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Sidebar: UK: Second Challenge to Employment Tribunal Fees

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CALIFORNIA LEGISLATIVE UPDATE

By Colette Coles

Welcome back to our annual review of new laws that may impact California employers! This year's highlights include California's new paid sick leave law, additions to sexual harassment training for "abusive conduct," an extension of the Fair Employment and Housing Act's protections to unpaid interns and volunteers, and liability for businesses that use contract workers. All newly-enacted laws are effective January 1, 2015 unless otherwise stated.

continued on page 2

MORRISON FOERSTER

Bills Signed into Law

AB 1522 – California's Paid Sick Leave Law.

By Ian Johnston

AB 1522 requires employers to provide paid sick leave to employees who work 30 or more days in a year. It covers all employees with limited exceptions, such as certain home health workers and those covered by collective bargaining agreements. Accrual begins 30 days after the start of employment, at which point employees will earn one hour of paid leave for every 30 hours worked. The law requires accrual until employees have 48 hours banked, which carry over from year to year. Employers may limit usage to 24 hours per year. Sick days are not "cashed out" when employees leave the job, although if an employee leaves and rejoins an employer within 12 months, the employee gets his banked time back. The law requires employers to show on pay stubs how many hours of sick leave are available to each employee, and to post a notice poster (to be prepared by the Labor Commissioner) informing employees of their rights under the law. The law will take effect on July 1, 2015, with accrual for employees beginning on July 31, 2015. AB 1522 is similar to San Francisco's paid sick leave law, although San Francisco's law provides for higher accrual caps.

AB 2053 – Training on "Abusive Conduct" to Be Added to Sexual Harassment Training.

Under existing law, employers of 50 or more employees are required to provide at least two hours of classroom or other interactive sexual harassment training to supervisors.[1] As a reminder, new supervisors must receive the training within six months of being promoted into a supervisory role, and all supervisors must receive the training every two years. The definition of "supervisor" is broad, and essentially includes any individual who has authority over other employees.[2] Training content currently must include information on federal and state law on sexual harassment prevention and remedies available for victims, as well as practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation. AB 2053 adds a new topic to the training: prevention of abusive conduct. Abusive conduct is defined as workplace conduct, with malice, that is hostile, offensive, and unrelated to an employer's legitimate business interests. The proponents of the bill hope that additional training and education on abusive conduct will decrease workplace bullying. So, dust off your sexual harassment training slides and add a few on abusive conduct. But, keep in mind that unless abusive conduct is directed at an employee because of a protected characteristic, abusive conduct likely does not violate California law.

AB 1443 – Extending FEHA's Protections to Unpaid Interns and Volunteers.

Existing law prohibits discrimination and harassment against job applicants, employees and specified contractors on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. This new law extends protection from discrimination and harassment to unpaid interns and volunteers. It also extends religious belief discrimination protection and accommodation requirements to unpaid interns and volunteers. The bill's proponents contended that these types of protections for unpaid interns are necessary given the greater role interns are playing in the modern workplace. Indeed, the recent spate of class action lawsuits against publishing and entertainment companies regarding their internship programs shows how common such programs have become—and how important it is to ensure that your unpaid interns are correctly classified.

AB 1897 – Contracting Entity Liability.

This new law creates joint liability for businesses that obtain or are provided workers in the usual course of their business from a labor contractor. The law imposes liability on companies for their labor contractors' failure to pay all required wages or secure valid workers' compensation coverage for contract workers. In bringing a lawsuit against a company, there is no need for the contractor's employee to show that the company controlled his working conditions or wages. Thus, businesses that contract for workers should ensure that their labor contractors are following California wage and workers' compensation laws. These businesses should also consider including indemnification provisions in contracts with labor contractors.

AB 2288 – Child Labor Protection Act of 2014.

AB 2288 strengthens current laws prohibiting child labor. First, the new law declares that the statute of limitations is tolled for child labor claims until the minor reaches the age of majority. Second, it permits an individual who is discriminated or retaliated against because the individual filed a claim for violation of child labor laws to seek treble damages. Third, it increases the civil penalties for a class of violations relating to the employment of minors 12 and under.

continued on page 3

UK: Second Challenge to Employment Tribunal Fees

By Caroline Stakim

Since July 2013, employees in the UK who wish to bring a statutory employment law claim (such as unfair dismissal, unlawful deduction from wages, or discrimination) against their employer have had to pay a fee. As well as discouraging litigation, the government's justification for this was to lessen the burden on taxpayers by having users of the tribunal service contribute toward its running costs.

Not everyone agreed. The trade union, UNISON, immediately challenged the new rules. With fees of either £160 or £250 (depending on the type of claim) being payable in order to issue a claim, and an additional £230 or £950 to secure a hearing on the merits, UNISON argued that a barrier to justice would be created and that the requirement to pay a fee would indirectly discriminate against women (as women typically earn less than men). UNISON's judicial review proceedings, however, were unsuccessful, primarily because the hearing was held very shortly after the new rules took effect and the High Court considered it too early to be able to assess the full impact they would have.

