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The California Grizzly Elbows Uncle Sam: New California Immigration Requirements For Private Sector Employers

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Partly in response to the inaction in Washington on immigration reform, the California Legislature, in the annual session concluded in mid-September,[1] passed several bills which were signed by Governor Brown that either create or increase penalties for employers that consider an applicant's or employee's immigration status, or retaliate against an employee because of that status.[2]

What Are The New Employment Laws Concerning Immigration?

On October 5, Governor Brown announced the signing of a group of immigration-related bills, covering a variety of workplace and civic activities.

SB 666

This bill adds section 244 to the Labor Code, adds sections 494.6 and 6103.7 to the Business and Professions Code (B&P), and amends sections 98.6 and 1102.5 of the Labor Code.

New Labor Code section 244(b) specifies that

> Reporting or threatening to report an employee's, former employee's, or prospective employee's suspected citizenship or immigration status, or the suspected citizenship or immigration status of a family member of the employee, former employee, or prospective employee, to a federal, state, or local agency because

1 *See* Christopher E. Cobey and Marina C. Gruber, *The Going Gets Steeper: 2013 California Employment Legislation Affecting Private Sector Employers*, Littler WPI ASAP, *available at* http://www.littler.com/publication-press/publication/going-gets-steeper-2013-california-employment-legislation-affecting-pr.

2 Copies of all bills, any available committee reports and floor analyses, and committee and floor votes on individual bills, can be found at http://leginfo.legislature.ca.gov.

> the employee, former employee, or prospective employee exercises a right under the provisions of this code, the Government Code, or the Civil Code constitutes an adverse action for purposes of establishing a violation of an employee's, former employee's, or prospective employee's rights. As used in this subdivision, "family member" means a spouse, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, or grandchild related by blood, adoption, marriage, or domestic partnership.

This new provision expands potential legal liability, and exposure to significant penalties, when considered in tandem with new B&P Code section 494.6, for an employer's recording or threatening to record a prospective employee's suspected citizenship or immigration status because the employee, former employee, or perspective employee exercises a right provided under the provisions of the Labor Code. The definition of "family member" also expands the scope of current law.

New B&P section 494.6 allows the Labor Commissioner or a court to suspend or revoke a business license if the licensee has been determined to have violated new Labor Code section 244. Section 494.6 specifies that an employer shall not be subject to suspension or revocation for requiring a prospective or current employee to submit, within three business days of the first day of work for pay, a USCIS I-9 Employment Eligibility Verification form.

New B&P section 6103.7 creates new cautions for California attorneys in the form of potential suspension, disbarment, or discipline, for reporting or threatening to report the suspected immigration status of a witness or a party "because the witness or party exercises or has exercised a right related to his or her employment, broadly interpreted."

Labor Code section 98.6 is amended to expand the actions that constitute grounds for re-instatement and reimbursement for lost wages and work benefits to include retaliation or subjecting to an adverse action (a term not defined in the amended statute). In addition, the amendments specify a civil penalty not exceeding $10,000 per employee for each violation of this section. The section's protections may now also be triggered by an employee's written or oral complaint that he or she is owed unpaid wages.

Labor Code section 1102.5 is expanded by extending a liability specified in subdivision (a) to include not only an employer, but also "any person acting on behalf of the employer" (a phrase that is not defined). In addition, that subsection now subjects entities to liability for making, adopting, or enforcing any rule, regulation, or policy which prevents an employee from disclosing information to a government or law enforcement agency, or "from providing information to, or testifying before, any public body conducting an investigation, hearing or inquiry."

