets, at a minimum, specified conditions required by federal law. (A.B. 2659; amended Vehicle Code section 15250.)

Employment-Related Bills Vetoed

The following are descriptions of vetoed employment-related legislation which, if enacted, would have:

- Prescribed specified duties on employers to reduce the risk of *heat illness among agricultural employees*, including the adopted heat illness prevention regulatory requirements. The proposal would have imposed specified civil penalties, and created a private right of action, for violations of these requirements. (A.B. 2346.)
- *Prohibited discrimination* in hiring based on an applicant's status as *unemployed*. (A.B. 1450.)
- Imposed additional *workplace smoking restrictions in long-term care facilities*. (A.B. 217.)
- Required the Department of Industrial Relations, by January 1, 2014, to adopt regulations governing the *working conditions of domestic work employees*. (A.B. 889.)
- Would have made it a *crime* for any person who directs an *agricultural employee* to perform, or supervises an agricultural employee in the performance of, outdoor work without providing the employee with *shade and potable water*, punishable by up to six months imprisonment in a county jail, a fine not exceeding \$10,000, or both. If that violation resulted in injury to an agricultural employee, the penalty would increase to up to one year imprisonment in a county jail, a fine not exceeding \$25,000, or both. (A.B. 2676.)
- Increased penalties for *unlawful use of wireless telephone* or electronic wireless communications in vehicles. (S.B. 1310.)

Political Prognosis

Notwithstanding the new districts and revised primary elections, control of the California Legislature is likely to remain in Democrats' hands following next month's general election. And with the same (Democrat) governor at the helm, the same policy atmosphere that has existed in 2011 and 2012 should continue in state government though at least the next general election in 2014.

Recommended Action Items for California Employers

1. Confirm that any commissioned employees have current and compliant commission agreements signed by January 1, 2013 (and that any inside and outside salespersons paid on commission are properly classified as such).
2. Review existing policies on breastfeeding, religious dress and grooming, and social media to conform to new laws. Ensure HR personnel, managers, and necessary employees are aware of the new requirements by training, notification, or both.
3. Confirm that the wage statements accompanying employee paychecks, whether issued by an employer directly or by a service, are in complete compliance with the requirements of amended Labor Code section 226. Confirm or establish the company representative to which the written or verbal requests for records pursuant to section 226(b) must be directed, as permitted by section 226(c).
4. Update any policies to use the term "intellectual disabilities" in place of "mental retardation."
5. Review recommended action items in Littler's ASAP, [What's In YOUR Personnel File? California Greatly Expands Employee Access And Creates Employer Penalties](#), regarding amended Labor Code section 1198.5 on personnel file access and copying.
6. Review any existing employment agreements with non-exempt employees that attempt to compensate for overtime on a salary basis and modify to conform to new law. Review industry- or profession-specific legislation described here for necessary compliance.

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