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2015 Legislative Developments

An Employer's Guide to New Laws Impacting the Workplace in 2016 and Beyond

By David W. Tyra and Meredith Packer Garey

The California Legislature has enacted a number of new laws that will impact employers and employees in 2016. These new laws are described below.

I. Wage and Hour Laws

A. SB 358 (Jackson): California Fair Pay Act

With the adoption of the California Fair Pay Act, the California Legislature enacted one of the toughest gender-based equal pay laws in the country. The Fair Pay Act is based on a number of legislative findings.

1. Legislative Findings

a. California's current gender pay gap results in women being paid 84 cents to every dollar earned by men. This gender pay gap increases dramatically for women of color.

b. This gender pay gap results in a higher statewide poverty rate for women vs. men.

c. California's current equal pay law, Labor Code section 1197.5, is "rarely utilized because the current statutory language makes it difficult to establish a successful claim."

d. "Pay secrecy also contributes to the gender wage gap, because women cannot challenge wage discrimination that they do not know exists."

Based on these legislative findings, the Legislature amended the provisions of Labor Code section 1197.5 as follows:

2. New Equal Pay Standards

a. Employers are prohibited from paying employees wage rates less than those 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. This prohibition is no longer limited to a comparison of employees working in the same establishment.

b. Employers may justify pay differentials based on a seniority system, merit system, a system that measures earnings by quantity or quality of production, or on any bona fide factors other than sex, such as education, training, or experience.

c. An employer may rely on a bona fide factor such as education, training, or experience only if it can show that the factor relied on is not based on or derived from a sex-based differential in compensation, is job-related, and is

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consistent with business necessity. "Business necessity" is defined as "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve." Furthermore, this factor does not apply if the employee can show that an alternative business practice exists that would serve the same business purpose without producing a wage differential.

d. Regardless of the factor(s) on which an employer relies to defend a gender wage differential, it must show the factor(s) relied upon was applied reasonably and accounts for the entire wage differential.

3. Liability and Statute of Limitations

a. Violation of the California Fair Pay Act can result in liability to the affected employee in the amount of wages not paid due to violation of the equal pay requirements, with interest thereon, and an equal amount as liquidated damages.

b. The new law is enforced by the Division of Labor Standards of Employment. An affected employee may also bring a civil action within two years of a violation. If the violation is willful, the employee can bring a suit within three years of the violation. In addition to the recovery of damages, a successful employee also is entitled to reasonable costs and attorney's fees.

4. Recordkeeping Requirements

Employers are required to maintain records of wages and wage rates, job classifications, and other terms and conditions of employment for all persons employed. The retention period for these records has been increased from two to three years.

5. Anti-Retaliation

Employers are prohibited from taking any adverse action against an employee who files a complaint with DLSE or brings his/her own action to enforce the provisions of the statute. The statute of limitation on a retaliation claim brought under this statute is one year from the retaliatory action.

B. SB 327 (Hernández): Meal Period Waiver Provision for Healthcare Workers

In *Gerard v. Orange Coast Memorial Medical Center* (2015) 234 Cal.App.4th 285, California's Fourth District Court of Appeal invalidated a portion of Industrial Wage Commission Order No. 5, the wage order applicable to employees working in hospitals, assisted living facilities,

and similar health care establishments, which permitted those employees to waive their second meal period in writing if they worked shifts of more than 12 hours in a workday. The appellate court found the provision in the wage order permitting healthcare workers to waive a second meal period during shifts of more than 12 hours conflicted with the language of Labor Code section 512, which prohibited such a waiver. On this basis, the court found the wage order invalid.

This legislation amends Labor Code section 512 to provide that the provisions of the wage orders permitting a waiver of a second meal period for healthcare workers working a shift in excess of 12 hours are valid, thereby invalidating the ruling in *Gerard*.

The Legislature declared the revisions to section 512 to be declarative of existing law, meaning those revisions have retroactive effect. The legislation also was adopted as an urgency measure, which means it took effect immediately upon being chaptered into law.

C. AB 970 (Nazarian): Enforcement of Employee Claims by Labor Commissioner

This bill amends the provisions of Labor Code sections 558, 1197, 1197.1, and 2802.

It permits the Labor Commissioner, upon request from a local agency, to investigate and enforce violation of local laws regarding overtime and minimum wages. It further authorizes the Labor Commissioner to investigate and enforce the statutory provisions requiring an employer to indemnify an employee for all expenses or losses incurred as a direct consequence of an employee's discharge of his or her duties.

