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RECENT DEVELOPMENTS IN CALIFORNIA EMPLOYMENT LAW

The latter part of 2012 saw many significant developments in California's ever-evolving employment-related laws. Late-term, pre-election legislative activity brought changes to several often-litigated provisions of the Labor Code and the Fair Employment and Housing Act. And key court decisions have further defined the landscape as well.

This SHB e-alert provides a summary of some of the most notable changes that will affect some or all employers in California.

FEHA Amended to Clarify Protections Based on Gender and Religion

The Fair Employment and Housing Act (FEHA) prohibits discrimination in housing or employment based on race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, mental and physical disability, medical condition, age, pregnancy, denial of medical and family care leave, or pregnancy disability leave. It also prohibits retaliation for protesting illegal discrimination.

The FEHA has been amended in certain noteworthy respects.

- **Breastfeeding**: In a bill purporting to be declaratory of existing law, the legislature modified the definition of "sex" to include breastfeeding and related medical conditions. This clarifies that breastfeeding and related conditions are in fact protected under the FEHA.

- **Religious Observance**: The legislature also amended the definition of "religious observance" to explicitly cover "religious dress practice" and "religious grooming practices." "Religious dress practice" includes "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 religious creed." And "religious grooming practices" covers "all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed." Segregation from other employees or from the public is not a reasonable accommodation.

Disability Regulations Adopted in December 2012 – Both Pregnancy and Non-Pregnancy

New disability regulations relating to pregnancy took effect December 30, 2012. The regulations apply to employers with five or more employees.

Covered employers must provide up to four months of unpaid leave to women who need time off from work due to pregnancy, childbirth, or related illness. There is no minimum service requirement before an employee becomes entitled to leave under these regulations.

New regulations relating to other disabilities also took effect December 30, 2012. Among the key issues addressed in the regulations are:

- **Reasonable Accommodation**: The new regulations provide a broad list of potential accommodations an employer might offer (and should consider offering), such as modified duties and schedules, more frequent breaks, special furniture, modified equipment, and lactation breaks.

- **Healthcare Providers**: The types of healthcare providers who can make a recommendation for leave or accommodation has been expanded to include licensed midwives, clinical psychologists and social workers, chiropractors, physician assistants, marriage and family therapists, and acupuncturists.

- **Forms**: Employers are required to provide prescribed forms to employees relating to the notice and certification process.

California employers are advised to review and revise their existing policies, handbooks and notices to ensure compliance with these new regulations.

Labor Code Section 980 Addresses Employer Requests for Social Media Access

Employer access to social media has been a hot topic lately across the country, and certainly in California. Assembly Bill 1844, approved by the governor in September 2012, added Section 980 to the California Labor Code. This new provision prohibits an employer from requiring an employee or applicant to do any of the following:

- Disclose username or password information.

- Access social media in the presence of the employer.

- Divulge any personal social media.

The bill specifically authorizes, however, requests reasonably believed to be relevant to an investigation of alleged employee misconduct or violation of law. In this case, the social media may be used only for purposes of the investigation or related proceedings. Employers further retain the right to require or request that an employee provide username and password information for purposes of accessing employer-issued devices, such as computers and PDAs.

The new law also prohibits retaliatory action for not complying with employer requests that violate this section. But an employer may still terminate or take other adverse action "if otherwise permitted by law."

Interestingly, the DLSE is not required to investigate or determine any violation of the Act. And no specific remedy is provided for in this section. This, however, leaves open the possibility of Private Attorney General Act lawsuits, as well as claims that an employer has violated Section 17200 of the Business and Professions Code as an extension of violating Labor Code Section 980.

Status of Employment-Related Arbitration Agreements with Class Waivers Under Review in California

Since the U.S. Supreme Court's ruling in *Concepcion v. AT&T*, there have been a number of cases in California addressing whether class waivers in employment-related arbitration agreements are enforceable. As just one recent example, see *Outland v. Macy's Inc.,* Case No. A133589, in the California Court of Appeals for the First Appellate District. In *Macy's*, the court declined to follow recent NLRB decisions, instead enforcing the arbitration agreement at issue and upholding dismissal of the plaintiff's claims. However, other California courts have gone both ways on this, some enforcing the agreements and some refusing to do so.

The National Labor Relations Board's position – as set forth in its *D.R. Horton* decision and others more recently – is that class waivers in arbitration agreements violate Section 7 of the NLRA. But California courts, and others across the country, have not followed *D.R. Horton*, and the majority of courts appear to favor enforcement of arbitration agreements, even those containing class waivers, in the employment setting.

The California Supreme Court has granted review in a number of recent cases relating to this matter, and many expect the court to provide more guidance in an upcoming decision.

Legislature "Overturns" *Arechiga v. Dolores Press* (2011), 192 Cal. App. 4th 567, Regarding Salaried Non-Exempt Employees' Regular Rate of Pay

In *Arechiga*, the court of appeals held that Labor Code Section 515 does not outlaw explicit mutual wage agreements – *i.e.*, agreements where the employer and employee explicitly agree to a fixed salary that covers all hours worked and includes premium pay for overtime.

In response to *Arechiga*, the California Legislature amended Section 515 of the Labor Code. Section 515 already contained language in subsection (d) stating that a non-exempt salaried employee's regular rate of pay is calculated by dividing his or her salary by 40. The recent amendment adds a provision stating that a fixed salary shall be deemed to provide a non-exempt worker compensation only for regular, non-overtime hours of work "notwithstanding any private agreement to the contrary."

In short, this amendment clarifies that the fluctuating workweek method of pay – endorsed by federal regulation under the Fair Labor Standards Act – is not applicable under California state law for non-exempt salaried employees.

Itemized Wage Statement Provisions Modified

California employers are required to provide employees itemized wage statements under Labor Code Section 226. Section 226 provides specific information that must be included on the wage statements (gross pay earned, total hours worked, deductions, net wages, time period covered, employee's name and last four digits of SSN, the name and address of the employer).

An employee suffering injury as a result of a "knowing and intentional" violation is entitled to recover actual damages or a prescribed penalty of $50 for an initial violation and $100 for subsequent violations. (The penalty is capped at $4,000.) The employee can also recover costs and reasonable attorney's fees.

Effective January 1, 2013, an amendment to Section 226 added language addressing when an employee has suffered injury, as well as what constitutes a "knowing and intentional" violation.

- **Injury**: If an employer fails to provide a statement to an employee, the employee is deemed to have suffered injury. Further, if an

employer provides a statement, but the statement does not contain the required information, then the employee may also be deemed to have suffered injury. But this occurs only if the employee who received a statement cannot promptly and easily determine, from the wage statement alone, gross wages, net wages, deductions made, the employer's name and address, or the employee's name and identification number.

- **Knowing and Intentional**: The amended statute clarifies that an isolated and unintentional payroll error due to clerical or inadvertent mistake is not enough to constitute a "knowing and intentional" violation.

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