Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Annual California Labor Law Roundup

Law360, New York (December 3, 2015, 2:17 PM ET) --

Stephanie Fong

Another year and another round of legislative updates. California's Legislature continues to provide a rich source of law. This year the highlights include equal pay legislation, expanded Labor Commissioner authority, complicated piece-rate compensation requirements, additional protections for whistleblowers and protected classes for discrimination, and an attempt to stem at least some of the onslaught of "nonsubstantive/technical violation" Private Attorney General Act of 2004 (PAGA) lawsuits. All newly enacted laws are effective Jan. 1, 2016, unless otherwise stated.

Bills Signed Into Law

SB 358 – Gender Wage Differential: SB 358, the "Fair Pay Act" is one of the most notable bills of 2015. SB 358 expands existing law, California Labor Code Section 1197.5, which prohibits an employer from paying an employee wages less than the rates paid to the opposite sex within the same establishment for equal work. SB 358 eliminates the requirement that the wage differential be within the same "establishment" and changes the standard from "equal work" to "substantially similar work." Under SB 358, to determine if an employee is performing "substantially similar work," a court will consider the "composite of skill, effort and responsibility, and performed under similar working conditions." In addition, SB 358 increases and shifts the burden to employers to defend a wage discrimination claim by requiring that the employer demonstrate that wage differential is not based on or derived from a sex-based differential in compensation, is related to the job at issue, and is consistent with business necessity. The employer must demonstrate that each of these factors is "applied reasonably," and that one or more relied-upon factors is the cause of the pay difference. The bill also contains anti-retaliation provisions and provides a private right of action to enforce its provisions. SB 358 also increases the record-keeping requirements for wage-related information and other terms and conditions of employment from two years to three years. Employers should consider auditing their pay practices to determine whether a pay differential exists and ensure that they document decisions related to pay, performance and promotions.

AB 304 – Amending California's Paid Sick Leave Law: California paid sick leave became effective on July 1, 2015, although it was enacted in 2014. Fourteen days after the effective date, the governor signed AB 304, effective immediately, to clarify some of the ambiguities raised by the original paid sick leave law. AB 304 clarified that in order to qualify for accrued sick leave, an employee must work 30 days for the same employer. It also created an alternative accrual method as long as the accrual is on a regular basis and the employee will have 24 hours of paid sick leave available by the 120th calendar day of employment. An

employer may limit an employee's use of accrued paid sick leave to 24 hours in each year of employment, calendar year, or 12-month period. For non-exempt employees, paid sick leave may be calculated in the same manner as the regular rate of pay for the workweek in which the paid sick leave is used or by dividing the employee's total wages, not including overtime pay, by the total hours worked in the full pay periods of the prior 90 days of employment. If the employer pays out sick leave on termination (not required), the employer is not required to reinstate accrued sick leave. However, if the employee is rehired within one year and sick leave was not paid out then accrued and unused sick leave shall be reinstated. The employer is not required to inquire or record the purpose for which paid sick leave is used. Finally, if the employer has an unlimited paid sick leave or unlimited time off policy, then the employer may provide the required written notice as to the amount of paid sick leave available by indicating "unlimited" on the employee's wage statement.

AB 1506 – California Labor Code Private Attorney General Act of 2004: PAGA (codified in Labor Code Sections 2699, 2699.3 and 2699.5) allows an employee to file a lawsuit against an employer personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. Since PAGA's enactment, employers and courts have been swamped with representative actions seeking significant monetary penalties for technical violations on pay stubs. In order to decrease the number of these cases, the Legislature amended PAGA to provide employers with 33 days to cure certain wage statement violations under Labor Code Section 226(a) before the employee may sue under PAGA. A violation is cured (and thus not subject to suit) once the employer has provided a fully compliant, itemized wage statement to each aggrieved employee for each pay period for the three-year period prior to the date of the written notice of violation. Notably, an employer can use this cure provision only once for the same violation of the statute during each 12-month period. This bill became effective upon enactment on Oct. 2, 2015.