Fast forward a year. The Ministry of Justice's quarterly published statistics have continued to show a significant decrease in the number of claims being brought against employers in the employment tribunals. For example, in the quarterly figures for April to June 2014, there was an 81% drop in the number of claims lodged compared to the same period for 2013 (before the fees applied).

Armed with this new evidence, UNISON's second judicial review proceedings have been brought before the High Court this month. Although it is thought that these second proceedings have a greater chance of success, the ruling, expected by the end of this year, is unlikely to put the matter to bed. Even with success, whether or not the fee regime will be scrapped altogether, or whether the level of fees charged will instead be reduced, is yet to be seen. Watch this space for updates.

AB 2743 – Waiting Time Penalties for Unionized Employees of Concert Halls and Theatres.

Generally, all wages due must be paid to an employee at the time the employee is discharged, or within 72 hours of when an employee quits—unless the employee has given at least 72 hours-notice of his or her intention to quit, in which case the wages are likewise due at the time of termination.[3] Failure to pay all wages due in these time frames to an employee who is discharged or who quits may subject the employer to waiting time penalties. In recognition of the fact that the nature of some businesses makes these time limits impractical, there are exceptions to these general rules for employees in certain industries, including: employees engaged in curing, caning, or drying of perishable fruit, fish, or vegetables; temporary employees; employees engaged in the production or broadcasting of motion pictures; oil drillers, and unionized employees of concert halls and theatres.[4] Under current law, waiting time penalties could be applied for failure to pay terminated employees in any of the above industries in the required time frames—except for unionized employees of concert halls and theatres. This bill remedies this, and allows unionized employees of concert halls and theatres to sue for waiting time penalties if not paid within the required time limits when laid off or discharged.

AB 2074 – Statute of Limitations Extended for Liquidated Damages in Minimum Wage Cases.

Under existing law, in actions alleging failure to pay California minimum wages, which have a three-year statute of limitations, employees may seek liquidated damages equal to the amount of unpaid wages plus interest.[5] A California court recently determined that notwithstanding the statute of limitations on the underlying wage claim, the proper statute of limitations for claims for these liquidated damages should be one year.[6] The legislature, believing that a one-year statute of limitations on liquidated damages did not serve the proper deterrent effect, enacted this legislation, which provides that the statute of limitations for liquidated damages for failure to pay the minimum wage is the same as the statute of limitations for the underlying wage claim. Thus, the statute of limitations for liquidated damages will be three years. Though, as a practical matter, because minimum wage claims can be asserted as violations of Business and Professions Code Section 17200, which has a four-year statute of limitations, the statute of limitations will likely be four years in most cases.

SB 1360 – Rest and Recovery Periods Must Be Treated as Hours Worked.

Under existing law, employers are required to provide employees with rest breaks and recovery periods.[7]

continued on page 4

Recovery periods, cool down periods of no less than five minutes in the shade to be taken if employees feel the need to protect themselves from overheating, were added to the law last year.[8] Both rest and recovery periods are intended to be counted as hours worked and compensated, but there is ambiguity in the way the law is currently drafted regarding recovery periods. This bill clarifies that recovery periods, like rest periods, are intended to be compensated.

Significant Vetoed Legislation

AB 2271 – Unemployment Discrimination.

This bill would have made it illegal to publish an online advertisement or announcement for a job which indicates that current employment is a requirement for the job. If it had been enacted, the bill would have subjected employers, employment agencies, and job posting websites to civil penalties for violations. According to his veto message, Governor Brown vetoed the bill because he believed that it could impede the state's efforts to help unemployed workers find jobs.

Federal Developments

Revisions to White Collar Exemptions. In March 2014, President Obama directed the Secretary of Labor to update regulations regarding who qualifies for overtime under the Fair Labor Standards Act.[9] The President's direction to the Secretary was to update existing protections consistent with the intent of the FLSA; address the changing nature of the American workplace; and simplify the regulations to make them easier to understand. The result of these updates will almost surely result in needing to review classifications for many currently-exempt workers, particularly those workers who earn close to the current minimum salary for exempt workers. When can employers expect new proposed regulations for comment? As of the last update from the Department of Labor, not until early 2015 at the soonest. Stay tuned.

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To view prior issues of the ELC, click here.

1 Cal. Gov. Code § 12950.1.
2 Cal. Gov. Code § 12926(t).
3 Cal. Lab. Code §§ 201, 202, 203.
4 Cal. Lab. Code §§ 201-201.9.
5 Cal. Lab. Code § 1194.2.
6 *Bain v. Tax Reducers*, 219 Cal. App. 4th 110 (2013).
7 Cal. Lab. Code § 226.7.
8 8 Cal. Code Regs. 3395(d)(3).
9 http://www.whitehouse.gov/the-press-office/2014/03/13/fact-sheet-opportunity-all-rewarding-hard-work-strengthening-overtime-pr.