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More Than Mandatory Paid Sick Leave: 21 New California Laws Will Affect Employers With Operations in the State

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Though the new paid sick leave law has received the most media coverage, the California legislative term that just ended has produced another bevy of new employment-related laws. The California legislature enacted and Governor Jerry Brown has signed 21 new laws that impose additional burdens on employers and continue the trend of expanding employee rights that has existed for several years. Except where otherwise specified in this alert, all of the new laws take effect on January 1, 2015.

Employee Leaves

AB 1522 (Mandatory Paid Sick Leave)

Known as the Healthy Workplaces, Healthy Families Act of 2014, AB 1522 entitles most California employees to employer-provided paid sick leave. The HWHFA does not become effective until July 1, 2015. However, California employers should begin addressing difficult decisions regarding how to comply with the new law's assorted accrual, use, notice and record-keeping requirements now.

The definitions of covered employers and employees are broad. An "employer" is any "person employing another under any appointment or contract of hire." There is no exclusion for small employers or non-profit corporations. An "employee" is defined by exclusion as every employee of an employer, except those who fit one of a handful of exceptions -- for example, those covered by collective bargaining agreements that satisfy specified conditions. Thus, absent an exception, the law applies to both exempt and non-exempt employees, whether full-time, part-time, or temporary, who work in California for 30 or more days within a year from the commencement of employment.

There is no blanket exemption from the coverage of the HWHFA for employers that already provide at least three days of paid sick leave per year. They still must meet the remaining requirements of the new law, including those pertaining to the permissible purposes for such leave, the conditions for its use, and notice and record-keeping.

There are two methods for earning paid sick days under the HWHFA: the accrual method and the lump-sum method. Under the accrual method, an employee accrues paid sick days at a rate of one hour for every 30 hours worked, beginning at the commencement of employment. Accrued sick days carry over to the following year of employment. However, employers may bar use until the employee completes 90 days of employment, and may limit an employee's use of accrual sick leave to three

days or 24 hours in each year of employment, and may cap an employee's total accrual of paid sick days to six days or 48 hours. In the alternative, employers may provide three days of paid sick leave in a lump sum at the beginning of each year to employees. Under this method, sick days do not accrue during the year and there is no carryover of sick days from year to year. Under either method, an employer is not required to provide compensation to an employee for any accrued, but unused paid sick days upon separation from employment.

There also are special rules regarding the use of accrued paid sick days. Employees may use accrued paid sick days for their own health needs, or for the health needs of a broad class of family members. Victims of domestic violence may also use accrued paid sick days for certain legal matters. Employees are free to determine how much paid sick leave he or she needs to use, subject to an employer-set minimum increment, not to exceed two hours. Employers may not require employees to search for or find a replacement worker to cover a permitted use.

Calculation of the rate at which employers must pay for paid sick leave is subject to special rules. If an employee receives a single hourly rate of pay, the rate of pay for leave time is the hourly wage. However, if in the 90 days preceding the sick leave, an employee had different hourly pay rates, was paid by commission, or was a nonexempt salaried employee, the rate of pay is calculated "by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment."

Employers must notify employees of their rights to paid sick leave by two means: (1) posted notice; and (2) an additional clause in time-of-hire Wage Theft Prevention Act notice. In addition, employers must provide each employee with written notice at the time of each payment of wages showing "the amount of paid sick leave available, or paid time off leave an employer provides in lieu of sick leave." Such "payday" notice may be included in an employee's wage statement or in a separate, simultaneous writing. Finally, employers must keep, for at least three years, records documenting (i) the hours worked, (ii) the paid sick days accrued, and (iii) the paid sick days used by each employee. These records are subject to review by the Labor Commissioner, as well as the employee upon request.

The HWHFA is enforced by a combination of the Labor Commissioner, the Attorney General, and civil actions under the California Private Attorneys General Act (PAGA). For every paid sick day unlawfully withheld, treble damages are available up to a maximum of $250, not to exceed an aggregate penalty of $4,000. Other penalties apply to violation of HWHFA notice obligations. PAGA actions are permitted, but recoveries exclude PAGA penalties and are limited to restitution, equitable or injunctive relief, and reasonable attorney's fees and costs.