D. SB 588 (De León): Labor Commissioner's Enforcement of Judgments for Non-payment of Wages

This bill adds new sections (commencing with section 690.030) to the Civil Code, amends Labor Code section 98 and adds new sections 96.8, 238, 238.1 through 238.5, and 558.1 to the Labor Code.

It grants to the Labor Commissioner sweeping new authority to enforce judgments against employers for non-payment of wages. Some of the more significant provisions include the following:

1. The Labor Commissioner is now authorized to act as a levying officer and to issue a notice of levy for the seizure of assets of an employer against whom a judgment has been obtained for non-payment of wages. Any person who receives a levy must surrender the credits, money, or property to the Labor Commissioner, or pay the Labor Commissioner the amount owed, within 10 days of service.

2. If a judgment for non-payment of wages is obtained against an employer, and that employer allows that judgment to go unsatisfied for 30 days from the date the right to appeal expires, the employer will not be permitted to continue to conduct business in the state unless the employer obtains a surety bond in the amount specified in the statute.

3. If an employer continues to conduct business without obtaining a

surety bond, the Labor Commissioner is authorized to issue a stop notice.

4. The Labor Commissioner is authorized to create liens on an employer's real property when a judgment for non-payment of wages is unpaid.

5. Employers providing long-term care services who allow a judgment for non-payment of wages to remain unsatisfied may have their license revoked.

E. AB 1513 (Williams) Employees Paid On a Piece-rate Basis

This bill adds section 226.2 to the Labor Code.

The new code section requires that employees who are paid on a piece rate basis be compensated for rest and recovery periods and other non-productive time separate from any piece-rate compensation.

In addition to other statutory requirements regarding information to be included on a pay stub, the pay stub of an employee paid on a piece-rate basis must set forth the total hours of compensable rest, recovery, and other non-productive periods and the gross wages paid for those periods. The term "other non-productive time" is defined as time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity compensated on a piece-rate basis.

The compensation paid to employees who are compensated on a piece-rate basis for rest, recovery, or other non-productive periods must be either an average hourly rate determined by dividing the total compensation for the workweek exclusive of those periods and any premium pay by the total number of hours worked, or the minimum wage, whichever is greater.

Employers who pay the minimum wage for rest, recovery, and other non-productive period when they should have been paying a higher amount have until April 30, 2016 to reprogram their payroll system but must pay affected employees the additional amount owed plus interest by no later than April 30, 2016.

II. New Leave Legislation

A. AB 304 (Gonzalez): Sick Leave Accruals Under the Healthy Workplaces Healthy Families Act

This bill made changes to the HWHFA passed in 2014. Specifically, the bill:

1. The definition of "employee" is revised to exclude retired annuitants working for public employers.

2. Authorizes employers to provide for employee sick leave accrual on a basis other than one hour for each 30 hours worked, provided that the accrual is on a regular basis and the employee will have 24 hours of accrued sick leave available by the 120th calendar day of employment.

3. Authorizes employers to limit an employee's use of paid sick leave to 24 hours or three days in each year of employment, a calendar year, or other designated 12-month period.

4. Clarifies that an employer is not required to pay additional paid sick leave pursuant to the HWHFA if the employer has a paid leave policy or paid time off policy, the employer makes available an amount of leave for specified uses, and the employer's policy satisfies the accrual, carry over, and other use requirements in the law.

5. The bill was adopted as an emergency measure and chaptered on July 15, 2015, which means it took effect immediately.

B. SB 579 (Jackson): Parental Leave

This bill amends Labor Code sections 230.8 and 233.

Labor Code section 230.8 currently requires an employer with 25 or more employees to provide employees who have children in a licensed child day care facility in grades K through 12 with up to 40 hours of leave per year to participate in school activities. This bill makes the following revisions.

1. The reference to licensed child day care facility is changed to licensed child care provider.

2. Specified bases for taking leave are expanded to include finding, enrolling, or reenrolling a child in school or a licensed child care provider, and to address a child care provider or school emergency.

3. The definition of "parent" is expanded to include a parent, guardian, stepparent, foster parent, grandparent, or a person standing *in loco parentis* to the child.

4. Finally, this bill makes changes to Labor Code section 233 (aka "Kin Care") to redefine "sick leave" as any leave taken for purposes specified in the HWHFA.

C. AB 375 (Campos): School Employees' Paternity and Maternity Leave

This bill adds Education Code section 44977.5.

