GT GreenbergTraurig

ALERT

Labor & Employment | October 2014

More Than Just Paid Sick Leave — 2014 California Legislative Update: Things You Need to Know for 2015

At Greenberg Traurig, we live our motto "built for change" and apply it for the benefit of the businesses we serve. Our California Labor and Employment Practice appreciates that although California presents opportunity, it also presents an often unique set of employment risk propositions, and these risks are often just one set among a constellation of others that require management. We also believe that while employers need to manage that risk, it is neither a stream of the "sky is falling" communications regarding every court rumination, nor is it a list of developments so comprehensive that the significant and the idiosyncratic blur together.

As such, we offer some insight into the more significant new employment-related legislation that, if not already addressed, should be given some thought prior to year-end. We address the developments by issue and add some thoughts on why we think it may matter to your company.

Employment Impact of the Imminent Issuance of Drivers Licenses to Persons Whose Presence In The U.S. Is NOT Authorized by Federal Law and Other Immigration related Concerns.

When the California Legislature chose to go its own way on immigration reform in 2013, it pulled employers in California into the middle of the immigration debate and a potentially very high stakes enforcement game. The constitutional issues with California's choice can be left for another day and another forum. We deal here, today, with what is. Among the seemingly more innocuous non-employment laws passed last year was AB 60, which directed California DMV to begin issuing documentation authorizing persons who are not authorized to be in the United States under federal law, to nonetheless be authorized to operate a motor vehicle in California.

The first issue which involved design of the new license was fought to a draw between DMV and U.S. Homeland Security. Sidestepping the politics as much as possible, Homeland Security wanted the distinction between the new licenses (which, signals an immigration issue) to be as pronounced as reasonably possible. DMV wanted the distinction to be as inconspicuous as possible. The cease fire was

signaled when DMV added the phrase "Federal Limits Apply" on the front and a small print statement that the license may not be used for federal purposes on the back. One, and perhaps the sole, beneficial outcome for our purposes is an acronym for the license: FLAL (Federal Limits Apply License). Homeland did not officially approve of the new design formally and did not officially concede its earlier demand for a different color. DMV nonetheless takes that position as authority to move forward. For those curious about how DMV will vet applicants for a FLAL, this DMV flow chart may prove instructive. Note that one method is a relatively discretionary secondary review within DMV. The FLAL will not indicate on what basis it was issued.

As for why this matters to employers within and outside of California, consider a few scenarios to describe the use of the documents:

- New applicant in a non-California state presents an I-9 and offers a FLAL to prove identity;
- New Applicant in California presents an I-9 and offers a FLAL to prove identity;
- Existing Employee qualifies for position as driver and for the first time tenders a FLAL as part of the onboarding process; and
- ICE audits your facility.

As you consider the federal implications (perhaps particularly as either a federal government contractor or a U.S. Department of Transportation regulated entity), hold those thoughts a moment as the California legislature added more considerations.

AB 1660 was enacted to clarify that national origin discrimination under the California Fair Employment and Housing Act (FEHA) includes but is not limited to discrimination on the basis of possessing a FLAL or presenting it to an employer. California's FEHA statute carries with it, of course, an opportunity for uncapped emotional distress and punitive damages.

AB 2751 purports to be cleanup legislation as to the other immigration related bills passed last year. Among the clarifications is that the civil penalty of up to $10,000 is payable to the employee or employees who suffered the violation. Similarly, the definition of unfair immigration-related practices was expanded to include filing or threatening to file a false report with a state or federal agency. It also adds to the list of prohibited acts, retaliation for attempts to update information based on a lawful change of name, Social Security number, or federal employment authorization document. Moreover among the remedies in the court case is the potential that the court can order governmental agencies to revoke various business licenses.

These two new laws increase both the decision making complexity and the risk/liability exposure, while at the same time providing additional incentives for challenging whatever choices the employer makes.

Labor Contractor and Independent Contractor Issues

California has, for a variety of reasons, become a particularly hostile environment for alternative workforces over the past few years. The court decisions over the past year have been quite aggressive in attacking a variety of independent contractor models. As has been the case, the key items of focus are the control the service recipient exercises over the worker providing the service and the question of integration of the work done into the general activities of the business to whom the services were provided.

