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"SENSE AND SENSIBILITY": LEGISLATIVE AMENDMENTS TO THE CALIFORNIA LABOR CODE'S PRIVATE ATTORNEYS GENERAL ACT

by David J. Murphy and Stephanie L. Fong

The California Legislature, in a burst of "common sense" in its treatment of employers, has amended California's "bounty hunter" law to eliminate some of its more onerous provisions. These amendments, known as Senate Bill 1809, revise and amend the Labor Code's Private Attorneys General Act (Labor Code § 2699) ("Act"), which has been making headlines again as a key issue in California's budget standoff. The Legislature struck a compromise and agreed to make major revisions to the Act in order to clear the way for the budget. Governor Schwarzenegger has indicated his support for the bill, and is expected to sign it into law in the very near future.

In our November 2003 *Employment Law Commentary,* we reported about the potentially severe consequences of Labor Code section 2699 for employers, including its potential for serious abuse. The Act essentially "deputized" employees to sue their employer for any alleged violation of the Labor Code. It allows employees to pursue penalties that in the past were only available through the Labor Commissioner, and created statutory penalties for other labor code sections that previously did not have any penalties attached to them. The Act essentially provided an employee with a "free ticket" into court: an employee could bring a civil suit, including a class action, bypass all administrative requirements, base the claim on minor technical violations, and impose substantial liability upon an employer. If an employee prevailed, the employee was entitled to 25% of any penalties recovered, and awarded attorneys' fees and costs.

SB 1809 will help to eliminate some of the frivolous lawsuits, and improves regulation of employees' claims. Although SB 1809 should help curb some of the lawsuit abuse of the Act, an employer must remain vigilant because the Act still allows an employee to sue on many Labor Code provisions and recover penalties and attorneys' fees. In short, while these amendments surely make "sense," this Act still lacks any "sensibility" for employers. Knowing this law and its provisions therefore remains important for every employer.

Key Changes Made by Senate Bill 1809 to the Private Attorneys General Act

Posting, Filing, And Reporting Requirements Are Eliminated As A Lawsuit Basis Except For Mandatory Payroll Or Workplace Injury Reporting Requirements.

SB 1809 amends the Act to prohibit employees from filing claims based on posting, filing, or reporting requirements, with only two exceptions. Those exceptions are for the filing or reporting requirements involving mandatory payroll and workplace injury reporting.[1] This change remedies a main

criticism of the Act: it allowed for lawsuits based on technical labor law violations. However, an employer is still subject to private causes of action by employees for any other Labor Code violations, including wage and hour, occupational safety and health, employee classification, drug and alcohol rehabilitation, layoffs, and public works violations.

The Requirement For Employers To File Their Employment Applications With The Labor Commissioner Not Only Cannot Be The Basis For A Lawsuit, But Is Eliminated Completely As A Requirement.

Currently, section 431 requires an employer to file with the Division of Labor Standards Enforcement ("DLSE") a copy of any application for employment that the employer has an applicant sign.[2] SB 1809 repeals section 431, eliminating it as grounds for a possible lawsuit under the Act because it was a requirement that few employers ever complied with and that the DLSE never enforced.[3]

The Amendments Redistribute The Penalties To Focus More On Education And Enforcement.

As discussed in our November 2003 *Employment Law Commentary*, an employee will still receive up to 25% of any penalties imposed on the employer. SB 1809 redistributes the rest of the penalties so that now the other 75% is distributed solely to the Labor and Workforce Development Agency ("LWDA") (an umbrella agency over the Division of Labor Standards Enforcement) for purposes of enforcement and education.[4]

The Amendments Require Court Review And Approval Of All Settlements And Give Courts Discretion To Reduce Penalties.

This new statute provides that a court must review and approve all settlements with a section 2699 cause of action, and gives the court the discretion to reduce the statutory penalties.[5] The court's involvement in settlement agreements should blunt some of the fears that claims under the Act would be used to leverage easier and higher settlement agreements from employers. Also, the courts are now given discretion to reduce what were once open-ended and mandatory penalties.[6] A limit, however, is that the court can only exercise this discretion if the facts and circumstances of the case result in the award being "unjust, arbitrary and oppressive, or confiscatory."[7] This is a high standard to meet, so an employer must still be aware that the potential for extremely high civil penalties remains.

The Amendments Set Up New Notice And Administrative Filing Requirements As A Precondition To A Lawsuit Being Filed.