Existing law provides that when a certificated school employee exhausts available sick leave and continues to be absent from his or her duties on account of illness or accident for an additional period of up to five school months, the employee is entitled to "differential pay" in an amount equal to the difference between his or her pay and the sum that is actually paid a substitute to fill that employee's position or, if no substitute is employed, the amount that would have been paid to such a substitute.

This bill would extend this differential pay benefit for a period of up to 12 weeks for an employee taking maternity or paternity leave under the California Family Rights Act (CFRA).

The bill further provides that if its provisions conflict with a collective bargaining agreement entered into before January 1, 2016, the collective bargaining provisions control until expiration or renewal of the agreement.

D. SB 221 (Jackson): California Wounded Warriors Transitional Leave Act

This bill amends Government Code section 19859 to provide that a state officer or employee who is a military veteran hired on or after January 1, 2016 who has a military service-connected disability rated of 30% or more by the Department of Veterans Affairs is granted additional sick leave credits of up to 96 hours for the purpose of undergoing medical treatment connected with his military service-connected disability. The affected employee is entitled to the additional sick leave credit at time of hire and the additional credit remains available for use for the following 12 months of employment. After 12 months, any remaining sick leave credits granted pursuant to this section that have not been used are forfeited and may not be carried over.

III. Discrimination/Retaliation Laws

A. AB 622 (Hernández): Prohibited Use of E-Verify System

This bill adds section 2814 to the Labor Code.

Except as required by federal law or as a condition for receiving federal funds, employers are prohibited from using the federal government's E-Verify system to check the employment authorization status of an existing employee or an applicant who has not been offered employment. It also prohibits an employer from using the E-Verify system at a time or in a manner not required by federal law or authorized under a federal-state memorandum of understanding.

The new statute does not prohibit an employer from using the E-Verify system for an applicant once that applicant has been offered employment.

If upon proper use of the E-Verify system, the employer receives a tentative nonconfirmation issued by the Social Security Administration, the employer must comply with the required employee notification procedures under the federal-state memorandum of understanding.

The bill imposes civil penalties of up to $10,000 and states it is designed to prevent discrimination in employment rather than sanctioning potential hires of unauthorized persons.

B. AB 987 (Levine): Anti-retaliation for Seeking Religion or Disability Accommodations

In *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, the Second District Court of Appeal held a mere request—or even repeated requests—for an accommodation, without more, did not constitute a protected activity sufficient to support a claim for retaliation in violation of Fair Employment and Housing Act.

This bill legislatively overrules this holding by amending Government Code section 12940 to provide that a request for religious or disability accommodation constitutes protected activity and an employee may not be retaliated against for requesting such an accommodation.

C. AB 1509 (Hernández): Employer Retaliation Liability

This bill amends Labor Code sections 98.6, 1102.5, 2810.3, and 6310 of the Labor Code.

The bill extends the anti-retaliation provisions of the Unfair Immigration Practices Act to an employee who is a family member of a person who has, or is perceived to have, engaged in protected activity under that law.

The bill also provides that the liability imposed on employers for certain unlawful activities by labor contractors does not extend to employers authorized to operate as a household goods carrier under the Household Goods Carriers Act.

D. SB 600 (Pan). Expansion of Unruh Civil Rights Act

This bill amends Civil Code section 51.

This bill expands the protections of the Unruh Civil Rights Act, which mandates full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever regardless of race or national origin, among other protected classifications, to individuals regardless of their primary language or immigration status.

The bill clarifies that its requirements do not mandate the provision of services in a language other than English unless otherwise required by law.

The bill states the amendments to the Unruh Civil Rights Act are declarative of existing law meaning those changes have retroactive application.

IV. Worker's Compensation/ Unemployment/Other Employee Benefits

A. SB 623 (Lara): Worker's Compensation Benefits

The bill adds sections 3733 and 4756 to the Labor Code.

The Uninsured Employers Fund and the Subsequent Injuries Benefits Trust Fund provide compensation to injured workers who are employed by an employer that lacks worker's compensation insurance. This bill provides that an injured worker is entitled to compensation under these funds regardless of citizenship or immigration status.

B. SB 667 (Jackson): Waiting Period for Disability Benefits

The bill amends Unemployment Insurance Code sections 2608 and 2627 to provide that, beginning July 1, 2016, the seven-day waiting period for receiving benefits does not apply to subsequent applications for benefits if the applicant met the seven-day waiting period requirement on the initial application for benefits.