AB 263

Under this new law (a few provisions of which were identical to SB 666):

- An employer is prohibited from retaliating or taking adverse action against any employee or applicant for employment because the employee or applicant has engaged in protected conduct. The new law expands the protected conduct to include a written or oral complaint by an employee that he or she is owed unpaid wages.
- An employee who was retaliated against or otherwise was subjected to an adverse action is entitled to reinstatement and reimbursement for lost wages.
- Willful refusal by an employer to reinstate or reimburse an employee who suffered a retaliatory action under these provisions is a misdemeanor.
- A person who violates these provisions is subject to a civil penalty of up to $10,000 per violation.
- It is not necessary to exhaust administrative remedies or procedures in the enforcement of specified provisions.
- It is unlawful for an employer or any other person to engage in, or direct another person to engage in, an unfair immigration-related practice, as defined, against a person for the purpose of, or with the intent of, retaliating against any person for exercising a right protected under state labor and employment laws or under a local ordinance applicable to employees, as specified.

- A unique addition to the Labor Code that should be a matter of significance for employers is a provision creating a rebuttable presumption that an adverse action, taken within 90 days of the exercising of a protected right, is committed for the purpose of, or with the intent of, retaliation. This provision should cause employers to act with heightened diligence when taking what could be characterized as an "adverse action" against an employee within 90 days to confirm that they have the information necessary to rebut such a presumption.
- An employee or other person who is the subject of an unfair immigration-related practice may institute a civil action for any violation of this statute. (This is in addition to any separate federal action that may be initiated by the Department of Justice, Civil Rights Division, Office of the Special Counsel for Immigration-Related Unfair Employment Practices (OSC).) A court may order the appropriate government agencies to suspend certain business licenses held by the violating party for prescribed periods based on the number of violations. The court must consider prescribed circumstances in determining whether a suspension of all licenses is appropriate.
- Any person acting on behalf of the employer is prohibited from making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, as provided, and from retaliating against an employee for such a disclosure. The current prohibited actions are expanded to include preventing an employee from, or retaliating against an employee for, providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry. Any person or entity that violates these provisions is guilty of a misdemeanor. Any corporation or limited liability company that violates the provision is subject to a civil penalty not exceeding $10,000 for each violation of these provisions.
- An employer is prohibited from discharging an employee or in any manner discriminating, retaliating, or taking any adverse action against an employee because the employee updates or attempts to update his or her personal information, unless the changes are directly related to the skill set, qualifications, or knowledge required for the job.

AB 60

This bill will allow undocumented residents to apply for and receive a California driver's license if they meet all other requirements for the license. The bill's findings indicate that there are potentially 1.4 million drivers who are unlicensed and uninsured.

The new statute will not take effect until the earlier of January 1, 2015, or on the date the director of the Department of Motor Vehicles signs a declaration stating the DMV is prepared to begin issuing driver licenses pursuant to the new law.

The DMV will be issuing regulations concerning documents necessary for proving a right to this license, and confirming the accuracy of any documents produced in support of that determination.

Licenses issued pursuant to this law will contain the following language:

> This card is not acceptable for official federal purposes. This license is issued only as a license to drive a motor vehicle. It does not establish eligibility for employment, voter registration, or public benefits.

Licenses issued pursuant to this new law will also bear a designation "DP" instead of "DL."

The 15-page law prohibits the use of the information used to obtain the license to consider an individual's citizenship or immigration status as a basis for criminal investigation, arrest, or detention.

The DMV is authorized to assess applicants for these licenses an additional fee sufficient to offset the reasonable costs to the DMV of implementing the new law.

Finally, the new law does not authorize an individual to apply for, or be issued, a commercial driver's license without submitting his or her social security number with his or her application.[3]

3 In other immigration-related legislation, AB 4, signed by Governor Brown, prohibits a law enforcement official from detaining an individual on the basis of a U.S. Immigration and Customs Enforcement (ICE) hold after that individual becomes eligible for release from custody, unless specific conditions are met. The Governor also signed AB 1024, which authorizes the California Supreme Court to admit an applicant who is not lawfully present in the United States as an attorney at law in all the courts of this state upon certification by the State Bar examining committee that the applicant has fulfilled the requirements for admission to practice law. Governor Brown vetoed AB 1401, which would have permitted undocumented residents to serve on juries in state courts.

How Do These New California Laws Interact With Existing Federal Laws On These Subjects?