AB 2536 (Expansion of Emergency Rescue Personnel Leave)

California Labor Code section 230.3 prohibits an employer from discharging or in any manner discriminating against an employee for taking time off to perform emergency duty as a volunteer firefighter, reserve peace officer, or emergency rescue person. AB 2536 expands the definition of "emergency rescue personnel" to include an officer, employee, or member of a disaster medical response entity sponsored or requested by the state. The new law also requires an employee who is a health care provider to notify his or her employer at the time the employee becomes designated as "emergency rescue personnel" and when the employee is notified that he or she will be deployed as a result of that designation. For purposes of the law, a "health care provider" means any person licensed

or certified pursuant to the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act.

Discrimination, Harassment and Retaliation

AB 2053 (Mandatory Abusive Conduct Prevention Training)

The California Fair Employment and Housing Act (FEHA) currently requires employers with 50 or more employees to provide at least two hours of sexual harassment prevention training every two years for supervisors in California. AB 2053 amends the FEHA to require that this training include the prevention of "abusive conduct."

The new law defines "abusive conduct" 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." AB 2053 provides that "abusive conduct" includes "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 can constitute abusive conduct, if it is "especially severe and egregious."

Interestingly, AB 2053 does *not* amend FEHA to make "abusive conduct" a prohibited employment action. No doubt the legislature will take that up in a future term.

AB 1443 (Expansion of Harassment Prohibition to Unpaid Interns and Volunteers)

The FEHA prohibits discrimination against employees and trainees based on several specified characteristics, including race, national origin, gender, age, disability and religion. AB 1443 expands the protections under the FEHA to the "selection, termination, training, or other treatment" of unpaid interns and individuals in a limited duration program providing unpaid work experience. The new law also prohibits harassment of unpaid interns and *volunteers* based on any characteristic protected by the FEHA. AB 1443 likewise extends the obligation to accommodate bona fide religious beliefs to unpaid interns and individuals in any other program that provides unpaid work experience.

AB 1660 (Expansion of Prohibition Against National Origin Discrimination)

Vehicle Code section 12801.9 authorizes the Department of Motor Vehicles to issue a driver's license to a person who is unable to submit satisfactory proof of authorization to be in the United States under federal law.

AB 1660 amends section 12926 of the FEHA, adding a definition of "national origin discrimination" and providing that the term includes, but is not limited to, discrimination on the basis of possessing a driver's license issued under Vehicle Code section 12801.9.

The new law provides, however, that an employer does not violate California law by taking action required by the federal Immigration and Nationality Act. Accordingly, AB 1660 does not affect an employer's obligation to obtain information required under federal law to determine identity and legal authorization to work in the United States.

AB 1660 also amends Section 12801.9 of the Vehicle Code to provide that driver's license information obtained by an employer (1) shall be treated as "private and confidential," (2) shall not be disclosed to any unauthorized person, and (3) may only be used by the employer to establish identity and authorization to drive.

AB 1650 (Prohibition Against Requesting Criminal Conviction Information for Certain Jobs)

Following the trend in some California cities and other states, the legislature has opened the door to a "ban-the-box" law, prohibiting employers from inquiring into an applicant's criminal conviction history. Known as the "Fair Chance Employment Act," AB 1650 prohibits contractors who submit a bid to the state for a job involving on-site construction-related services from asking an applicant for an on-site construction-related job to disclose orally or in writing any information about the applicant's criminal conviction history. The law provides an exception for workers obtained through a union hiring hall pursuant to a collective bargaining agreement, allowing an employer with such a union relationship to obtain criminal conviction history with respect to workers dispatched from the union hiring hall.