In addition, the bill revises the conditions under which two consecutive periods of disability benefits are considered one disability benefit period. Existing law provides that two consecutive period of disability benefits are considered one disability benefit period they are separated by no more than 14 days. This bill expands that separation period to 60 days.

C. AB 1245 (Cooley): Unemployment Electronic Reporting and Funds Transfers

This bill amends various sections of the Unemployment Insurance Code and adds new section 1112.1 to require that all employers with 10 or more employees file all required EDD reports electronically and remit all funds through electronic transfer. The requirement takes effect on January 1, 2017.

D. AB 963 (Bonilla): Teachers' Retirement

The bill revises the Defined Benefit Program of the State Teachers' Retirement Plan as set forth in several Education Code sections.

Specifically, the bill revises the definition of "creditable service" to include any activities that do not meet the statutory definition of "creditable service" but were performed for an employer as defined in the Defined Benefit Program on or before December 31, 2015 and were reported as creditable service to the State Teachers' Retirement System. Creditable service also is defined to include specified activities performed by consulting teachers in the California Peer Assistance and Review Program.

The bill also revises the definition of "member" to include any person who has completed "creditable service" under the revised definition.

The bill permits any member, including a retired member, to elect to have all of that member's creditable service subject to coverage by a different public retirement system other than the Defined Benefits Program if the member is not already excluded from coverage by the other public retirement system. Alternatively, a member who had service removed from the system and reported to a different public retirement system may elect to have all of that service, and any subsequent service, subject to coverage by the Defined Benefit program and excluded from coverage by the other public retirement system.

Finally, the bill requires employers, upon request by the system, to provide the system with information regarding the certification qualification, minimum standards, or provisions of an approved school charter for the operation of a charter school required to perform creditable service.

E. SB 546 (Leno): Health Care Coverage Rate Review

The bill amends section 1374.21 of the Health and Safety Code and adds new section 1385.045 to that code. It also amends section 10199.1 of the Insurance Code and adds new section 10181.45 5 to that code.

The bill requires large group health care service plan contracts (> 50 enrollees) to file with the Department of Managed Health Care the weighted average rate increase during the 12-month period ending January 1 of the following year. The average shall be weighted by the number of enrollees in each large group benefit design in the plan's large group marked and adjusted to the most commonly sold large group benefit design by enrollment during the 12-month period. The required information must be submitted to the department by October 1, 2016 and on or before October 1 annually thereafter.

The bill also requires the department to conduct public meetings on an annual basis regarding large group rate changes.

V. Legislation Affecting Employment Status

A. AB 202 (Gonzalez): Professional Sports Team Cheerleaders

The bill adds section 2754 to the Labor Code.

A cheerleader who is utilized by a California-based professional sports team either directly or through a labor contractor is deemed to be an employee of the team.

A California-based team means a team that plays the majority of its home games in California.

A cheerleader mean an individual who performs acrobatics, dance, or gymnastic exercises on a recurring basis.

A professional sports team is either a minor or major league level team in the sports of baseball, basketball, football, ice hockey, or soccer.

B. AB 359 (Gonzalez): Grocery Workers

The bill adds Part 9.5 (commencing with section 2500) to Division 2 of the Labor Code.

1. Obligations of Incumbent Grocery Employer. The new law requires that within 15 days after the execution of a transfer document an incumbent grocery must provide the successor grocery employer with the name, address, date of hire, and employment occupation classification of each eligible employee.

The incumbent employer is required to post a notice of the change in control at the affected location within five business days following execution of the transfer document.

2. Obligations of Successor Grocery Employer. The successor grocery employer must maintain a preferential hiring list of eligible employees identified by the incumbent employer and must hire from that list for a period beginning with the execution of the transfer document and continuing for 90 days after the grocery establishment is fully operational and open to the public under the successor grocery employer.

An eligible employee hired pursuant to the above must be retained for at least 90 days under the terms and conditions of employment established by the successor employer and pursuant to the terms of any applicable collective bargaining agreement.

If the successor employer operates with fewer employees than the incumbent employer, eligible employees shall be retained based on seniority within job classifications.

During the 90-day transition period, eligible employees retained under the new law may only be discharged for cause.

At the end of the 90-day transition period, the successor employer is required to conduct a written performance evaluation of each eligible employee retained. If the employee's work performance has been satisfactory, the successor employer is required to consider offering the employee continued employment.

