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The Going Gets Steeper: 2013 California Employment Legislation Affecting Private Sector Employers

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The California Legislature concluded its 2013 regular session on September 12 with a flourish, sending a total this year of 896 bills to Governor Jerry Brown for approval (of 2,256 introduced). By the signing deadline last Sunday evening, Governor Brown had signed 800 bills into law, and vetoed 96 (11%).

The following is a brief description of the major 2013 bills affecting California private-sector employers.

The Key New Employment Laws

- California's minimum wage will increase from \$8 to \$9 an hour effective July 1, 2014, and to \$10 an hour effective January 1, 2016.¹
- Applicants and employees who are undocumented residents gained additional rights, including protections from retaliation and "unfair immigration-related practices," and new penalties were created for enforcement of these new rights.²
- Leave must be provided for court appearances for some employees who are victims of crime (Senate Bill (SB) 288).³
- Under the Fair Employment and Housing Act (FEHA), actionable sexual harassment need not be motivated by sexual desire (SB 292).
- The privileged category of "military and veteran status" is added to the FEHA (AB 556).

Unless otherwise noted, the effective date of all new laws is January 1, 2014.

- ¹ See Christopher E. Cobey and Marina C. Gruber, *Raising the Floor: California Increases its Minimum Wage*, Littler ASAP (Sept. 30, 2013), available at <http://www.littler.com/publication-press/publication/raising-floor-california-increases-its-minimum-wage>.
- ² See Christopher E. Cobey and Rebecca M. Aragon, *The California Grizzly Elbows Uncle Sam: New California Immigration Requirements for Private Sector Employers*, Littler ASAP (October 16, 2013) available at <http://www.littler.com/publication-press/publication/california-grizzly-elbows-uncle-sam-new-california-immigration-require>.
- ³ Senate Bill (SB) 288. All versions of each bill, and committee and floor reports and votes, can be found at the California Legislative Information site (<http://leginfo.legislature.ca.gov>). AB refers to Assembly Bill.

New Laws Applicable to All or Most California Private-Sector Employers

- Permits **suspension or revocation** of an **employer's business license** for **retaliation** against employees, former employees or prospective employees by threatening to report or reporting an employee's suspected or actual citizenship or immigration status, or the suspected or actual **citizenship or immigration status** of a family member, to a federal, state or local agency because the employee, former employee or prospective employee **exercised their rights under the Labor Code, Government Code, or Civil Code, and establishes a civil penalty up to \$10,000 per violation**; no requirement to exhaust administrative remedies under the Labor Code to bring a civil action under a provision of the Code unless the Code explicitly requires.⁴
- Prohibits specified "**unfair immigration-related practices**," increases civil penalties to as high as \$10,000 per employee per violation for any retaliation against an employee, authorizes a **private right of action** for equitable relief, damages, and penalties, and requires a court to order the appropriate government agencies to **suspend or revoke an offending employer's business license**. Expands the protected conduct to include a written or oral complaint by an employee that he or she is owed unpaid wages; expands the prohibited actions 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.⁵
- Adds "**military and veteran status**" (defined as "a member or veteran of the U.S. Armed Forces, U.S. Armed Forces Reserve, the U.S. National Guard, and the California National Guard") to the list of categories protected from employment discrimination under the FEHA; provides an exemption for an inquiry by an employer regarding military or veteran status for the purpose of awarding a veteran's preference as permitted by law.⁶
- Prohibits an employer from discharging, discriminating or retaliating against an employee who is a victim of a specified serious criminal offense for taking time off from work, upon the victim's request, to appear in court to be heard at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue.⁷
- Amends the **California Whistleblower Protection Act to prohibit an employer from making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information** to a government or law enforcement agency, if the employee has reasonable cause to believe that the information discloses a violation of, or noncompliance with, a local rule or regulation. The amendments also **prohibit an employer from retaliating against an employee because the employer believes that the employee disclosed or may disclose information** to a government or law enforcement agency, or to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation, if the **employee has reasonable cause** to believe that the information discloses a violation of a state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation. Finally, the measure **prohibits** an employer from **retaliating** against an employee for disclosing, or refusing to participate in an activity that would result in a **violation of, or noncompliance** with, a local rule or regulation.⁸
- Specifies, for purposes of the definition of harassment because of sex under the FEHA, that **sexually harassing** conduct need not be motivated by sexual desire.⁹
- Authorizes the award of **attorney's fees** and costs in an action brought for the non-payment of wages, fringe benefits or health and welfare pension fund contributions, where the prevailing party is not the employee (i.e., **prevailing party is the employer**), provided that the trial court finds that the employee brought the court action in **bad faith**.¹⁰

4 Only one current section so requires. SB 666 adds Business and Professions Code §§ 494.6 and 6103.7; amends Labor Code §§ 98.6 and 1102.5, and adds § 244. See also Christopher E. Cobey and Rebecca M. Aragon, *The California Grizzly Elbows Uncle Sam: New California Immigration Requirements for Private Sector Employers*, supra note 2, for additional detail.