AB 2751 (Expansion of Remedies for Retaliation Against Suspected Undocumented Workers)

Last year the legislature enacted Labor Code sections 1019 and 1024.6, prohibiting discrimination and retaliation against employees suspected of being undocumented. AB 2751 expands the protection for these workers, and clarifies last year's law by:

- providing that the $10,000 civil penalty available under Section 98.6 is to be awarded to the *employee*, not the state;
- clarifying that the prohibition against discrimination or retaliation for updating personal information is limited to updates or attempts to update personal information "based on a lawful change of name, social security number, or federal employment authorization;"
- prohibiting any threat to file or filing a false report or complaint with *any* state or federal government agency about an employee who is suspected to be undocumented; and
- clarifying that the remedy of business license suspension under Labor Code section 1019 is limited "to the business location or locations where the unfair immigration-related practice occurred."

AB 1792 (Prohibition of Discrimination Against Employees Receiving Public Assistance)

Proclaiming that "when low wages and a lack of benefits leave workers unable to make ends meet, they turn to public assistance programs from health care, food, and other basic necessities, [and that] [e]mployers that pay low wages and offer no benefits shift the costs of doing business onto taxpayers," the legislature enacted AB 1792, requiring the Employment Development Department (EDD) and Department of Finance (DOF) to collaborate with other specified state agencies to develop and publish a list of California's top 500 employers with the largest number of employees enrolled in a public assistance program. "Employer" is defined in the law to mean an individual or organization that employs 100 or more individuals who are receiving public assistance.

The EDD's report must include the average cost of benefits provided to the employer's workers, and the average CalFresh benefit provided to those households.

AB 1792 also creates Government Code section 13084, prohibiting employers from (1) discharging, or in any matter discriminating or retaliating against an employee who enrolls in a public assistance program; (2) refusing to hire a person because he or she is enrolled in a public assistance program;

and (3) disclosing to any person or entity that an employee receives or is applying for public benefits, unless otherwise permitted by state or federal law to do so.

New Government Code section 13084 has a sunset provision, *i.e.*, the law will expire by its terms on January 1, 2020, unless it is extended or made permanent before then.

Wage and Hour

SB 1360 (Prohibiting Wage Deduction for Heat-Illness Prevention Recovery Periods)

Labor Code section 226.7 was amended last year to provide a monetary penalty for failing to provide an employee in a covered industry with required heat-illness prevention recovery periods. SB 1360 further amends Section 226.7 to provide that such recovery periods must be paid breaks, and counted as working time for overtime pay calculation purposes.

AB 1723 (Expansion of Methods for Imposing Waiting-Time Penalties)

Currently there are three methods for recovering unpaid minimum wages: (1) through an administrative hearing with the Labor Commissioner initiated by a complaint from an employee; (2) through a civil action by the employee; and (3) through a citation issued by the Labor Commissioner after investigation of an employer. Waiting-time penalties under Labor Code section 203 may only be recovered as part of an administrative hearing or civil action. AB 1723 amends Section 203, authorizing the Labor Commissioner to impose waiting-time penalties as part of its citation process. However, an employer can request an administrative hearing to contest the citation and/or proposed assessment of waiting-time penalties.

AB 2074 (Statute of Limitations for Liquidated Damages Claim)

Labor Code section 1194.2 currently authorizes a claim for "liquidated damages" (an amount equal to the alleged unpaid wages) in connection with an employer's failure to pay the minimum wage. However, courts have reached different conclusions as to the statute of limitations that applies to such a claim. AB 2074 amends Section 1194.2 to provide that a claim for liquidated damages may be filed at any time prior to the expiration of the statute of limitations that applies to the underlying action for unpaid wages.

AB 2743 (Waiting-Time Penalties for Theatrical and Concert Event Venue Employees)

Labor Code section 201 requires a discharged employee to be paid his or her final wages at the time of discharge. However, Labor Code section 201.9 authorizes a theatrical or concert event venue employer to agree to a different time for payment of final wages for its employees covered by a collective bargaining agreement. Labor Code section 203 provides a monetary penalty for late payment of wages, but this waiting-time penalty does not currently apply to wages paid late to a theatrical or concert event venue employee. AB 2743 extends the waiting-time penalty to such employees.

AB 2288 (Expansion of Remedies for Child Labor Law Violations)

AB 2288 creates the Child Labor Protection Act, codified at Labor Code section 1311.5. The law increases civil penalties to $25,000-$50,000 for Class "A" violations of the Labor Code (specified in Section 1288) involving a minor age 12 or younger. AB 2288 also authorizes treble damages to be awarded to an employee who is discriminated or retaliated against because he or she filed a claim alleging a child labor violation.

