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Labor & Employment E-Alert

Recent Developments in CA Labor & Employment Law

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RECENT DEVELOPMENTS

Arbitration Agreements Maybe Enforceable When An Employee Pursues Administrative Remedies

On October 17, 2013, the California Supreme Court issued its opinion in *Sonic-Calabasas v. Moreno*, holding that an employment arbitration agreement is enforceable even where an employee is pursuing administrative remedies (typically for alleged unpaid wages) through the California Labor Commissioner.

Important to note, the Court also held that an arbitration agreement may still be found to be unconscionable if it fails to meet the *Armendariz* standards. The Court stated: "As with any contract, the unconscionability inquiry requires a court to examine the totality of the agreement's substantive terms as well as the circumstances of its formation to determine whether the overall bargain was unreasonably one-sided" and that the agreement must provide an employee with an accessible and affordable arbitral forum for resolving wage disputes.

New Employment Protections

For Victims of Domestic Violence

On October 11, 2013, Governor Jerry Brown signed a law barring employment discrimination against victims of domestic violence and those who experience stalking or sexual assault.

This new law makes it unlawful for an employer to terminate or otherwise discriminate against a worker because he or she is a victim. It also entitles victims to "reasonable" safety accommodations in the workplace such as changing a phone number, relocating a desk and/or implementing a workplace safety plan.

The introduction of the bill was based on a teacher, Cari Charlesworth, who was fired when her abusive husband went into the school's parking lot and caused the school to go on lockdown. In support of the bill, Ms. Charlesworth testified that "victims should not have to continue to suffer in silence due to the fear they have of losing their jobs. … [They] need to be able to speak up about what is happening so they can get the help they need to leave their abusive situation." The new law will go into effect on January 1, 2014.

Employers should check their policies to ensure compliance with this new law. Employers should also revisit their leave policies ensuring compliance with the Victims of Domestic Violence Leave Act.

California's Minimum Wage Increases

On September 25, 2013, Governor Jerry Brown signed a new law making California the first state to reach a $10.00 per hour minimum wage. The new law raises the minimum wage from the current $8.00 per hour to $9.00 per hour on July 1, 2014, and then to $10.00 per hour on January 1, 2016.

With this change, employers must ensure exempt employees are meeting the requisite salary minimums in order to maintain their exempt status.

Under the existing minimum wage of $8.00, exempt employees must be paid an annual salary of at least $33,280. With the increase on July 1, 2014, the minimum salary for an exempt employee will increase to $37,440, and then to $41,600 on January 1, 2016.

Employers who do not ensure that their exempt employees are receiving at least these amounts will be exposed to misclassification claims.

Paid Family Leave Law Expanded

On September 24, 2013, Governor Jerry Brown signed into law a bill that expands California's Paid Family Leave Program ("PFL"), which is a benefit paid for by the California Employment Development Department. The PFL provides up to six weeks of wage replacement benefits to workers who take time to care for a seriously ill child, spouse, parent, or domestic partner or to bond with a domestic child within one year of birth or placement of the child in connection with foster care or adoption. The new law expands the scope to include benefits for an employee who is taking time off to take care of a grandparent, grandchild, sibling or parent-in-law. The expansion goes into effect on July 1, 2014.

Military and Veteran Protections Extended by FEHA

Effective January 1, 2014, "military and veteran status" will be added to the list of protected classes under the Fair Employment and Housing Act ("FEHA") in order to increase protections against employment discrimination for the 1.8 million California residents who are military members and veterans. The law defines "military or veteran status" as "a member or veteran of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, and the California National Guard." The new law would allow employers to inquire regarding an applicant's or employee's military or veteran status for the purpose of awarding a veteran's preference as permitted by law.

FEHA Amended to Clarify the Definition of Sexual Harassment

Effective January 1, 2013, FEHA has been amended to state: "sexually harassing conduct need not be motivated by sexual desire." With the change, plaintiffs may demonstrate harassing conduct by showing one of the following:

• Sexual intent or desire by harasser towards plaintiff;

• General hostility by harasser towards particular sex of which plaintiff is member; or

• Disparate treatment by harasser towards members of both sexes in workplace.

Overtime Compensation for Domestic Workers

Effective January 1, 2014, employers of employees who engage in "domestic work," including nannies, housekeepers, and those who provide care for people with disabilities, must pay time and a half for each hour worked over nine hours in one day or 45 hours in one week.

The San Francisco Family Friendly Workplace Ordinance

Effective January 1, 2014, the San Francisco Family Friendly Workplace Ordinance will expand protections for workers with family care-giving duties and require employers to provide flexible accommodations for employees. It applies to employers and their agents who regularly employ 20 or more employees.

Under the rule, employees who have been employed for six or more months and work eight hours or more per week have the right to request a flexible work arrangement to assist with caregiver responsibilities for: (1) a child; (2) a parent age 65 or older; or (3) a spouse, domestic partner, parent sibling, grandchild or grandparent with a serious health condition. Employees may request accommodations in terms of their hours, schedule, work location, work assignment and the predictability of their work schedule.

