employment brief

Legal Developments Affecting Employers
Murchison & Cumming, LLP Management Advisors

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CONTRIBUTORS

Ellen M. Tipping [Editor & Contributor] is a Partner in Murchison & Cumming's Orange County office. Ms. Tipping specializes in employment law, providing advice and counsel, and representation of employers in litigation through trial and appeal.

New Legislation for 2013

Ellen M. Tipping
etipping@murchisonlaw.com

The New Year opens with some significant new laws. Among these are expansions of the anti-discrimination statute for religious dress and grooming and breastfeeding employees; new notices to be provided to pregnant employees; detailed rules for responding to requests for inspection of personnel files; employee privacy rights in their use of social media; and legislation which overturns court decisions as to salaries for nonexempt employees and penalties against employers for itemized wage statement violations. Here are the new laws which will affect all California employers.

Protection for Religious Dress or Grooming (AB 1964)

The Fair Employment and Housing Act ("FEHA") prohibits discrimination against employees and applicants based on protected characteristics, and requires a reasonable accommodation by an employer to prevent discrimination. Religious creed" is one such characteristic, and the definition has been expanded to include "religious dress practice" and "religious grooming practice."[1] These are defined as follows:

"Religious dress practice" shall be construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed.

"Religious grooming practice" shall be construed broadly to include all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed.

1 *Cal. Govt. Code* §12926(p)

An employer must accommodate such dress or grooming practices unless doing so would present an undue burden. Segregation of the individual from other employees or the public as a reasonable accommodation is expressly prohibited.[2]

Breastfeeding Added to Protections Against "Sex" Discrimination (AB 2386)

The protected characteristic of "sex" has also been expanded to protect women who are breastfeeding.[3] The definition now states that "sex" includes, but is not limited to, (1) pregnancy or related medical conditions; (2) childbirth or related medical conditions; and (3) breastfeeding or related medical conditions.

New Pregnancy Regulations Affecting All Employers

Changes have been made to the regulations for Pregnancy Disability Leave, and include:

- A clarification to the definition of "four months" for calculation of that period as amounting to 122 days (for intermittent leaves);
- Expanded definition of when a woman is "disabled by pregnancy."
- Changes to Notices "A" (employers with fewer than 50 employees) and "B" (employers with 50 or more employees), which notify employees about their rights and responsibilities under pregnancy disability leave. There is also an approved form for completion by the employee's health care provider.

Inspection of Personnel Records--Expanded Requirements (AB 2674)

The law concerning an employee's rights to inspection of his or her personnel records has become substantially more detailed.[4] An employee has the right to inspect and receive records pertaining to his or her performance or any grievance "at reasonable intervals and at reasonable times."

The statute now specifies:

- Records must be made available within 30 calendar days of a written request;
- If requested, a copy must be provided at a charge not to exceed the actual cost of reproduction;
- Records must be maintained for not less than three years after termination of employment;
- An inspection request shall be made by the employee in writing, but an employer-provided form shall be made available to the employee upon a verbal request;
- Once an employee files a lawsuit, he or she has no right to request records under this statute.

The law also provides instructions for handling records requests from former employees, including the places where the records may be made available. Further, former employees are entitled to only one request for records per year.

Privacy Protections for Employee Social Media (AB 1844)

This bill adds a new section to the Labor Code, §980, entitled Employer Use of Social Media. The statute applies a broad definition to the term social media which essentially covers any electronic service or content, and prohibits employers from requiring or requesting an employee or applicant to:

- disclose a user name or password for the purpose of accessing personal social media;
- access personal social media in the presence of the employer;
- divulge any personal social media.

2 *Govt. Code* §12940(l)(2)
3 *Cal. Govt. Code* §12926(q)(1)
4 *Labor Code* §1198.5

The law does not affect the existing right to request an employee to divulge personal social media reasonably believed to be relevant to an investigation of suspected employee misconduct or law. Additionally, an employer may require an employee to disclose a username, password, or other method for the purpose of accessing an employer-issued electronic device.

Salaries for Nonexempt Employees (A.B. 2103)

This law, amending Labor Code §515, prohibits any private agreement between an employer and employee for a salary to a nonexempt employee which includes overtime hours. The new law states, "Payment of a fixed salary to a nonexempt employee shall be deemed to provide compensation only for the employee's regular, nonovertime hours, notwithstanding any private agreement to the contrary."[5] For the purpose of calculating an overtime rate, "the employee's regular hourly rate shall be 1/40th of the employee's weekly salary."

This law overturns a Court of Appeal decision which held that the employee could enter into an "explicit mutual wage agreement" for a fixed salary to include overtime at an overtime rate, so long as the agreement specified a base hourly rate of pay of no less than the minimum wage, and not less than one and one-half times that rate for every hour of overtime worked.[6]

Wage Statement Violations--Injury Presumed (S.B. 1255)

Existing law requires that every paycheck include an itemized wage statement containing nine categories of information. The law provided for a penalty of $50 for the first pay period and $100 for each subsequent pay period, per employee, up to a maximum of $4,000, plus costs and attorneys fees to an employee who "suffers an injury" as the result of the employer's "knowing and intentional failure" to include all information. However, the law did not define "injury."[7]

The employee is now "deemed to suffer injury" if the employer either does not provide a wage statement, or fails to provide accurate and complete information as to any one of the nine items, and the employee cannot "promptly and easily determine" from the wage statement alone any of the following: the amount of gross and net wages for the pay period, all deductions, the employer's name and address, and the employee's name and identification number or last four digits of the social security number. "'Promptly and easily determine'" means a reasonable person would be able to readily ascertain the information without reference to other documents or information."

Commission Contract Requirements (A.B. 2675)

Labor Code §2751, requiring a written commission agreement for services in California, is amended to clarify that written agreements are not required when the compensation is for (1) short-term productivity bonuses such as paid to retail clerks; and (2) temporary variable incentive payments that do not decrease payment under the written contract; and (3) bonus and profit-sharing plans in the absence of an offer to pay a fixed percentage of sales and profits.

5 *Labor Code* §515(d)(2)

6 *Archiega v. Dolores Press* (2011) 192 Cal. App.4th 567

7 *Labor Code* §226(e)

LOS ANGELES
801 S. Grand Ave., 9th Fl.
Los Angeles, CA 90017
(213) 623-7400
Managing Partner: Jean M. Lawler

ORANGE COUNTY
801 Park Tower
200 West Santa Ana Blvd.
Santa Ana, CA 92701
(714) 972-9977
Partner In Charge: Dan L. Longo

SAN FRANCISCO
Embarcadero Center West
275 Battery Street, Suite 550
San Francisco, CA 94111
(415) 524-4300
Partner In Charge: Kasey C. Townsend

SAN DIEGO
750 B. St., Ste. 2550
San Diego, CA 92101
(619) 544-6838
Partner In Charge: Kenneth H. Moreno

LAS VEGAS
6900 Westcliff Drive, Suite 605
Las Vegas, NV 89145
(702) 360-3956
Partner In Charge: Michael J. Nuñez

H.R. TIPS

Drug Testing Applicants & Existing Employees

Employers should know that the rules are different for applicants and existing employees.

Applicants: Employers may require drug testing of applicants so long as it is part of a general test required of all applicants.

Existing Employees: Employers must tread carefully when considering asking an existing employee to take a drug test. Generally, the request must be justified by a business necessity through the position held by the employee. If an employer believes a drug test is warranted, it is wise to seek the opinion of employment counsel before making the request of the employee.

MURCHISON & CUMMING LLP
801 S. Grand Avenue
Ninth Floor
Los Angeles, CA 90017