The law tolls the statute of limitations for claims related to the employment of minors until the individual reaches 18 years of age, and applies retroactively.

Use of Contractors

AB 1897 (Imposition of Joint Employer Liability for Wage and Hour Violations of Labor Provider)

AB 1897 creates Labor Code section 2810.3. Under the new law, if a labor provider, *e.g.*, a temporary staffing firm, fails to pay all required wages or fails to secure valid workers' compensation coverage, the company for whom the workers are providing services "shall share with the labor contractor all civil legal responsibility and civil liability for all workers supplied" to the company.

AB 1897 exempts from its coverage: (1) employers with a workforce of less than 25 workers, (2) business entities with five or fewer workers provided by labor contractors at any given time, (3) the state or any political subdivision of the state, (4) motor carriers of property, (5) motor club services, (6) cable providers, (7) telephone corporations, (8) motion picture payroll services, (9) union hiring halls, and (10) non-profit community organizations.

A "labor contractor" is defined as an individual or entity that, either with or without a contract, supplies a company with workers to perform labor within the company's usual course of business. It does not include (1) a bona fide non-profit, community-based organization that provides services to workers, (2) a bona fide labor organization or apprenticeship program, (3) a motion picture payroll services company, or (4) a third-party who is a party to certain employee leasing arrangements, if the employee leasing arrangement contractually obligates the company using the workers to assume all of the civil legal responsibility and liability that exists under the new law.

AB 1897 does **not** impose shared liability on a company that uses an independent contractor that does not fall within the definition of "labor contractor."

The law does not apply when the workers provided are exempt from the payment of overtime compensation.

Before filing a civil action against the labor contractor's customer, a worker or his or her representative must provide 30 days' notice to the customer of the alleged violations. The new law prohibits the customer from taking any adverse action against a worker who has provided notification of violations or filed a claim or civil action.

AB 1897 specifically prohibits any attempt to contract around the law's requirements. However, it does not prohibit a company from contracting for indemnification by the labor contractor for its failure to pay required wages or secure valid workers' compensation coverage.

SB 477 (Requirements for Use of Foreign Labor Contractors)

The California Business and Professions Code regulates the use of foreign labor contractors who recruit foreign workers for assignments in California. SB 477 redefines "foreign labor contracting activity" to mean recruiting or soliciting for compensation a foreign worker who resides outside of the United States in furtherance of that worker's employment in California. "Foreign labor contracting activity" does *not* include activities of an employer if those activities are solely to find workers for the employer's own use. "Foreign labor contractor" is defined as any person or entity that performs foreign labor contracting activity.

The new law requires foreign labor contractors to register with the Labor Commissioner by July 1, 2016, and pay a registration fee set by the Department of Industrial Relations to support the ongoing costs of the program. The contractor also must post a surety bond between $25,000 and $150,000, based on the contractor's annual gross receipts.

Employers, including those based outside of California, are prohibited from using any foreign labor contractor to supply workers in California, unless the contractor is registered with the California Labor Commissioner.

SB 477 provides a civil action and monetary penalties for violations.

Civil Rights

AB 2617 (Prohibition of Pre-Dispute Agreement to Arbitrate or to Waive Certain Civil Rights Claims)

Civil Code sections 51, 51.5, 51.6, 51.7 and 51.9 prohibit among other things, discrimination and harassment in connection with providing and receiving goods and services in California based on specified characteristics, including sex, race, color, religion, ancestry, national origin, disability, or medical condition, or because another person perceives the person to have one or more of those characteristics.

AB 2617 amends Civil Code sections 51.7, 52, and 52.1 to prohibit businesses from requiring an individual to agree to arbitrate or waive the right to file a claim for alleged violation of these civil rights statutes as a condition of being able to provide, receive or enter into a contract for goods or services. A *post-dispute* agreement to arbitrate or to waive a claim is not prohibited.