The employee's request must be in writing and must explain how the change will help him meet his caregiver responsibilities. The employer must then meet with the employee and respond in writing within 21 days. If the employer denies the request, it must explain in writing the reason for the denial and notify the employee of his or her right to request reconsideration.

In any written denial of a request for a flexible work arrangement, the employer must be clear as to why it cannot accommodate the request. The employer is required to provide a "bona fide business reason" for the denial, such as productivity loss, a detrimental effect on meeting customer demands, an inability to organize work among employees or insufficient work during the time the employee proposes to work. An employer denying a request also must provide the employee with the text of the Ordinance granting reconsideration rights.

The Ordinance allows eligible employees to make two requests per year. However, an employee may make additional requests following the birth of a child, the placement of a child through adoption or foster care, or an increase in the employee's caregiving duties for a family member with a serious health condition.

The San Francisco Office of Labor Standards Enforcement (OLSE), responsible for enforcement of the Ordinance, intends to publish mandatory posters providing employees notice of their rights under the Ordinance. The OLSE also will manage compliance with the Ordinance through employer audits and handle claims of retaliation or interference with employees' rights under the Ordinance. Accordingly, employers are required to maintain documentation of employee requests for three years.

THE EARLIER CHANGES IN 2013

The FEHA's New Definition of "Sex"

The definition of "sex" under the Fair Employment and Housing Act (FEHA), which prohibits discrimination in employment was expanded to include breastfeeding and related medical conditions. This law required employers to provide employees with an update to their Discrimination and Harassment Notice.

FEHA Protection of Religious Dress and Grooming Practices

FEHA prohibits discrimination on the basis of an employee's religious beliefs and observances. The 2013 amendment states that when providing reasonable accommodation of employees' religious dress or grooming practices, employers cannot segregate employees either from the public or other employees.

Employee Social Media Privacy Interests Are Protected

California employers are prohibited from requiring or requesting that employees or job applicants provide their usernames or passwords for personal social media accounts, access their accounts in the employer's presence or divulge personal social media. Social media includes any "electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or internet website profiles or locations."

As a result of this law, employers are prohibited from discharging, disciplining, threatening or otherwise retaliating against an employee or applicant for not complying with a request by the employer that violates these provisions. There is one exception. Employers are permitted to ask employees for their personal social media content for the purpose of an employer's investigation into alleged employee misconduct or violations of the law.

Employee Rights to Inspect Personnel Files – Clarified

California Labor Code section 1198.5 has been amended to include a new provision that provides clarification regarding an employee's inspection rights of his/her personnel file. According to the amendment, an employer must retain personnel files for at least three years following termination of employment and must permit current and former employees, or their representatives, to inspect and receive a copy of the employee's personnel files within 30 days of receiving a written request to do so.

The law also states that employers are not required to comply with more than one request per year by a former employee or with more than 50 requests per month by employees' representatives, with certain exceptions.

Temporary Service Employers Must Provide Detail on Wage Statements

California Labor Code section 226, relating to itemized wage statements and wage notice requirements, now requires

specified information from temporary service employers. In addition to information already required on employees' itemized wage statements, temporary service employers are also required to provide itemized information concerning the rate of pay and total hours worked for each assignment. They are also required to provide the name, physical and mailing address and telephone number of the main office of the legal entity for whom the employee will perform work.

Commission Agreements Must Now Be in Writing – A Handshake Won't Do!

Effective January 1, 2013, a new law requires both in-state and out-of-state employers paying commissions to employees working in California to have written commission agreements setting forth the method by which commissions are computed and paid. Employers are required to give signed copies of the agreement to employees and obtain the employees' signed receipts.

Are Your Background Check Policies Compliant?

While background checks are used to aid employers defending against negligent hiring claims, if not properly put into practice, these policies could expose employers to racial/national origin discrimination claims.

The Equal Employment Opportunity Commission's enforcement campaign is aimed at preventing disparate impact discrimination caused by most common background check scenarios.

Employers should review their policies ensuring there are no blanket policies rejecting applicants with criminal histories. Employers must also consider whether the conduct underlying an arrest or conviction makes the individual unfit for the position in question. Employers must ensure their policies and hiring managers do not treat applicants of different races or national origin with similar criminal histories differently.

In addition, if an employer uses targeted exclusions, wherein the employer has a policy or practice of excluding individuals from particular positions for specified criminal conduct, the employer must provide the individual with the opportunity to demonstrate the exclusion does not apply to him/her.

This is achieved by considering information provided by the individual that demonstrates the policy, as applied, is not job related and consistent with business necessity. The individualized evidence presented may establish the individual was not correctly identified in the criminal record or that the record is otherwise inaccurate. Other factors should also be considered such as rehabilitation efforts, facts or circumstances surrounding the offense, and conduct or evidence that the individual performed the same type of work post-conviction with the same or a different employer with no known incidents of criminal conduct.

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