



Dillingham & Murphy, LLP

www.dillinghammurphy.com

California Governor Approves New Employment Legislation

California Governor Jerry Brown recently approved a number of new employment laws, which are reviewed below. The changes are effective January 1, 2014 unless otherwise specified.

Increase in State Minimum Wage

The California minimum wage will increase to \$9.00 per hour effective July 1, 2014 and to \$10.00 per hour effective January 1, 2016. This will also increase the minimum salary for exempt employees, who must be paid a monthly salary of no less than two times the minimum wage for full time employment. [Assembly Bill 10]

Amendments to the California Fair Employment and Housing Act

The California Fair Employment and Housing Act ("FEHA") is amended to specify that sexual harassment does not need to be motivated by sexual desire to be unlawful. This amendment is largely unnecessary as existing case law makes it clear that harassment motivated "because of" the victim's gender is unlawful and harassment motivated by sexual interest is only one type of sexual harassment. [Senate Bill 292]

Military and veteran status will be added to the list of classifications protected by the FEHA. However, this will not prevent an employer from asking about military or veteran status in order to provide a preference as permitted by law. [Assembly Bill 556]

Protections for Victims of Domestic Violence, Sexual Assault and Stalking

Labor Code sections 230 and 230.1, which provide protections to victims of domestic violence and sexual assault, are amended to add the same protections to victims of stalking. Section 230 currently prohibits employers from retaliating against victims of domestic violence and sexual assault for taking time off work to obtain relief to ensure the health, safety or welfare of the victim or his/her child. Examples of such relief are restraining orders. In addition to extending this protection to victims of stalking, the amendments make it unlawful for employers to discriminate against any of these victims because of their status and create obligations similar to those owed to employees with disabilities.

Employers will be required to provide reasonable accommodation when requested by an employee for safety reasons. "Reasonable accommodation" may include implementing safety

measures such as a transfer, reassignment, modified schedule, changed work telephone, changed work station, installed lock, assistance in documenting domestic violence, sexual assault or stalking occurring at work, implementing a safety procedure or other adjustment to the job structure, workplace or work requirement, or referral to a victim assistance organization.

Employers will also be required to engage in an interactive process with these employees to determine an effective reasonable accommodation. Employers will not be required to provide an accommodation that constitutes an undue hardship or that would violate their obligation to provide a safe and healthful workplace for all employees.

Employers must consider exigent circumstances or danger facing the employee in determining whether an accommodation is reasonable.

Employers may require that an employee requesting such an accommodation provide a written statement certifying that the accommodation is necessary for a protected reason and certification of the employee's status as a victim.

The amendments also add victims of stalking to Labor Code section 230.1, which currently prohibits employers with 25 or more employees from discriminating against an employee who is a victim of domestic violence or sexual assault from taking time off to:

- (a) Seek medical attention for injuries.
- (b) Obtain services from a domestic violence shelter or rape crisis center.
- (c) Obtain psychological counseling.
- (d) Participate in safety counseling or take other actions to increase safety, including relocation.

“Stalking” is defined as in the California Penal Code and civil stalking statute. Generally, it means engaging in a pattern of conduct with the intent of following, alarming or harassing the victim, such that the victim reasonably feared for his or her safety or that of an immediate family member.

These amendments create additional burdensome leave and accommodation obligations for already over-burdened California employers. Employers must now treat employees who report they are victims of domestic violence, sexual abuse or stalking like employees with disabilities. It is even less clear in these situations when an employer can take the position that a proposed accommodation presents an “undue hardship.” For example, will employers be required to hire armed guards to protect an employee (and his/her coworkers) from an estranged spouse and for how long? Requiring employers to consider “exigent circumstances” or “dangers facing an employee” is likely to evolve into a de facto requirement that they hire a threat assessment consultant whenever one of these situations arises. There is no “undue hardship” limitation on the obligation to permit an employee to take time off under section 230.1. Although the leave

may not exceed the 12 weeks permitted under the FMLA, section 230.1 applies to employers who have half the number of employees required for FMLA leave. [Senate Bill 400]

Paid Family Leave Benefits Expanded

Paid Family Leave benefits will be extended to employees who need time off work to care for seriously ill grandparents, grandchildren, siblings and parents-in-law. PFL currently only applies to time off to care for children, spouses, parents, domestic partners, or for baby bonding. Employees who take PFL are not entitled to reinstatement, unless required by another law, such as FMLA or CFRA. These amendments are effective July 1, 2014. [Senate Bill 770]

Prevailing Employer May Only Recover Attorneys' Fees in Bad Faith Wage Claims

Labor Code section 218.5 is amended to limit an employer from recovering attorneys' fees in a lawsuit for unpaid wages to cases in which the employee brought the lawsuit in bad faith. Section 218.5 currently permits the prevailing party in an action to recover unpaid wages to recover attorneys' fees and applies the same standard to prevailing employers and employees. [Senate Bill 462]

Expanded Protections for Labor Code Retaliation and New Protections for Unfair Immigration-Related Practices

Labor Code section 98.6 currently prohibits an employer from discharging or discriminating against an employee for engaging in certain conduct protected by the Labor Code. Section 98.6 is amended to clarify that an employer is also prohibited from retaliating or taking any adverse employment action against an employee who engages in the protected conduct and adds making a written or oral complaint for unpaid wages as protected conduct. In addition to reinstatement and reimbursement for lost wages and benefits, remedies will include a civil penalty of up to \$10,000.