5 AB 263 amends Labor Code §§ 98.6, 98.7, 1102.5, and 1103, and adds § 1019.

6 AB 556 amends Government Code §§ 12920, 12921, 12926, and 12940.

7 SB 288 adds Labor Code § 230.5. The number of "serious criminal offense[s]" exceeds 80.

8 SB 496 amends Government Code §§ 905.2 and 19683, and adds § 8547.15; amends Labor Code § 1102.5.

9 SB 292 amends Government Code § 12940(j)(4)(C).

10 SB 462 amends Labor Code § 218.5.

- Requires exclusion of **prior criminal convictions** from consideration in employment decisions when the conviction has been **judicially dismissed**.¹¹
- Extends current **protections** required of employers for employees who are victims of domestic violence and sexual assault to employees who are known or suspected **victims of stalking**, and requires **reasonable accommodations**.¹²
- **Broadens** the definition of family within the **Paid Family Leave (PFL)** program to allow workers to receive partial wage replacement benefits while taking care of seriously ill **siblings, grandparents, grandchildren, and parents-in-law**. The provisions of this bill take effect July 1, 2014.¹³
- **Criminalizes** an employer's **failure to remit withholdings from an employee's wages** that were made pursuant to state, local, or federal law, and prescribes how recovered withholdings or court-imposed restitution, if any, are to be forwarded or paid.¹⁴
- Expands the civil penalty and the payment of restitution of wages an employer must pay to the employee for a **Labor Commissioner citation** to include payment of **liquidated damages**.¹⁵
- Creates a lien, upon issuance of a final **order of the Labor Commissioner**, and authority for the Labor Commissioner to **record a certificate of lien** with the county recorder of any county in which the **employer's property** may be located; lien continues on the employer's real property until satisfied or released, as provided, or for 10 years, as specified, and would require the county recorder to accept, record, and index the certificate of lien.¹⁶
- Amends **data breach disclosure requirements** for any California business experiencing a breach of computerized data that includes personal information.¹⁷

New Laws Applicable to Some California Private-Sector Employers

- **Requires** an employer employing 50 or more employees to permit an employee who performs emergency duty as a volunteer firefighter, reserve peace officer, or emergency rescue personnel, as defined, to take a specified **leave of absence for the purpose of engaging in fire, law enforcement, or emergency rescue training**.¹⁸
- Expands the Contractors State License Board's (CSLB) administrative authority to encompass additional instances when a licensed or unlicensed **contractor** has **improperly or fraudulently used a contractor's license**; permits the CSLB to punish the violation of general restrictions on license usage with warning letters, citations, fines, or **suspension or revocation of a contractor's license**, without having to rely on local law enforcement.¹⁹
- Amends the Business and Professions Code to make the **qualifying applicant for a contractor's license responsible for exercising direct supervision and control** over his or her employer's or principal's construction operations to secure compliance with the Contractors' State License Law; violation of these provisions is grounds for disciplinary action, and a misdemeanor punishable by imprisonment in a county jail not to exceed six months, by a fine of not less than \$3,000, but not to exceed \$5,000, or by both imprisonment and fine.²⁰