3. Definitions:

a. Change in control means any disposition of all or substantially all of the assets or controlling interest.

b. Eligible grocery worker means any individual whose primary place of employment is at the grocery establishment subject to a change in control and who has worked for the incumbent employer for at least six months prior to execution of the transfer document. The term does not include managerial, supervisory, or confidential employees.

c. Grocery establishment means any food retail store over 15,000 square feet.

d. Incumbent grocery employer means the person that owns, controls, or operates the grocery establishment at the time of change of control.

e. Successor grocery employer means the person that owns, controls, or operates the grocery establishment after the change of control.

f. Transfer document means the purchase agreement or other document effecting the change in control.

VI. Public Employment

A. SB 331 (Mendoza): Civic Reporting Openness in Negotiations Efficiency Act (CRONEY)

This bill enacts new Chapter 4.5 (commencing with section 22175) of the Public Contracts Code. CRONEY applies to a local agency that has adopted a COIN ordinance, i.e., an ordinance that requires as part of the collective bargaining

process under the Meyers-Milias-Brown Act, openness and transparency in labor negotiations.

For local agencies that have adopted a COIN ordinance, the local agency must take the following steps with respect to any contract that has a value in excess of $250,000:

1. The local agency must appoint an unbiased independent auditor to review the cost of any proposed contract who shall report regarding his/her recommendations with respect to the contract. The report shall be made available to the public at least 30 days before the contract may be considered by the governing body of the local agency.

2. The local agency must disclose all offers and counter offers within 24 hours on its public web site.

3. The local agency must disclose the names of all persons who participated in the negotiations for the contract.

4. Each member of the local agency's governing body along with all staff members must disclose all communications in which they have participated regarding the contract.

5. The contract may be adopted only after a minimum of two meetings during which the public has an opportunity to comment on the contract.

B. SB 29 (Beall): Mental Health Training for Peace Officers

This bill adds section 13515.28 to the Penal Code.

The new code section requires POST to mandate that field training officers who are instructors in field training programs have at least eight hours of crisis intervention behavioral health training. The training must address issues relating to stigma, must be culturally relevant and appropriate, and must include the following topics: mental illnesses and intellectual disabilities, distinguishing those conditions from substance abuse disorders, proper responses, conflict resolution, appropriate language when interacting with emotionally distressed persons, available resources, and the perspectives of individuals and families with experience in these subjects.

For field training officers assigned or appointed prior to January 1, 2017, the training must be completed by June 30, 2017. Thereafter, the training must be completed within 180 days of appointment as a field training officer.

C. AB 229 (Chang): State Employee Travel Reimbursement

This bill adds new section 19822.4 to the Government Code.

The new code section mandates reimbursement for expenses incurred in using such services as Uber, Lyft, or airbnb.

D. AB 215 (Alejo): Maximum Cash Settlement for Local Agency Employment Contract

This bill amends section 53260 of the Government Code.

The code section requires that all contracts of employment between an employee and a local public agency include a provision that limits the maximum cash settlement an employee may receive upon termination of the contract, regardless of the duration of its term, to an amount equal to the monthly salary of the employee multiplied by the number of months left on the unexpired term up to a maximum of 18 months. For school district superintendents the maximum is 12 months.

The statute provides that the above amounts are maximums and does not prescribe payments of lower amounts.

The new requirements apply to any contract executed on or after January 1, 2016.

VII. Public Works

A. AB 852 (Burke): Expanded Definition of Public Works

This bill adds section 1720.7 to the Labor Code.

The new code section expands the definition of a public work on which prevailing wages must be paid to include any construction, alteration, demolition, or repair work done on a general acute care hospital pursuant to a private contract when the project is paid for, in whole or in part, with the proceeds of conduit revenue bonds.

VIII. Private Attorney General Act

A. AB 1506 (Hernández): Labor Code PAGA Claims Regarding Noncompliant Pay Stubs

This bill amends the Labor Code Private Attorneys General Act of 2004, Labor Code section 2699, *et seq.*

These revised code sections would give an employer the right to cure any failure to comply with the requirement that itemized wage statements contain the name and address of the legal entity that is the employer and the inclusive dates of the pay period. To demonstrate it had cured any failure to comply with these pay stub requirements, the employer would have to show it had provided compliant itemized wage statements to employees for each pay period for the three-year period prior

to the date of the written PAGA notice. An employer would be entitled to cure this specific non-compliance with pay stub requirements only once in a 12-month period. If the employer successfully cured the non-compliance, the complaining employee(s) would be barred from bringing a PAGA suit for that specific violation of the pay stub requirements.

The bill was adopted as an urgency measure, which means it took effect immediately upon being chaptered into law.

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