SB 588 – Labor Commissioner: Enforcement of Judgments: Recognizing the problem that employees are often unable to collect on judgments for unpaid wages, the California Legislature attempted (but failed) to pass bills in 2013 and 2014 that would have allowed an employee to file a lien on an employer to collect a judgment for unpaid wages. SB 588 addresses this issue by establishing new procedures for the Labor Commissioner to enforce judgments for nonpayment of wages on behalf of an employee. The Labor Commissioner will now be able to use any existing remedies available as a judgment creditor and to act as a levying officer when enforcing a judgment pursuant to a writ of execution. This includes putting liens on any credits, money or property belonging to the employer. Also, if the final judgment remains unsatisfied for 30 days after the time to appeal the judgment has expired, and there is no appeal pending, the employer must obtain a surety bond sufficient to cover the value of the judgment, otherwise the employer must cease business operations in California. Finally, SB 588 makes owners, directors, officers and managing agents of the employer individually liable for willful failure to pay wages, provide a pay stub, failure to pay minimum wages or overtime, or indemnify an employee for proper business expenses.

AB 970 – Labor Commissioner: Enforcement of Employee Claims: With the increase in local minimum wage ordinances, AB 970 amends Labor Code Sections 558 (overtime) and 1197.1 (minimum wage) to authorize the Labor Commissioner to investigate and enforce violations of local laws regarding overtime or minimum wage provisions. The Labor Commissioner may issue citations and penalties for violations except when the employer has already been cited for the same violation by the local entity. AB 970 also amends Labor Code Section 2802, which required an employer to indemnify his or her employees for all necessary employee expenses, to authorize the Labor Commission to issue citations and penalties to employers who fail to properly reimburse their employees.

AB 987 – Discrimination: Requests for Accommodation: California's Fair Employment and Housing Act

(Government Code Section 12940, et seq.) requires employers to reasonably accommodate known disabilities and prohibits retaliation against an employee who opposes prohibited employment practices. AB 987 amends the California Fair Employment and Housing Act (FEHA) in response to the decision in Rope v. Auto-Chlor System of Washington Inc., 220 Cal. App. 4th 635 (2013), that held that an accommodation request is not a protected activity. The Legislature clarified that requesting reasonable accommodations for disability or religious belief is protected activity and an employer is prohibited from retaliating or discriminating against a person for requesting accommodations, regardless of whether the accommodation request was granted. Employers should ensure their anti-discrimination policies cover these requests and be aware of the potential claims of discrimination based on these accommodation requests.

AB 1509 – Discrimination: Family Member Status: This bill amends Labor Code Section 98.6 which prohibits an employer from discriminating, retaliating, or taking an adverse action against an employee or applicant for filing a claim with the Labor Commissioner or engaging in protected conduct. AB 1509 expands the protection to prohibit an employer from retaliating against an employee who is a family member of a person who engaged in, or perceived to engage in protected conduct. Similar protections were also added to California Labor Code Section 1102.5 (the "California Whistleblower Act") and to California Labor Code Section 6310 (workplace safety complaints). This law continues the recent trend of additional protections for employee whistleblowing or complaints about working conditions or pay.

SB 600 – Discrimination: Citizenship, Language, Immigration Status: The Unruh Civil Rights Acts requires businesses to provide equal accommodations and services regardless of sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status or sexual orientation. SB 600 expands the protections of the Unruh Civil Rights Act by including citizenship, primary language, and immigration status as additional protected categories. SB 600 also specifies that these protections do not require the provision of services or documents in a language other than English, unless otherwise required by law.

SB 579 – Expansion of Family School Partnership Act and Kin Care Law: This bill coordinates California's "Kin Care" law (Labor Code Section 233) with the Healthy Workplaces, Healthy Families Act of 2014 (paid sick leave) to expand an employee's right to take job-protected time off to include finding, enrolling, or re-enrolling a child in school or with a child care provider and to address the need for a child care provider or a school emergency. Currently, Labor Code Section 230.8 allows a parent, grandparent, or guardian to take unpaid time off from work to participate at a child's school or licensed child care facility. This protected leave is now extended to any employee who is a stepparent, foster parent or any individual standing in loco parentis to a child. Employers may not discriminate against or discharge an employee for taking such leave and should review and update their leave policies consistent with these additional authorized reasons.

AB 622 – E-Verify System: Unlawful Business Practices: The federal E-Verify program allows employers to verify that their employees are authorized to work in the United States. To address the concern that employers may misuse the E-Verify system, federal law prohibited employers from using the E-Verify system at a time or in a manner not required by federal law or not authorized by the memorandum of understanding to check the employment authorization of an existing employee or applicant who has not yet received an offer of employment. AB 622 adds Labor Code Section 2814 to also make it a violation of the Labor Code for an employer to misuse the E-Verify system. It also requires an employer that uses the E-Verify system to provide notifications by the Social Security Administration or the United States Department of Homeland Security related to the employee's E-Verify case "as soon as practicable." Finally, AB 622 authorizes civil penalties up to $10,000 per violation of Labor Code Section 2814, and

specifies that each unlawful use of the E-Verify system constitutes a separation violation.

