CONN MACIEL CAREY

More New Laws for California Employers

Following a flurry of activity in the final days of California's 2016 legislative session, this past month Governor Jerry Brown has signed into law various employment bills addressing everything from state employee pensions to expanding overtime eligibility and regulating employment agreements. This continues the tide of new employee-friendly laws in the Golden State. Although dozens of employment bills have recently been signed into law, we have summarized the significant new laws especially impacting private sector employers.

In Monumental Shift, California Bars Employers from Selecting Out-of-State Forums for Resolving Employment Disputes

Historically, employers have had the option of writing into an employment agreement the requirement that disputes arising from that agreement be litigated in an out-of-state court provided that there is some connection to that state forum by, for example, the employer maintaining a corporate headquarters there. However, in enacting Senate Bill (SB) 1241, California has by legislative fiat barred employers from requiring that California employees litigate any resulting dispute out of state.

Specifically, SB 1241 prohibits any contract entered into, modified or extended on or after January 1, 2017 from requiring an employee who *primarily resides and works in California* to litigate or arbitrate outside of California "a claim arising in California." Employers are also prohibited from using such contracts to deprive employees of any substantive protection under California law.

A significant concern for employers is that SB 1241 authorizes employees to bring lawsuits to enjoin enforcement of voidable agreements due to forum selection and choice of law provisions, and in doing so may recover attorney's fees as the prevailing party. Accordingly, it is imperative that employers ensure that, as of the first of the year, any such agreements entered into with employees, including confidentiality, executive and severance agreements, not require litigation or arbitration of disputes outside of the state, or the waiver of California employment law protections. Equally significant, an employer's attempt to enforce an unlawful contract may place it in the defensive position of battling a lawsuit by a plaintiff's attorney whose motivation is the recovery of attorney's fees.

There is one notable exception, however. SB 1241 exempts from its provisions any contract with an employee who is individually represented by legal counsel in negotiating the terms of the agreement. Consequently, if employers are negotiating a severance or settlement with a current or former employee represented by counsel, it is advisable that this representation be memorialized in the agreement

particularly if the employer considers selecting another state's forum or laws for any resulting dispute. It should be noted here that this law does not impact existing California law that requires the application of California substantive law to employment disputes where there is an important public policy interest at issue.

Limitation on Criminal Background Inquiries Now Includes Juvenile Court Proceedings

California Labor Code section 432.7 generally prohibits an employer from asking an applicant for employment to disclose, or from using as a factor in determining any condition of employment, information concerning an arrest or detention that did not result in a conviction, a referral or participation in any pre-trial or post-trial diversion program, and a conviction that has been judicially dismissed or ordered seal. Assembly Bill (AB)1843 amends this law to prohibit as well any inquiry into "an arrest, detention, processing, diversion, supervision, adjudication or court disposition that occurred while the person was subject to the process and jurisdiction of juvenile court law." However, the bill does authorize an employer at a health care facility to inquire into an applicant's misdemeanor or felony conviction in a juvenile court proceeding that occurred within the past five years and involves commission of a sex crime.

Expansion of California's Equal Pay Law to Include Race and Ethnicity and Bar Consideration of Past Salaries

Existing California law (Cal. Labor Code section 1997.5) prohibits an employer from paying an employee at wage rates less than the rates paid to employees of the opposite sex "for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." SB 1063 amends this law to broaden its scope to prohibit any pay disparity based on race and ethnicity, in addition to sex.

Existing law also permits exceptions to the prohibition on gender pay disparity where the wage payment is made pursuant to a seniority system, merit system, system which measures earnings by quantity or quality of production, or differential based on any bona fide factor other than sex. AB 1676 amends this equal pay law to provide that any prior salary cannot, by itself, justify a disparity in compensation under these exceptions. The legislative findings indicate that this bill was designed to address wage disparity and expressed the view that seeking salary history from job applications and relying on prior salary to set employee's pay rates contribute to the gender wage gap.

Health Illness Prevention Requirements to Include Indoor Workplaces

California has adopted a Heat Illness Prevention Standard, which requires that for certain outdoor work, employees be trained about heat illness prevention, and provided adequate fresh water and access to shade. The Division of Occupational Safety Health (Division), which is charged with enforcing Cal/OSHA workplace safety standards, considers enforcement of heat illness prevention standard to be a "special emphasis" program and, as such, during every compliance inspection involving work sites that may be subject to this requirement, Cal/OSHA inspectors are expected to inquire about and possibly evaluate the employer's Health Illness Prevention Plan.

The Heat Illness Prevention Standard applies to all outdoor places of employment. However, there has been some confusion among Division inspectors as to when work is "outdoor" work. In a recent precedent decision, the California Occupational Safety and Health Appeals Board ruled that an employer's Injury and Illness Prevention Program was deficient because it failed to provide adequate training on the hazard of indoor heat illness for employees working in *an enclosed warehouse.*

SB 1167 seeks to remove any ambiguity regarding whether these standards apply to indoor places of employment, by requiring that the Division, by January 1, 2019, propose to the Occupational Safety and Health Standards Board a Heat Illness and Injury Prevention Standard governing workers in indoor places of employment. The bill states, however, that it does not prohibit the adoption of a standard that limits the application of high heat provision to certain industry sectors. It remains to be seen how broad the indoor standard will be and the types of employers that will be affected.

Single User Restrooms Must Be All-Gender

AB 1732 requires that, commencing March 1, 2017, all single-user toilet facilities in any business establishment, place of public accommodation, or government agency be identified as all-gender toilet facilities. The law authorizes inspectors, building officials, or other local officials responsible for code enforcement to inspect for compliance with these provisions.