On a parallel track, the legislature has been very active regulating what amounts to contracting out labor in the janitorial, construction, farm labor, garment, security guard and more recently warehousing industries. In those spaces, existing law prohibits contracting on terms the service recipient knows or should know are inadequate to permit the other party to perform the contract and comply with existing California law as to its own workforce. A classic example would be a contract where it is foreseeable based on past experience that the amount paid would be inadequate for the number of hours to get the job done unless a sub minimum wage was paid.

California took that concept one step further and into all industries with AB 1897. In essence, if you are a business which employs 25 or more workers (including all engaged by outsourced Labor Contractors) and obtain the services of at least five workers through a Labor Contractor, you share all civil liability and legal responsibility with the Labor Contractor for payment of wages, safety and workers' compensation. A Labor Contractor, for this purpose, is an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business. There are some exceptions.

The reason this matters beyond the exposure under the new statute is the concept of doing harm while trying to do good or iatrogenics. It would not be all that difficult to manage your AB 1897 risk by putting contract obligations and reporting requirements on your Labor Contractor's workforce. Doing that, however, may come painfully close to the kind of control that places independent contractor status in peril. The Labor Contractor almost by definition is providing services in an area close enough to the usual course of business that it may satisfy the integration component of independent contractor misclassification, which carries its own stiff penalties.

Employer Paid Sick Days AB 1522

As our colleague Koray Bulut explained in greater detail in his management *Alert*, California has adopted mandatory paid sick leave with rules that become effective July 1, 2015. There will be some administrative compliance issues and indications are that the statewide mandate will not replace local ordinances in places like San Francisco and San Diego. In summary, employees will accrue one paid hour of sick leave at their regular rate of pay for every 30 hours worked up to a maximum 24 hour accrual unless the employer chooses to provide more (as most do). Existing employer PTO programs can count and in the absence of a PTO program, the paid sick leave need not be cashed out at termination.

"It's Probably Nothing:" Data Gathering on Employees of Large Employers Receiving Medi-Cal Benefits. AB 1792

The back story on this one is that a year or so ago a bill to charge large employers whose employees appeared on the Medi-Cal benefits rolls made significant progress but de-railed when the Affordable Care Act data gathering and employer mandate requirements were suspended for a year. What AB 1792 does is solve a bit of the data gathering issue to revisit the employer chargeback concept. Department of Health Care Services (DHCS) now reports to Employment Development Department (EDD) the Social Security numbers of Medi-Cal recipients. This data is then to be combined and sorted by employer. DHCS, EDD and State Department of Social Services then calculate the average cost of state and federally funded benefits provided to the employees of large employers (100+ employees). We shall reserve our best guess as to what is to be done with that data.

AB 1792 does more, however, and prohibits an employer from discharging or discriminating against individuals receiving public benefits or from refusing to hire a Medi-Cal beneficiary. We also reserve our speculation as to why the Legislature believes this is a problem to be assessed now.

Minimum Wage Liquidated Damages Enhancements AB 2074

Although the management rule is to make sure that no matter how complex your compensation systems get, you always have the state and federal minimum wage covered, the price of failure is worth noting. California has had a liquidated damage penalty for failure to pay minimum wages when due. However, in the ordinary course of things the statute of limitations on unpaid wages tends to be three years. Liquidated damages are generally treated as a penalty for statute of limitations purposes and hence subject to the one year statute of limitations. Perhaps on the theory that if it is worth punishing a mistake it is worth punishing it thoroughly, this legislation provides that the liquidated damages are available for the same three year look back period as the minimum wage failure itself.

Press 1 for Amputations—Cal-OSHA Electronic Reporting Requirement AB 326

Employers have been required to promptly notify Cal-OSHA of serious workplace injuries and deaths for quite some time. The new requirement is to immediately notify the Division of Occupational Safety and Health by e-mail or by phone in the event of a serious occupational injury or death. The management piece of this one is retaining proof in some format that you have complied.

Fix it Fast—Cal-OSHA Citation Discretion Limited AB1634

Cal-OSHA is often humorless but also not unreasonable at times when it comes to abatement and adjustment of penalties. The Legislature apparently determined there was a little too much discretion and after a citation for serious violations, the division shall not grant a proposed modification to civil penalties for abatement or credit for abatement unless the employer has:

(1) Abated the violation at the time of the initial inspection.