SB 623 – Workers' Compensation: Benefits: Workers' compensation law generally requires an employer to compensate an employee for any injury sustained by the employee if the injury arose out of, and in the course of, employment. In the event an employer fails to pay compensation as required, the employee may apply to receive the funds from the Uninsured Employers Fund or the Subsequent Injuries Benefits Trust Fund. Previously, workers' compensation regulations prohibited an undocumented injured employee from receiving benefits from these funds. SB 623 adds Section 3733 to the Labor Code which extends coverage of these workers' compensation funds to provide that a person will not be excluded from receiving benefits from these funds based on his or her citizenship or immigration status.

AB 1245 – Electronic Premium Payments and Reporting: Unemployment Insurance Code Section 1088 requires employers to submit reports of their contributions, a quarterly return, a report of the wages paid, and to make contributions for unemployment insurance premiums. Since 2011, the Employment Development Department (EDD) has provided online payment and reporting services via the EDD's e-Services for Business website. However, the majority of California employers continue to file hard copy reports. Beginning on Jan. 1, 2017, an employer with 10 or more employees will be required to electronically file the report of contributions, quarterly return, and report of wages, and all employers will be required to electronically file starting on Jan. 1, 2018. A $50 penalty may be imposed on the employer for failing to file the reports or remit payments electronically without good cause once required.

SB 501 – Wage Garnishment Restrictions: Under current wage garnishment law, there is a potential disincentive for an employee to earn more because the more the employee earns the more wages are subject to garnishment. Effective July 1, 2016, SB 501 will attempt to reduce this disincentive by decreasing the prohibited amount of an employee's weekly earnings subject to levy under an earnings withholding order from exceeding the lesser of (i) 25 percent of the employee's weekly earnings or (ii) 50 percent of the amount by which the employee's earnings for the week exceed 40 times the minimum wage.

AB 1513 – Piece-Rate Compensation: This bill codifies recent Court of Appeal decisions holding that employees paid on a piece-rate basis must be compensated separately for rest and recovery periods and nonproductive time in addition to their piece rate compensation. Under newly added Labor Code Section 226.2, piece-rate workers must receive an hourly pay rate no less than the higher of an average hourly rate determined by dividing the total compensation for the workweek, excluding compensation for rest and recovery periods and overtime, by the total hours worked during the workweek excluding rest and recovery periods or the minimum wage. For other nonproductive time, piece-rate workers must be paid an hourly rate no less than the minimum wage. The bill defines "other nonproductive time" as time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis.

Adding to the administrative burden, AB 1513 also amends Labor Code Section 226(a) to impose new wage statement obligations upon employers who compensate their employees on a piece-rate basis, including the total hours of compensable rest and recovery periods and other nonproductive time and the rate of compensation and gross wages paid for both of those periods. Employers who compensate their workforce on a piece-rate basis need to ensure their compensation practices are in compliance and must also specify the newly required information regarding the hours of compensable rest and recovery periods, the rate of compensation for those periods, and the gross wages paid for these pay periods on their employee wage statements.

AB 359 and AB 897 – 90-Day Retention of Grocery Workers Following Change of Ownership: AB 359 adds Labor Code Sections 2500-2522 to require a "successor grocery store employer" to retain the current grocery workers for 90 days upon a "change in control" of a grocery store. At the end of the 90-day period, the new employer must prepare a written performance review for each worker and "consider offering" continued employment to all employees who have performed satisfactorily or better. This bill was supported by unions because it helps ensure that the buyer of a grocery store is a legal successor that must remain unionized. When signing AB 356, Governor Brown noted an ambiguity in how the law applies if an incumbent grocery employer has ceased operations. AB 897 was enacted to clarify that the definition of "grocery establishment" excludes any retail store that has ceased operations for six months or more.

Vetoed Bills

Governor Brown vetoed several bills that would have had a substantial impact on employers, including:

SB 3 – Minimum Wage: The minimum wage is currently scheduled to increase to $10 per hour in January 2016. This bill would have increased the minimum wage to $11 per hour in January 2016, to $13 per hour by July 2017, and annual inflation-based increases would start in 2019.