PAGA Updates

The Labor Code Private Attorneys General Act of 2004 (PAGA) authorizes an aggrieved employee to bring a civil action to recover specified civil penalties and attorney's fees on behalf of other employees for violation of certain Labor Code provisions, including wage and hour provisions. Existing law requires notice of the claim from the aggrieved employee to Labor Workforce Development Agency (LWDA) and employer by certified mail.

SB 836 amends PAGA to require online filing and transmission of pre-litigation notices to LWDA. This bill also requires that a copy of any proposed settlement of PAGA claims be submitted to LWDA at the same time that it is submitted to the court, and requires parties to provide LWDA with a copy of the court's judgement.

This bill also extends various timelines, including the time LWDA reviews new cases from 30 to 60 days, the time for LWDA to notify parties of the intent to investigate violations from 33 to 65 days, and provides LWDA up to a 180-day time limit for investigating and citing the employer. The new law has a "sunset provision" of July 1, 2021, meaning that the law will lapse at that time unless it is extended.

Expanded Overtime Eligibility for Certain Classes of Employees

Governor Brown also signed into law several bills that expand overtime eligibility for certain categories of employees. Under existing law, California's agricultural workers are entitled to overtime wages when they work more than 10 hours in a work day or more than 60 hours in a work week. AB 1066 incrementally lowers the threshold hours for qualifying for overtime wages so that they are consistent with California's standard overtime rule.

Beginning January 1, 2019, agricultural workers will be eligible for overtime after nine and a half hours worked in a work day, or work in excess of 55 hours in a work week. Beginning January 1, 2020, that overtime threshold will be reduced to nine hours in a work day or 50 hours in a work week. The following year, that number will be reduced to eight and a half hours in a work day or 45 hours in a work week. Eventually, effective January 1, 2022, the overtime basis will be in line with state law, *i.e.*, eight hours in a work day or 40 hours in a work week.

To address the concerns of small, independent farms, the multi-year phase in is deferred until 2022 for businesses with 25 or fewer employees. The new law also vests with the Governor authority to temporarily suspend the scheduled implementation of the overtime requirements provided that implementation of the scheduled state minimum wage increase is suspended as well.

Similarly, California has expanded overtime protections for teachers employed by private elementary and secondary schools. Existing law exempts from overtime those private school teachers earning at least twice the state minimum wage for full-time employment and meeting other criteria. AB 2230 revises the earning standard for this exemption effective July 1, 2017. On or after that date, the law provides that the overtime exemption applies to private school teachers earning: 1) no less than 100 percent of the lowest salary offered by any school district; or (2) no less than 70 percent of the lowest salary offered by the school district or county in which the private elemental or secondary academic institution is located. In either instance, the comparable position must require a valid California teaching credential and not be pursuant to an emergency permit, intern permit or waiver.

Another new employment law impacts domestic workers. Specifically, SB 1015 removes the sunset provision to the Domestic Worker Bill of Rights, which granted overtime protections to California's privately hired domestic workers. Thus, this bill has made the law's provisions permanent.

New Disclosures Required Regarding Protected Leave

AB 2337 requires that California employers provide specific written disclosures to employees upon hire concerning the existing entitlement to leave due to domestic violence, sexual assault or stalking under Labor Code section 220.1. The bill tasks the California Labor Commissioner with developing a form that employers may elect to use to comply with this provision.

Employer Sponsored Retirement Plans

SB 1234 creates a new retirement savings program, the California Secure Choice Retirement Savings Program, for an estimated seven million workers in the private sector who do not have employer-sponsored retirement benefits. The bill requires eligible employers that do not offer specified retirement plans or accounts (*i.e.*, employer sponsored retirement plans) to have a payroll deposit retirement savings arrangement so that employees may participate in the program. An eligible employer is defined as "a person or entity engaged in a business, industry, profession, trade or other enterprise in the state . . . . that has five or more employees and that satisfies the requirements to establish or participate in a payroll deposit retirement savings arrangement."

The requirement is phased-in over a three-year period based on the employer's size. Beginning three months after the opening of enrollment, employers with 100 or more employees must have an

arrangement to allow employees to participate in the plan. Beginning six months after enrollment opens, employers with 50 or more employees must participate, and beginning nine months after enrollment, the size of employer covered by the mandate drops to those with five or more employees. However, any employer may choose to have a payroll deposit retirement savings arrangement established to allow participation in the program once the program is opened for enrollment.

Eligible employees will be automatically enrolled in the program when it opens, with the opportunity to opt-out. If an employee does not select a specific contribution amount, three percent of an employee's salary will automatically be contributed to their Secure Choice account. The fund will invest in a diversified portfolio that focuses on long-term financial growth. Employees may change their contribution levels at any time, or choose not to participate at all. The bill makes clear that employers are not responsible for the plan or liable as a plan sponsor. Employers may, however, make contributions to their employees' retirement accounts, provided that it is permitted under the Internal Revenue Code and would not cause the program to be treated as an employee benefit plan under the Employee Retirement Income Security Act. Employers are also free to set up their own employer sponsored retirement plan at any time instead of having a payroll deposit retirement savings arrangement under the program.

Takeaways for Employers

As a result of these developments, we recommend that California employers take the following steps:

- Update template employment agreements to ensure that the forum selection and choice of law provisions are compliant. It is also important that any existing employment agreements modified or extended on or after January 1, 2017 be similarly updated.
- Absent any applicable exemption, modify job applications to make clear that any inquiry into an applicant's criminal background excludes juvenile court proceedings, among other categories of prohibited inquiry under existing law.
- Update employee handbooks to ensure that employees are notified of their right to leave due to domestic violence, sexual assault or stalking, as well as protection from retaliation for exercising those rights.
- Evaluate California compensation practices for compliance with equal pay and overtime wage laws.
- Ensure that retirement plans meet minimum requirements under the law.

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