11 SB 530 amends Labor Code § 432.7, and adds Penal Code § 4852.22.

12 SB 400 amends Labor Code §§ 230 and 230.1.

13 SB 770 amends Unemployment Insurance Code § 3300, and amends, repeals, and adds §§ 2708, 3301, 3302, and 3303.

14 SB 390 amends Labor Code § 227.

15 AB 442 amends Labor Code §§ 1194.2 and 1197.1.

16 AB 1386 amends Labor Code § 98.2.

17 SB 46 amends Civil Code §§ 1798.29 and 1798.82.

18 AB 11 amends Labor Code § 230.4.

19 SB 261 adds Business and Professions Code § 7114.2.

20 SB 262 amends Business and Professions Code § 7068.1.

- Requires employers of employees not exempt from meal or rest or recovery period requirements to pay those employees for any meal or rest or recovery periods. A “recovery period” is defined as “a cooldown period afforded an employee to prevent heat illness”), and sets the rate of pay for rest and **recovery periods**.²¹
- As part of the 70-page state government budget bill, applies the provisions of the **Displaced Janitor Opportunity Act**²² to every contractor that provides **food and beverage services at a publicly owned entertainment venue**.²³
- Amends laws on **work sharing unemployment compensation benefits programs** to bring California law into compliance with the federally enacted Middle Class Tax Relief and Job Creation Act of 2012; percentage of the hours’ reduction cannot be less than 10 percent or more than 60 percent; **participating employers providing health and/or retirement benefits are obligated to continue the benefits as if the affected employees were working their normal hours**; employers also have reporting requirements for obtaining approval for work sharing plans, as specified. The new law limits the application of these provisions to work sharing plans that become effective before **July 1, 2014**, and prohibits the renewal of those work sharing plans on or after that date.²⁴
- **“Domestic Worker Bill of Rights”** regulates certain domestic work employees’ hours of work; provides an overtime compensation rate of **time-and-a-half for hours worked exceeding nine hours in a day or 45 in a week**; the law “sunset” January 1, 2017, unless extended.²⁵
- **Increases the car wash employer’s bond requirement** amount from \$15,000 to \$150,000; exempts an employer from that requirement if the employer has a collective bargaining agreement in place that meets specified criteria; deletes the existing sunset date for the statute governing car washes, thus extending those provisions indefinitely.²⁶
- Requires an owner or operator of a **stationary source** (here, an oil refinery) with one or more covered processes that is required to prepare and submit a risk management plan, when contracting for the performance of construction, alteration, demolition, installation, repair, or maintenance work at the stationary source, to require that its contractors and any subcontractors **use a skilled and trained workforce** to perform all onsite work within an **apprenticeable occupation** in the building and construction trades, including skilled journeypersons paid at least a rate equivalent to the applicable **prevailing hourly wage rate**.²⁷
- Makes a **successor farm labor contractor** liable, as specified, for **wages and penalties, owed by a predecessor farm labor contractor**.²⁸
- Exempts certain **professional athletes** from the occupational disease and cumulative injury provisions of California’s **workers’ compensation laws** where the athletes play outside of California but attempt to file for workers’ compensation within California. The professional athlete exemption applies to pending workers’ compensation claims filed on or after September 15, 2013.²⁹
- Enacts the Home Care Services Consumer Protection Act, which provides, on and after January 1, 2015, for the licensure and regulation of home care organizations by the State Department of Social Services, and the registration of home care aides.³⁰

21 Per Cal-OSHA, a “recovery period” is “a period of time to recover from the heat in order to prevent heat illness.” Title 8, Cal. Code of Regs. § 3395 requires recovery periods of shade accessibility for outdoor workers during high temperatures in the industries of agriculture, construction, landscaping, oil and gas extraction, and transportation workers (except those in air-conditioned vehicle and not engaged in loading or unloading). SB 435 amends Labor Code § 226.7. For more information, see Ben Huggett and Brian Dixon, Failure to Provide Cal-OSHA-Required Recovery Periods to Avoid Heat Illness Now Results in Premium Pay – And More Class Action Litigation, Littler ASAP (Oct. 18, 2013), available at <http://www.littler.com/publication-press/publication/failure-provide-cal-osha-required-recovery-periods-avoid-heat-illness->.

22 Labor Code §§ 1060-1065.

23 SB 71, §39; new Labor Code § 1063.5 became **effective June 27, 2013**, as an urgency measure.

24 AB 1392 amends Unemployment Insurance Code § 1279.5.

25 AB 241 adds Labor Code §§ 1450-1454, and repeals existing § 1454.

26 AB 1387 amends Labor Code § 2055 and repeals § 2067.

27 SB 54 adds Health and Safety Code § 25536.7.

28 SB 168 adds Labor Code § 1698.9.

29 AB 1309 amends Labor Code § 3600.5.

30 AB 1217 adds Health & Safety Code §§ 1796.10-1796.63.

- Subjects any person registered as a **garment manufacturer** who fails to **display** his or her **name, address, and garment manufacturing registration number** on the front entrance of his or her business, to a civil penalty.³¹

Prevailing wages:

- Requires the director of the Department of Industrial Relations to **establish a new process to determine whether a project is a public work**, and thus subject to the **prevailing wage** laws, upon the request of any party, as specified.³²
- Prohibits a California **charter city** from receiving or using state funding or financial assistance for a construction project if the city has a charter provision or ordinance that authorizes a contractor to not comply with **prevailing wage provisions** on any public works contract.³³
- Amends the Labor Code to modify existing law concerning permissible credits employers may take against the obligation to pay the general prevailing rate of per diem wages for **prevailing wage payments**; prohibits credit from being granted for employer payments made to monitor and enforce laws related to public works if those payments are not required by a collective bargaining agreement.³⁴
- Changes the **deadline for service of wage and penalty assessments** by the Labor Commissioner on public works projects, modifies the date by which any action by a joint labor-management committee to enforce **prevailing wage** requirements must be filed, and changes the permissible amount of redaction a public works contractor can make to payroll records kept for inspection.³⁵

