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NEW CALIFORNIA EMPLOYMENT LAWS FOR 2013

by: Laura K. Sitar

Following are new or amended California employment laws likely to be of interest to you as we head into 2013. Employers should review Employee Handbooks and Policies and Procedures manuals to assure your policies are consistent with these changes.

NEW RESTRICTIONS REGARDING REQUESTS FOR SOCIAL MEDIA ACCESS (AB 1844)

Beginning January 1, 2013 employers in California will be prohibited from requesting user names and passwords for social media sites from their employees or job applicants. Employers cannot circumvent the law by requesting that employees or applicants access social media sites in the employer's presence. Requests that employees divulge any personal social media are also prohibited which presumably encompasses requests regarding the social media content of co-workers or other "friends" on social media. Social media is broadly defined as "videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, on line services or accounts, or Internet web site profiles or locations." The law specifically prohibits any form of retaliation against an employee who refuses an employer's unlawful social media request.

Employers may continue to request that employees divulge personal social media reasonably believed to be relevant to an investigation of employee misconduct or a violation of the law as long as the information disclosed is not used for any purpose other than the investigation or a related proceeding.

Interestingly, complaints of violations are to be made to the Division of Labor Standards Enforcement, however, the Labor Commissioner is not required to investigate complaints. Further, the law fails to spell out the penalties that would or could be imposed for a violation.

CLARIFICATION OF EMPLOYEE'S RIGHTS TO INSPECT PERSONNEL FILES (AB 2674)

This law amends current Labor Code § 1198.5 to require employers to provide a current or former employee, or his or her representative, an opportunity to inspect and receive a copy of the employee's personnel file within 30 days of a written request, except during the pendency of a lawsuit filed by the employee or former employer relating to a personnel matter. The law requires that employers develop and provide a written form that employees may use to request access to and a copy of their personnel files. If the employer fails to provide inspection or copying of the requested records within the required time, the employee may recover a $750.00 penalty. The employee may also obtain injunctive relief, costs and attorneys fees. An employer is not required to comply with more than 50 such requests made by its employees in one calendar month.

The law additionally amends Labor Code § 226 which requires that employers maintain copies of wage statements for three years and produce them upon request. AB 2674 defines a "copy" of a wage statement as a duplicate of the itemized statement provided to an employee or a computer-generated record that accurately shows all of the information that existing law requires to be included in the itemized statement.

DISCRIMINATION AGAINST BREAST-FEEDING MOTHERS PROHIBITED (AB 2386)

Under the California Fair Employment and Housing Act, it is unlawful to engage in specified discriminatory practices in employment or housing accommodations on the basis of sex. Under existing law, “sex,” has been defined as including gender, pregnancy, childbirth, and medical conditions related to pregnancy or childbirth. That definition is now expanded to include breast-feeding or medical conditions related to breast-feeding.

The legislature has specifically stated this bill is declaratory of existing law making it currently in effect.

EXPANDING RELIGIOUS ACCOMMODATIONS REQUIREMENTS (AB 1964)

The California Fair Employment and Housing Act also protects the right of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of an individual's religion. Specifically, an employer or other covered entity is required to reasonably accommodate the religious belief or observance of an individual unless the accommodation would be an undue hardship on the conduct of the business of the employer or other entity.

This law specifically adds "religious dress practices" and "religious grooming practices" as beliefs or observances covered by the protections against religious discrimination, and would specify that an accommodation of an individual’s religious dress practice or religious grooming practice that would require that person to be segregated from the public or other employees is not a reasonable accommodation. Religious clothing should be broadly construed 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 creed." Religious grooming practice is to be similarly broadly construed 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."

NON-EXEMPT SALARIED EMPLOYEES MUST RECEIVE OVERTIME (AB 2103)

With AB 2103 the legislature has clarified that regardless of any agreement between an employee and an employer, a salaried, non-exempt employee must be paid for each overtime hour worked at a rate that is at least 1.5 times the weekly salary divided by no more than 40. When such employees work more than eight hours in one day or 40 hours in one week, they are entitled to overtime.

Last year in Arechiga v. Dolores Press, Inc., 192 Cal. App. 4th 567 (2011), a California court of appeal upheld an explicit written mutual wage agreement that predetermined a nonexempt employee's overtime compensation and included it as part of the employee's salary. The Arechiga

court concluded that Labor Code § 515 did not specifically invalidate such agreements. This new law overrules the decision in Arechiga. To calculate the appropriate overtime rate, employers must follow Labor Code § 515(d), which states that, "[f]or the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee's regular hourly rate shall be 1/40th of the employee's weekly salary."

About the Author:
A shareholder at Wroten & Associates, Laura Sitar defends medical malpractice, employment, and elder abuse cases. She litigates cases on behalf of doctors, dentists and long-term care facilities involving all types of employment actions including sexual harassment, wrongful termination, retaliation and wage and hour claims. She also provides employment related risk management services to help clients avoid litigation. Ms. Sitar became an attorney after a 15-year career in corporate management where she directed the human resource function of a 2000 employee, $100 million region. Since commencing a second career in law 10 years ago, she was a senior associate with a prestigious healthcare defense firm before joining Wroten & Associates, where she is a shareholder.

Ms. Sitar graduated cum laude from Tufts University, in Boston Massachusetts in 1979. She attended Western State University, College of Law, were she graduated summa cum laude and valedictorian of her class in 1998. While at Western State she clerked for Justice William Rylaarsdam on the California Court of Appeals and successfully argued a sexual harassment and retaliation claim before the Ninth Circuit Court of Appeals. She was a recipient of the 1998 Fellowship of the American Board of Trial Advocates. Ms. Sitar has been a member of the California State Bar since 1998 and is admitted to practice in the U.S. District Court for the Central District of California.

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