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Employment & Labor

Key Employment Law Developments Your Business Should be Aware of

By DEAN ROCCO

THE start of a new year requires companies to measure their employment practices against a myriad of new laws and trends. The following noteworthy developments will impact most California businesses in 2014:

• **Minimum Wage Rate Increase** Starting July 1, 2014, California's minimum wage rate will increase to $9 per hour. Employers must remember that the rate increase also impacts exempt employees, who are subject to minimum salary tests. For example, employees treated as exempt under the executive, administrative and professional exemptions must earn an annualized salary of at least $37,440 when the increase takes effect.

• **Expanded Whistleblower Protections** Existing laws prohibit employers from retaliating against employees who report illegal conduct to government agencies. Amendments to the California Labor Code now extend such "whistleblower" protections to internal complaints as well as complaints made in connection with employees performing their job duties. Complaints about unpaid wages are now expressly considered protected activity under the Labor Code.

• **New Rights for Crime Victims** Existing law provides victims of certain crimes, including domestic violence and sexual assault, the right to time off from work for medical treatment and court dates, and employers cannot discriminate against such employees. The Labor Code now applies these protections to victims of a wider range of crimes, including stalking. Moreover, employers must now grant such employees' requests for reasonable accommodations to provide for their safety at work (e.g., installing locks or changing work schedules).

• **Additional Limits on Background Checks** Existing laws prohibit employers from asking employees and applicants to disclose arrests not resulting in convictions or information regarding referrals to pre-trial or post-trial diversion programs. The Labor Code now prohibits employers from inquiring about expunged, sealed or dismissed convictions. Starting July 1, 2014, public sector employers cannot request any background information until first determining whether an applicant meets the minimum qualifications for the job.

• **New Immigrant Worker Protections** A combination of new laws prohibits employers from engaging in "unfair immigration-related practices" toward immigrant workers. Among other things, employers may not report or threaten to report such workers to immigration authorities because they exercise their rights under the law (e.g., complaining about not being paid their wages).

• **Broadened Definition of Sexual Harassment** Amendments to California's Fair Employment & Housing Act (FEHA) explain that sexual harassment need not arise from conduct motivated by sexual desire. Under the amendments, for example, a male employee can claim sexual harassment by a male co-worker who is not homosexual or acting from sexual desires.

• **New Penalties for Missed "Recovery Periods"** Cal-OSHA regulations require employers of certain outdoor workers to provide five-minute rest breaks to "cool down" as needed. Labor Code amendments now provide penalties of one hour's pay if employers fail to provide such recovery periods.

• **New Protections for Military Service Members and Veterans** FEHA now includes "military or veteran status" among the classes of persons protected against employment discrimination.

• **Expanded Paid Family Leave Coverage** Starting July 1, 2014, California's Paid Family Leave program will provide expanded income replacement benefits to employees taking unpaid leaves to care for seriously ill grandparents, grandchildren, siblings or parents-in-law.

• **Increased Scrutiny on Unpaid Internships** Recent highly publicized decisions, such as Glatt v. Fox Searchlight Pictures, Inc., reflect a trend in lawsuits seeking to recover against employers who misclassify unpaid interns. While federal and state employment laws allow for unpaid internships, Courts will treat interns as employees entitled to compensation where, rather than undertaking training for their own benefit, they do productive work directly benefiting the employer (e.g., displacing or otherwise doing the work of regular employees).

• **Developing Issues with "Bring Your Own Device" Programs** Employers increasingly allow employees to use their own computers and cell phones in their work. In the case of non-exempt employees, employers must consider whether such programs accurately track work conducted on devices outside the workplace. Employers must also consider whether allowing employees remote access to data and files triggers issues under federal and state privacy and data security laws.

What Your Business Should be Doing

At a minimum, your business should:

• Review employment practices to comply with these new laws and trends

• Update relevant personnel forms and handbook policies as necessary

• Train supervisors and managers in how to identify and respond to these types of issues in the workplace.

Dean Rocco is a distinguished employment law attorney who lends his knowledge and perspective to proactive counseling and training measures, while providing efficient and effective litigation of employment law disputes. For more information on the laws discussed in this article or to learn more about Wilson Elser, contact Rocco at (213) 443-5100 or dean.rocco@wilsonelser.com.

EMPLOYMENT & LABOR

Is Your Organization Prepared?

What Employers Need to Know About the Changing Legal Landscape in California

By DAVID G. HOILES Jr. and JOHN M. WICKER

New state employment laws for 2014 will affect the day-to-day operations of many businesses in California this year.