AB 2617 requires that any agreement to arbitrate or to waive a legal right under Civil Code sections 51.7, 52, or 52.1 must be knowing and voluntary, in writing, and expressly not made as a condition of entering into a contract for goods or services, or as a condition of providing or receiving goods and services. Any waiver that is required as a condition of entering into a contract for goods or services is rendered involuntary and unenforceable by the law.

AB 2617 places the burden of proving that the arbitration agreement or waiver was entered into knowingly and voluntarily and not made as a condition of the contract on the person attempting to enforce the arbitration agreement or waiver.

The new law applies to all contracts for goods or services entered into, modified, or extended on or after January 1, 2015.

AB 2634 (Expansion of Remedies for Civil Rights Violations)

Civil Code section 52.1 provides individual remedies for alleged violations of civil rights, including a civil action for damages and injunctive relief to stop the violation. AB 2634 expands the relief available to include equitable and declaratory relief to eliminate a *pattern or practice* of interference, or attempts to interfere, with civil rights by an individual or company.

Health Care Coverage

SB 1034 (Health Care Coverage Eligibility Provisions)

SB 1034 repeals language in the Health and Safety Code that provides a different insurance waiting period from the up to 90-day period authorized under the federal Patient Protection and Affordable

Care Act. The law also makes other conforming changes, including requiring the employer to notify an employee of the consequences of failing to enroll for coverage during an open enrollment period.

Workplace Safety

AB 1634 (Stiffer Penalties for Employers Who Fail to Abate Workplace Safety Hazards)

AB 1634 prohibits the California Division of Occupational Safety and Health (DOSH) from granting modification to civil penalties for abatement or credit for serious violations of Cal-OSHA unless the employer has done one or more of the following:

- abated the violation at the time of the initial inspection; or
- abated the violation at the time of a subsequent inspection prior to the issuance of a citations; or
- within ten working days after the date fixed for abatement, submitted a signed statement under penalty of perjury and supporting evidence showing that the violation has been abated.

The submission of a signed abatement statement does not constitute admission of a violation during the appeal of a citation.

If the employer fails to provide the DOSH with evidence of abatement or the signed statement within ten working days after the end of the abatement period, the DOSH will notify the employer that an additional civil penalty for failure to abate will be assessed retroactively. The additional civil penalty will not be assessed if the employer can provide sufficient evidence that the violation was abated prior to that date. If the DOSH does not receive evidence of abatement, it will conduct a reinspection within 45 days after the end of the abatement period.

AB 1634 also provides that the filing of a petition for reconsideration of a final order or decision that classifies a citation as serious, repeat serious, or willful serious will not stay or suspend the requirement to abate the hazard. The employer must request a stay or suspension of abatement by filing a written, verified petition with supporting declarations within ten days after the issuance of the order or decision.

AB 326 (Email Submission of Reportable Workplace Safety Incidents)

Current law requires an employer to immediately report a work-related serious injury, illness, or death to the DOSH by telephone or *telegraph*. AB 326 amends Labor Code section 6409.1 to remove the reference to telegraph, and allow reports to be made by email.

Civil Litigation

AB 2494 (Resurrection of Monetary Sanctions for Frivolous Litigation Tactics)

AB 2494 revives Section 128.5 of the Civil Procedure Code and provides judges and arbitrators with the authority to award monetary sanctions when litigants employ bad-faith litigation tactics that are frivolous or solely intended to cause unnecessary delay.

“Actions or tactics” are defined as the making or opposing of motions, or the filing and service of a complaint, cross-complaint, answer, or other responsive pleading. “Frivolous” is defined as meaning totally and completely without merit or for the sole purpose of harassing an opposing party. Monetary

sanctions under this law are not available in connection with discovery requests, responses, objections, and motions.

The new law has a sunset provision, providing that it will remain in effect only until January 1, 2018, unless a later enacted statute deletes or extends that end date.

What Should Employers Do?

California-based employers and out-of-state-employers with employees in California should immediately review their policies, procedures and practices to ensure compliance with the new laws. If you have any questions concerning these developing issues, we encourage you to contact the Paul Hastings lawyer with whom you work or one of the lawyers listed below to discuss these developments.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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