2014 Legal Update

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Significant changes are on the horizon for California employers in 2014. The California Legislature was at it again in 2013, from requiring "cool down" periods for employees working in hot weather to clarifying the standard for sexual harassment and expanding whistleblower protections, among other new legislation. Below is a summary of some of the major items from the Legislature's 2013 agenda. Not every new law affects every employer, but employers should be informed of these legal developments to determine whether any changes are necessary to their policies and procedures. As every new year brings with it a long list of new employment-related laws, it is important that employers not fall behind on compliance measures.

AB 10: Minimum Wage

Assembly Bill 10 put in the pipeline two separate $1.00 increases in the California minimum wage rate. Effective July 1, 2014, the California minimum wage will increase from the current $8.00 per hour to $9.00 per hour. Effective January 1, 2016, the California minimum wage will increase to $10.00 per hour, making it the highest minimum wage in the US. In addition to payroll adjustments for minimum wage employees, this change may also require a raise for employees whose wages are pegged to the minimum wage, particularly exempt employees. In order to remain correctly classified as exempt from overtime under California law, exempt employees must be paid at least two times the minimum wage. This means that the current annual salary minimum for exempt employees, $33,280, will increase to $37,440 on July 1, 2014, and to $41,600 on January 1, 2016. The alternative, of course, is to reclassify employees as non-exempt in lieu of raising their salaries above the new bar.

AB 435: Shade Penalty

Assembly Bill 435, which became effective January 1, 2014, expanded meal and rest break rules by incorporating "recovery" periods in accordance with Cal/OSHA guidelines. AB 435 provides that employees working outdoors in temperatures exceeding 85 degrees Fahrenheit are entitled to "cool down" periods as needed. Such employees are now entitled to at least five minutes in a shaded area in order to avoid overheating. The penalty for failure to provide recovery periods is the same as the penalty for failure to provide a meal or rest break—one hour of pay. To comply with this new law, affected employers should implement a cool down policy, train supervisors on how to deal with this issue, and provide Cal/OSHA-compliant shade and seating to employees working in hot weather.

SB 400: Stalking

Senate Bill 400, which became effective January 1, 2014, extends leave of absence protections to victims of stalking, including time off to appear at legal proceedings. Employers with more than 25 employees must provide employees who are victims of stalking with time off to seek medical attention, obtain services from a shelter or crisis center, obtain counseling, or participate in safety planning. SB 400 also prohibits discrimination and retaliation based on an employee's status as a victim of stalking, making this a protected category. Upon request by an employee who is a victim of stalking, employers are now required to provide such employee with a reasonable accommodation and engage the employee in the interactive process—just as they would for employees with a disability. Reasonable accommodations may include implementation of safety measures, such as transfer, reassignment, modified schedule, change of work telephone, change of work station, lock installation, and referral to a victim assistance organization. To reduce legal risk, employers should take seriously all reports of threats to employees. Upon receiving a report, whether directly from the victim employee or indirectly from others, that an employee may be a potential victim of stalking, employers should consider engaging a threat assessment professional to determine a reasonable response. In light of SB 400, failing to protect employees may expose employers to potential negligence liability.

AB 11: Time Off For Emergency Duty

Assembly Bill 11, which became effective on January 1, 2014, requires employers with 50 or more employees to provide a leave of absence of 14 days per calendar year for reserve peace officers and emergency rescue personnel to receive training. Previously, only volunteer firefighters were entitled to such leave.

AB 556: Military and Veteran Status

Assembly Bill 556 expands the list of protected categories under the Fair Employment and Housing Act ("FEHA") to include "military and veteran status." This means that employers may not retaliate or discriminate against employees based on an employee's status as a veteran or member of active or reserve military.

SB 292: Sexual Harassment

Senate Bill 292 is the Legislature's response to the California Court of Appeal's decision in *Kelley v. The Conco Companies*, 196 Cal. App. 4th 191 (2011). In *Kelley*, the court held that in order to survive summary judgment a plaintiff in a same-sex harassment case must prove that the harasser harbored a sexual desire for the plaintiff. The *Kelley* decision caused a split in authority among California appellate courts and a potential inconsistency with federal case law, not to mention a public fury over the seemingly unfair outcome. SB 292 clarifies that sexually harassing conduct need not be motivated by sexual desire. Sexual harassment may now include vulgar, graphic, and sexually explicit language not motivated by sexual desire (for example, same-sex harassment where the harasser is neither homosexual nor intending statements to be taken literally).

SB 496 and AB 263: Legislation Protecting Whistleblowers

Effective January 1, 2014, the Legislature amended Labor Code § 1102.5, which "protected" employees from retaliation for reporting to a "government or law enforcement agency" what the employee reasonably believes is unlawful conduct by the employer. Section 1102.5 was amended in four ways. First, the amendment added protection for internal reports to a person "with authority" over the employee or a person with "authority to investigate." This includes, for example, a written or

oral complaint by an employee to a supervisor or the human resources department that the employee is owed unpaid wages. Prior to this amendment, Section 1102.5 did not protect employees who blew the whistle within the company. Second, Section 1102.5 now protects reporting non-compliance with local laws and regulations—previously, the law only protected reports of what an employee reasonably believed was a violation of state or federal statutes. Third, Section 1102.5 now prohibits retaliation for an anticipated disclosure of a complaint. Fourth, the amendment created a $10,000 per employee "civil penalty" for violation of this whistleblower provision.

Importantly, Section 1102.5 carries a very onerous burden of proof for employers. Once an employee establishes by a preponderance of the evidence that her/his protected activity was a "contributing factor" to the adverse employment action, the employer must prove by "clear and convincing" evidence that it would have acted the same without the protected activity. This high burden of proof, coupled with the expanded protections and increased penalties under Section 1102.5, makes terminating an employee after she or he complains about wage and hour issues or other potential unlawful conduct quite dangerous and risky. Before taking any adverse action against an employee who had recently complained about what she or he believed was a violation of local, state or federal law, employers should cross all their t's and dot all their i's, or better yet consult an attorney. In such case, employers must be sure they can prove by clear and convincing evidence that the decision to take adverse action would have been made without any complaints from the employee. Accurate and contemporaneous documentation and the timing of the adverse employment decision are keys to prevailing against retaliation claims under Section 1102.5.

AB 524 and AB 263: Immigration Extortion

As of January 1, 2014, California law prohibits "unfair immigration-related practices" in response or reaction to an employee's protected conduct, including an employee's reporting Labor Code violations (or what the employee reasonably believes is a violation), seeking information about such violations, and advising someone at the about such violations. Prohibited "unfair immigration-related practices" include improper I-9 practices, using E-Verify to check immigration status when it is not legally required, threatening to file or filing a false police report, and threatening to contact or contacting immigration authorities. Under the new law, unfair immigration-related practices occurring within 90 days of the person's exercise of a protected right creates a rebuttable presumption of retaliation. The law creates a $10,000 per employee "civil penalty" for such retaliation. California employers should refrain from using immigration status as a weapon, but should instead continue to pursue compliance with state and federal laws. An important implication of this new law is that it provides undocumented workers the right to file retaliation lawsuits against their employers.

Grace Horoupian is a partner in the Irvine office of Fisher & Phillips LLC. Her practice is focused on representing employers in a variety of employment cases, including claims for civil rights violations, harassment, discrimination, retaliation, wrongful termination, wage and hour claims, ADA and ADEA violations, unfair business practices, misappropriation of trade secrets and class action disputes. Her firm's Web site www.laborlawyers.com has a wealth of resources, newsletters, state guidelines and free webinars for employers.