AB 465 – Restrictions on Arbitration Agreements: This bill would have prohibited employers from requiring that applicants and/or employees sign mandatory pre-dispute arbitration agreements as a condition of employment.

AB 676 – Discrimination against Unemployed Applicants: This bill would have prohibited an employer from including in a job posting that an unemployed person is not eligible for the job, and would have prohibited an employer from asking about an applicant's employment status until the employer had determined that the applicant met the minimum qualifications for the position.

AB 1017 – Salary History Information: This bill would have prohibited an employer from seeking salary history information about an applicant for employment.

AB 1354 – Equal Pay: State Contracting: This bill would have required an employer with 100 or more employees in California and a contract of 30 days or more, to submit a general nondiscrimination program including policies and procedures designed to ensure equal employment opportunities for all employees and applicants, an analysis of employment selection procedures, and a workforce analysis to the Department of Fair Employment and Housing prior to becoming a contractor with the State.

SB 406 – Expansion of California Family Rights Act (CFRA): This bill would have expanded the definition of "child" and would have expanded the use of CFRA to care for grandparents, grandchildren, siblings, and parents-in-law.

Federal Developments

In June 2015, the U.S. Department of Labor issued its long-awaited proposed amendments to the Fair Labor Standards Act "white collar" exemption tests for executive, administrative and professional employees. The DOL's proposed regulations did not amend the duties portions of the tests, but proposed revising the salary basis test from $455 per week to $970 per week ($50,440 annually) beginning in 2016. Similarly, the "highly compensated exemption" would be increased from $100,000 annually to $125,148 annually. The DOL also proposed automatically updating these amounts each year. If adopted, the DOL estimates that the new regulation would eliminate the exempt status for approximately 21.4 million

employees.

The DOL also continued to emphasize the worker misclassification enforcement initiative, by issuing an "Administrator's Interpretation" (AI) in July 2015, that explains circumstances in which individuals are misclassified as independent contractors under the FLSA. The AI is not subject to the rulemaking process, but provides the DOL's view of the law as guidance to employers. While the AI applied the six factor test commonly used to determine contractor vs. employee status under the FLSA, it reflected the DOL's preference in determining employee status. For example, the AI stated that the parties' understanding or agreement concerning the relationship is not relevant to the analysis of the worker's status. Likewise, it emphasized that "economic realities" should be examined to determine the true relationship of whether the individual is economically dependent on the employer or whether the individual is truly in business for him or herself. Ominously for employers, the AI suggests that most workers are employees implying that many independent contractors, in the DOL's view, are misclassified.

Finally, the National Labor Relations Board continues to make news and additional challenges for employers. First, the NLRB's position remains firmly anti-arbitration agreements. In July 2015, the NLRB ruled that even a nonmandatory arbitration agreement that is voluntarily entered into by employees is unlawful if it requires employees to waive joint, class or collective actions in all forums, judicial and arbitral. Then, in August 2015, the NLRB adopted a broad definition of joint employer such that a business only needs to exercise "indirect" control over workers to be a joint employer. As a result, businesses could be liable for their subcontractors or the agencies they use, corporations could be on the hook for franchisee workers, and parent corporations could be charged for a subsidiary's or affiliate's unfair labor practices. There is currently congressional support for rolling back this rule. The NLRB also adopted a 733-page final rule, which took effect on April 15, 2015, and expedites the union election process. By speeding up the election process, the NLRB limits the employer's ability to investigate and present a campaign against the union which may result in more union elections in a shorter period of time and potentially more union victories. In some good news, despite the NLRB's generally aggressive approach to social media policies that restrict or set boundaries regarding what issues employees can discuss, the NLRB actually affirmed a social media policy which "urge[d] all employees not to post information regarding the company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the company's business." In affirming the Administrative Law Judge's decision, the NLRB noted that the language referenced "morale" and "being civil to others and their opinions" which reflects the policy's intent to regulate the manner, not the content, of what employees post.

With these new laws in mind, employers should review their employment policies and practices and ensure they are up to date. And with that, we look forward to another year of exciting employment and labor developments. Until next year!

—By Stephanie L. Fong, Morrison & Foerster LLP

Stephanie Fong is an associate in Morrison & Foerster's San Diego office.