Labor Code section 1102.5 currently prohibits an employer from retaliating against an employee for disclosing information to a government or law enforcement agency which the employee reasonably believes discloses a violation of state or federal statute or violation or noncompliance with a state or federal rule or regulation. The amendments expand these protections to reports made to persons who have authority over the reporting employee or the authority to investigate or correct the violation or noncompliance, as well as to employees who provide information to or testify before a public body. The amendments also add reports of violations of local rules or regulations.

New Labor Code section 244 will permit employees to file civil actions based on a Labor Code violation without exhausting administrative remedies unless the code section specifically requires exhaustion.

This new section will also make it an "adverse action" to report or threaten to report an employee's (or an employee's family member's) suspected citizenship or immigration status to a

public agency because the employee has exercised a right under the Labor, Government or Civil Codes.

New Labor Code section 1019 will makes it unlawful for an employer to engage in certain immigration-related practices in retaliation for any person exercising rights protected by the Labor Code or local ordinance. “Unfair immigration-related practices” include:

- (a) Requesting more or different documentation than required to complete the Form I-9 or refusing to honor such documents that on their face appear to be genuine.
- (b) Using the E-Verify system to check employment authorization status of a person at a time or in a manner not authorized by federal law.
- (c) Threatening to file or filing a false police report.
- (d) Threatening to or contacting immigration authorities.

“Unfair immigration-related practices” does not include conduct expressly and specifically directed or requested by the federal government.

Engaging in an “unfair immigration-related practice” within 90 days of a person exercising his/her rights under the Labor Code or local ordinance creates a rebuttable presumption of retaliation.

The new section authorizes a civil action and prevailing plaintiffs will be entitled to attorneys’ fees and costs, including expert costs. It also authorizes the court to suspend licenses held by the violating party.

Existing law prohibits employers, except in specified situations, from obtaining a consumer credit report for employment purposes. New section 1024.6 prohibits employers from taking adverse action against an employee because he/she updates or attempts to update his/her personal information, unless the updates are directly related to the skills, qualifications or knowledge required for the job. [Assembly Bill 263; Senate Bills 496 & 666]

Domestic Worker Bill of Rights

The Domestic Worker Bill of Rights adds Labor Code sections 1450-1454 to require overtime pay for certain personal attendants. “Personal attendant” is defined as any person employed by a private household, or a third-party employer recognized in the health care industry to work in a private household, to supervise, feed, or dress a child, or a person who by reason of advanced age, physical disability, or mental deficiency needs supervision. This applies to employees who also perform non-attendant work so long as the non-attendant work does not exceed 20 percent of the total hours worked per week.

This law will not apply to anyone who is an immediate relative of the employee, a person under the age of 18 who is employed as a babysitter for a minor child, or a “casual babysitter,” whose

employment is irregular or intermittent and whose vocation is not babysitting. There are a number of other exceptions.

Covered personal attendants will have to be paid time and one-half when they work more than nine hours in one workday or 45 hours in one workweek. [Assembly Bill 241]

Failure to Remit Withholdings from Wages a Crime

Labor Code section 227, which currently makes it a crime to fail to make agreed upon payments to health and welfare and other funds, is amended to also make it a crime to fail to remit withholdings from an employee's wages to the appropriate agency. [Senate Bill 390]

Penalty for Failure to Provide Employees with Cooldown Period

Labor Code section 226.7 is amended to prohibit employers from requiring an employee to work during any required cooldown period necessary to prevent heat illness. Employers who fail to comply with this requirement will be subject to the same one hour pay penalty that applies to missed meal and rest breaks. [Senate Bill 435]

Successor to Farm Labor Contractor Liable for Unpaid Wages

New Labor Code section 1698.9 will making certain successors to farm labor contractors liable for wages and penalties owed to the predecessor's employees. In order for the successor to be held liable, it must meet one or more the following criteria:

- (a) Use substantially the same facilities or workforce to offer substantially the same services as the predecessor (certain successors who have had a valid license for at least the preceding three years may have an affirmative defense).
- (b) Share in the ownership, management, control of the workforce or its business operations are interrelated with the predecessor.
- (c) Employ as a manager any person who directly or indirectly controlled the wages, hours or working conditions of the employee(s) owed wages or penalties by the predecessor.
- (d) Be an immediate family member of any owner, partner, officer, licensee, or director of the predecessor or any person who had a financial interest in the predecessor.
[Senate Bill 168]

Carla J. Hartley
601 California Street, Nineteenth Floor, San Francisco, CA 94108
Tel.: (415) 397-2700; Fax: (415) 397-3300
cjh@dillinghammurphy.com