(2) Abated the violation at the time of a subsequent inspection prior to the issuance of a citation.

(3) Submitted a signed statement under penalty of perjury and supporting evidence, when necessary to prove abatement, in accordance with subdivision (b) of Section 6320.

Healthcare Reform Apparently Has Not Made U.S. Happier—Hospital Violence Prevention SB 1299

New Labor Code §6401.8 requires a number of hospitals to adopt workplace violence prevention plans as part of their Injury and Illness Prevention Plans by July 1, 2016.

Interns and Bullies

Unpaid interns and the concept of bullying have drawn significant attention and the legislature has responded with AB 1443 and AB 2053. AB 1443 adds a section to the FEHA prohibiting discrimination and harassment of unpaid interns, volunteers and others getting training without wage compensation. AB 2953 amends the provision of FEHA requiring mandatory supervisor training on harassment that has become so near and dear to all managers' hearts. The amendment requires training on prevention of abusive conduct which is defined as:

conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests.

> *Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious.*

Most in the private sector recognize what the statute describes as "abusive conduct" as both bad manners and extremely bad for business. There are indications in the legislative history if not the statute itself that the vision was that abusive behavior meant something other than already unlawful harassment.

The Potential End of DFEH's Electronic Case Filing System.

DFEH has proposed emergency regulations to end the electronically filed claims that were commenced when it instituted the e-filing program in 2012. The original plan was to bring the agency into the internet age and adjust to budgetary constraints on available resources to conduct case intake in fewer offices. What resulted, however, was a blunt force lesson in the doctrine of unintended consequences.

On the one extreme, the system was such that lawyers could file complaints on behalf of employees, with no declaration of truthfulness, send it in and receive a responsive right to sue letter within a matter of seconds with no human eyes ever looking at the complaint. On the other end of the spectrum any person could initiate a complaint by putting pretty much anything in the data fields, a case number would be assigned and if no right to sue letter was requested, the complaint went into a queue for eventual human processing. As there was no vetting on intake, DFEH was flooded with complaints it lacked the resources to investigate.

Greenberg Traurig's Labor & Employment Practice provides an array of workplace strategies and legal counsel, including practical and efficient consulting, technical assistance, and litigation services for domestic and international clients. The team offers a wide range of services, from initial counseling to National Labor Relations Board (NLRB) and National Mediation Board proceedings. They help employers maintain positive relations with their employees while avoiding the expense and disruption of litigation.

This *GT Alert* was prepared by **James M. Nelson** and **Jennifer Holly**. Questions about this information can be directed to:

- James M. Nelson | +1 916.442.1111 | nelsonj@gtlaw.com
- Jennifer Holly | +1 916.442.1111 | hollyj@gtlaw.com
- Or your Greenberg Traurig attorney

Albany
+1 518.689.1400

Amsterdam
+31 (0) 20 301 7300

Atlanta
+1 678.553.2100

Austin
+1 512.320.7200

Boca Raton
+1 561.955.7600

Boston
+1 617.310.6000

Chicago
+1 312.456.8400

Dallas
+1 214.665.3600

Delaware
+1 302.661.7000

Denver
+1 303.572.6500

Fort Lauderdale
+1 954.765.0500

Houston
+1 713.374.3500

Las Vegas
+1 702.792.3773

London*
+44 (0) 203 349 8700

Los Angeles
+1 310.586.7700

Mexico City+
52 (1) 55 5029 0000

Miami
+1 305.579.0500

New Jersey
+1 973.360.7900

New York
+1 212.801.9200

Northern Virginia
+1 703.749.1300

Orange County
+1 949.732.6500

Orlando
+1 407.420.1000

Philadelphia
+1 215.988.7800

Phoenix
+1 602.445.8000

Sacramento
+1 916.442.1111

San Francisco
+1 415.655.1300

Seoul∞
+82 (0) 2 369 1000

Shanghai
+86 (0) 21 6391 6633

Silicon Valley
+1 650.328.8500

Tallahassee
+1 850.222.6891

Tampa
+1 813.318.5700

Tel Aviv^
+972 (0) 3 636 6000

Warsaw~
+48 22 690 6100

Washington, D.C.
+1 202.331.3100

Westchester County
+1 914.286.2900

West Palm Beach
+1 561.650.7900