Employers must comply with federal employment verification laws that require them to, among other things, verify an applicant's identity and eligibility for employment in the U.S. through the I-9 process. These same laws prohibit employers from employing persons who present documentation required by the I-9 that do not appear to be genuine or that do not relate to the applicants or employees in question.

The anti-retaliation provisions in AB 263 pose potential problems for employers in situations where, for example, an employment application requests driver's license information for positions that do not require a commercial driver's license, but where driving is a job requirement (for example, pizza delivery positions). If an applicant lists a DP license, can an employer refuse to process the application further through the e-Verify process for fear that doing so would trigger a "report" to a federal agency given the employer has constructive knowledge of the applicant's suspected undocumented immigration status? If so, has the employer retaliated against, and/or interfered with, the applicant's rights for refusing to further process the employment application? Is seeking employment protected conduct for purposes of AB 263?

The new provisions in Labor Code Section 244(b) which prohibit employers from reporting suspected citizenship or immigration status information to state, local, or federal agencies are equally problematic as applied in certain situations. For example, in a workers' compensation matter involving a Labor Code Section 132(a) retaliation claim, is an employer precluded from presenting evidence to the Worker's Compensation Appeals Board that an employment termination occurred, not because the workers' compensation applicant filed a claim for injuries, but rather, the employer later learned that the applicant was undocumented and not eligible to work in the U.S.? In a Division of Labor Standards Enforcement proceeding involving claims that a former employee was not paid a higher driver rate of pay, is an employer precluded from presenting evidence to that agency that the former employee was not eligible for the higher rate of pay because, through the former employee's admission to the employer or otherwise, he was ineligible to hold a valid driver's license? The answers to these questions are unclear.

The passage of AB 60 places employers in the precarious position of either complying with their state law obligations to refrain from employing such individuals (if, for example, DP licenses are inadvertently shown or intentionally produced during the application process or employment), or facing possible liability under AB 60 because employers took into consideration DP licenses in determining work eligibility. For example:

- Is an applicant or employee's presentation of a DP license a basis to suspect that other documents presented during the I-9 process are not genuine or do not relate to the applicant?
- Because AB 60 prevents any person or entity from using a DP license in connection with verification of work eligibility, must an employer disregard such a license or face possible liability under this new law?
- If an employer disregards an applicant or employee's presentation of a DP license, does the employer face possible penalties under the Immigration Reform and Control Act because the employer had, or should have had, reason to suspect the genuineness of the documentation ultimately used to complete the I-9?
- If an applicant presents a DP license during a pre-employment application process, and an employer nonetheless proceeds to run that individual through the e-Verify process, has the employer reported the applicant to an agency, or taken an adverse action against him, because of his immigration status in violation of AB 60?
- If the applicant presents a DP license in satisfaction of the employer's employment eligibility requirements, and the employer declines to consider it, would that create an actionable OSC claim?

Unfortunately, as passed, AB 60 does not address these very real scenarios. Perhaps these situations will be clarified in follow-up legislation processed and signed before AB 60 licenses are issued. One way to minimize these possible scenarios is to post prominent notices and advisories in employment applications that DP licenses are not acceptable forms of identification for employment verification and should not be shown for that purpose.

What California Private Sector Employers Should Do

1. Review all employee handbook provisions, policies, and other procedures that might be affected by the changes in the law described in this *ASAP,* and revise those provisions accordingly.

2. Train your supervisors on how these new laws will affect company operations involving employees, including what constitutes an unfair immigration-related practice. Remind them to escalate any written or oral complaints about the manner or payment of wages to ensure such complaints are quickly addressed.
3. Remain informed on efforts to implement, and perhaps delay the implementation of, the expanded right to driver's licenses authorized by AB 60. If AB 60 is implemented, be particularly careful in training supervisors concerning what they may and may not do, if and when they view a driver's license that has the designations required by AB 60.
4. Update or implement arbitration policies to include claims involving AB 60 matters, and incorporate such arbitration provisions in employment applications.

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