Previously, an employee filing a section 2699 claim did not have to provide advance notice to the employer or fulfill any administrative requirements before filing a suit. SB 1809 adds a new section 2699.3 of the Labor Code, which requires an employee and employer to follow specific procedures before the employee can commence a section 2699 lawsuit.[8] An aggrieved employee must give written notice by certified mail to the LWDA and the employer of the specific allegation, including the supporting facts and theories.[9] If the agency decides to investigate, it will notify the employer and employee within 33 days and complete the investigation and issue a citation if appropriate within 120 days.[10] If a citation is issued, the employer has fourteen days to cure the violation, or the employee can commence the lawsuit.[11] If the agency fails to provide timely notice, or decides not to issue a citation, the employee can still sue under section 2699.[12]

While the specific procedures for the employer and employee should provide employers with a chance to cure a violation before a lawsuit, these procedural guidelines do not dramatically improve employers' protection from section 2699 claims. One of the initial reasons for the passage of section 2699 was that the LWDA was unable to effectively enforce the Labor Code and was only able to investigate a small percentage of claims. The LWDA currently only investigates and cites a small percentage of the claims brought to its attention. Thus, after the initial notification letter to the LWDA by the

employee and the failure of the LWDA to investigate or cite the employer, the employee can still bring a private cause of action. Beyond initially notifying the employer, unless the LWDA actually investigates and cites the employer, the employee can still bring a private cause of action.

The Amendments Bar A Lawsuit If The Labor Commissioner Or Cal/OSHA Cites An Employer And The Employer Cures And Abates.

If an employee follows the procedures described above, and the employer is cited within the timeframe, as long as the employer cures or abates the violation within fourteen days, employees are barred from bringing a lawsuit based on the violation.[13]

SB 1809 Will Apply Immediately And Retroactively.

Since January 1, 2004, over 65 lawsuits have been filed claiming penalties under Labor Code 2699.[14] The statute clearly states that SB 1809 is to be applied immediately. The provisions eliminating claims for posting, notice, reporting, and filing issues will apply retroactively in order to prevent and cure any frivolous lawsuits to which these terms apply that have been filed since January 1, 2004. In addition, the provision giving courts discretion to reduce penalties also will apply retroactively for all claims filed since the Act's inception[15]

Practical Advice to Address The Act and Its Amendments in SB 1809

- Employers should consider converting employees on a weekly payroll to semi-monthly to reduce the number of pay periods used to compute liability.

- Employers should update their employee handbook annually to comply with all provisions of the Labor Code as of January 1, 2004. In order to ensure compliance, employers should also consider consulting their counsel to make sure no statement contravenes laws or regulations that would allow a basis for a legal action.

- Employers should audit their employment practices and policies to ensure compliance with all provisions of the Labor Code (including Cal/OSHA).

- Managers, supervisors, and other decision makers should be trained on existing and new laws.

- Employers should maintain good records since an employer has the burden of proof to show compliance, especially relating to wage and hour issues.

Employers should update their employee handbook annually to comply with all provisions of the Labor Code as of January 1, 2004

- Employers should provide an employee complaint procedure that encourages employees to bring possible Labor Code violations to the employer's attention to minimize liability. While good faith is not an explicit defense, the ability to show an employer's actions attempting to comply with the Labor Code still may be considered as a factor to minimize the extent of liability. The complaint procedure should be included as part of the employee handbook.

Concluding Thoughts on SB 1809

The Private Attorneys General Act will have a significant impact on California employers. SB 1809 does decrease the number of technical violations possible under the Act. It also grants the court discretion to determine the statutory penalties and improves regulation of employees' claims by the LWDA's administrative scheme to help eliminate frivolous lawsuits. However, it fails to eliminate one of the most troubling provisions that will continue to encourage filings: prevailing plaintiffs are awarded a share of the penalties,

attorneys' fees, and costs, and employers are awarded nothing for successfully defended cases. Since SB 1809 amends several provisions of the Act and improves it in favor of the employer, at least some "sensibility" is restored. However, this unfortunately does not change the fact that Labor Code section 2699 has created an entirely new area of potential liability for employers. Accordingly, employers must remain proactive and take steps to continually review and ensure their compliance with the Labor Code. ■

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[1] SB 1809, § 3(f)(2) (as of July 27, 2004).

[2] Cal. Labor Code § 431.

[3] SB 1809, § 2 (as of July 27, 2004).

[4] SB 1809, § 3(i)(as of July 27, 2004) (Previously, 50% of the penalties were distributed to the General Fund and only 25% distributed to the LWDA).

[5] SB 1809, § 3(l) (as of July 27, 2004).

[6] SB 1809, § 3(e)(2) (as of July 27, 2004).

[7] SB 1809, § 3(e)(2) (as of July 27, 2004).

[8] SB 1809, § 4 (as of July 27, 2004).

[9] SB 1809, § 4(1) (as of July 27, 2004).

[10] SB 1809, § 4(2)(B) (as of July 27, 2004).

[11] SB 1809, § 4(2)(A)(i) (as of July 27, 2004).

[12] SB 1809, § 4(2)(A)(ii) (as of July 27, 2004).

[13] SB 1809, § 3(h) (as of July 27, 2004).

[14] Erika Frank, Chamber President Applauds Agreement for Major Overhaul of "Sue Your Boss" Law, available at http://www.calchamber.com/headlines/index.cfm (July 27, 2004).

[15] SB 1809, § 6(b)(1) & (2) (as of July 27, 2004).

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