Employment-Related Bills Vetoed or Failing Passage

Vetoed:

- Proposal would have created a new evidentiary privilege, making confidential most communications between a union agent and a union member.³⁶
- Proposal would have provided that an appeal of an OSHA citation or notice that is classified and cited as a serious violation, repeat serious violation, willful serious violation, willful violation, willful repeat violation, or failure to abate, would not stay abatement dates and requirements, except as specified, and would have allowed expedited appeal hearings.³⁷
- Proposal would have provided that changes made to prevailing wage rates apply on their effective date to any contract that is awarded or for which notice to bidders is published on or after January 1, 2014, as specified.³⁸
- Proposal would have expanded the definition of “public works,” for purposes of prevailing wage payment requirements, to also include any construction, alteration, demolition, installation, or repair work done under private contract on a hospital or health care facility project when the project is paid for, in whole or in part, with the proceeds of conduit revenue bonds, as defined, that were issued on or after January 1, 2015.³⁹

Failing Passage to Date:

- Proposal would assess penalties against employers with 500 employees or more whose employees choose to enroll in the MediCal program.⁴⁰

31 AB 1384 adds Labor Code § 2676.55.

32 SB 377 amends Labor Code § 1773.5, and adds § 1741.1.

33 SB 7 adds Labor Code § 1782.

34 SB 776 amends Labor Code § 1773.1.

35 AB 1336 amends Labor Code §§ 1741, 1771.2, and 1776.

36 AB 729.

37 AB 1165.

38 AB 1140.

39 SB 615.

40 AB 880.

- Proposal would add “familial status” to the FEHA as an additional protected status.⁴¹
- Proposal would extend the same prohibitions on the smoking of tobacco products in workplaces to electronic cigarettes.⁴²
- Proposal would allow individual employees to submit alternative work schedules to employers, e.g., 10 hours a day for four workdays a workweek, with (1) the ninth and tenth hours being paid at the regular rate of pay, and (2) overtime for any hours beyond 10 hours in a day, or 40 in a workweek.⁴³
- Proposal would allow employees to file liens on employers’ properties during wage disputes.⁴⁴
- Proposal would amend various sections of the Business and Professions Code to add new registration and bonding requirements for certain foreign labor contractors, create joint and several liability between both foreign labor contractors and employers who use their services, impose and increase penalties for noncompliance, and authorize the Labor Commissioner to adopt regulations or policies and procedures to implement these provisions.⁴⁵
- Proposal would require the Department of Industrial Relations to procure a case management system that has the capability to provide the public with free, web-based access to a searchable database containing information regarding the final disposition of all complaints, citations, and administrative proceedings of the department.⁴⁶

Looking forward to 2014

Expect to see many of the measures that were either vetoed by the Governor, or that failed passage in the Legislature in 2013, to re-surface in 2014.

What the Legislature passes, and what the Governor signs next year, will be affected by the 2014 general election in which Governor Brown will most likely seek re-election, and in which 100 of the 120 state legislative seats in the Assembly and Senate will be up for election—as well as events in Washington, D.C.

Other Wage Rate Increases for 2014

The City of San Jose’s minimum wage increases to \$10.15 effective January 1, 2014.⁴⁷

The 2014 City and County of San Francisco’s minimum wage rate had not been announced as this *ASAP* went to press.⁴⁸ The 2014 minimum rate of pay that would render computer software employees exempt under California Labor Code Section 515.5(a)(3) has also not been announced as of the date of this *ASAP*’s publication.

What You Need to Do Now

1. Update your employee handbook and, if necessary, policies and procedures, related to the increase in the minimum wage rate; changes in available leaves of absence; new protected categories; and prohibitions against discrimination in employment based on citizenship or immigration status, among other changes made by the new legislation.

41 SB 404.

42 SB 648.

43 AB 907; SB 607.

44 AB 1164.

45 SB 516.

46 AB 1385.

47 See <http://www.sanjoseca.gov/?nid=3491>.

48 Information on the Minimum Wage Ordinance can be accessed here: <http://sfgsa.org/index.aspx?page=411>.

2. Consider also revising your handbook and policies and procedures to reflect 2013 major case holdings, as described in Littler's 2013 publications available at www.littler.com.
3. Train, or send a memo to supervisors, advising them of the new laws, their responsibility to know these new laws, and their responsibilities to administer policy in conformity with the new laws.
4. Stay alert for modifications coming in 2014 regarding new California driver's licenses (AB 60), and how they may or may not be used in the workplace; and regulations on California Family Rights Act.⁴⁹
5. Contact either of the co-authors with any questions about new laws mentioned in this *ASAP*.

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⁴⁹ Draft modifications are available at www.dfeh.ca.gov.