Compensation

Beginning July 1, 2014, the state's hourly minimum wage rate will increase by $1.00, to $9.00 an hour. Another increase of $1.00 an hour will be effective January 1, 2016. Additionally, in July 2014, the minimum salary test for the Executive, Administrative and Professional overtime exemptions will increase from $33,280 to $37,440 annually, with a second increase to $41,600 taking effect in January 2016.

California law provides that an employee should receive one hour of pay for not receiving meal or rest periods. A new law expands the one hour of pay to missed "recovery periods" and applies to any meal, rest or recovery period mandated by applicable statute, regulation, standard, or order of the California Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health. A "recovery period" is "a cool-down period afforded an employee to prevent heat illness."

Additionally, a new law excludes from gross income (for tax years 2013 to 2018), for state personal income tax purposes, any amount received by an employee from an employer to compensate for additional federal income taxes incurred by the employee from employer-provided health benefits because of the federal government's failure to recognize same-sex spouses or domestic partners. The new law covers same-sex couples who are married or registered domestic partners whose employers reimburse them for federal taxes the couples pay on health care benefits for their partner and dependents.

Absences

As the result of an amendment to California Labor Code section 230.4, employers with at least 50 employees now must provide temporary leaves of absence of up to 14 days per calendar year to employees who serve as volunteer firefighters, reserve peace officers or emergency rescue personnel for the purpose of engaging in fire, law enforcement or emergency rescue training.

Moreover, a new law prohibits employers from discharging, discriminating or retaliating against employees who are victims of certain serious offenses for taking time off from work to appear in any court proceeding in which their rights are in issue. The legislation broadly defines "victim" to include "any person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act." A "victim" also includes the person's "spouse, parent, child, sibling, or guardian." Employees who are discharged or otherwise discriminated against because they have taken such time off may file a complaint with the state Division of Labor Standards Enforcement and are entitled to reinstatement and reimbursement for lost wages and benefits.

Employers with at least 50 employees now must provide temporary leaves of absence of up to 14 days per calendar year to employees who serve as volunteer firefighters, reserve peace officers or emergency rescue personnel for the purpose of engaging in fire, law enforcement or emergency rescue training.

Discrimination

After an amendment to the California Fair Employment and Housing Act (the "FEHA), employers' discrimination policies may need to be revisited to reflect that military and veteran status are now protected categories. The law defines "military or veteran status" as "a member or veteran of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, and the California National Guard." Furthermore, the law now allows employers to inquire about an applicant's or employee's military or veteran status for the purpose of awarding a veteran's preference, as permitted by law.

Another revision to the FEHA dictates that employees bringing claims of sexual harassment no longer need to show that the harassment is motivated by sexual desire.

Employers with operations in California should ensure their policies and practices are in compliance with these new laws.

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EMPLOYMENT & LABOR

A New Twist Complicating the Challenge of Assessing Lost Earnings Damages in Employment Suits

By GRANT WATERKOTTE

It is no secret: California is viewed as perhaps the most employer unfriendly litigation forum in the Union. So long as California remains the eighth largest economy in the world, there will be no shortage of employers providing the legal system with ample opportunities to demonstrate this.

Naturally, employers seek to prevent litigation as a general rule. But no matter how diligent the employer, litigation has a way of rearing its ugly head. When the inevitable happens, it is incumbent upon those in the employer's risk management department to accurately assess the risks involved.

Enter Villacorta v. Cemex Cement: the most recent complication to the confounding challenge of assessing damages in wrongful termination suits. Under Villacorta, an employee can obtain indefinite lost wages even if he finds subsequent employment in the exact same field at a higher salary.

In Villacorta, Plaintiff was a mechanical engineer/ maintenance planner at Cemex's Victorville cement plant. Plaintiff was one of hundreds of employees laid off. Plaintiff sued Cemex for wrongful termination, emotional distress and national origin discrimination. Plaintiff was Filipino. He contended that he was laid off when several, less qualified Venezuelans were not.

Plaintiff's salary at the time he was laid off was approximately $65,000. He was unable to find employment for eight months. Plaintiff eventually found a job in Lebec, CA – 120 miles from his home in Corona. Plaintiff received a 7% pay increase at his new job.

Plaintiff's counsel asked the jury to award $44,000 in lost wages for the eight months Plaintiff was unemployed. Plaintiff's counsel did not ask for future lost wages. The jury ultimately awarded $198,000 in past lost wages. This figure reflected what Plaintiff would have made at Cemex from the date of his termination through the trial date. The jury awarded nothing for past/future emotional distress.

Defense counsel moved for judgment notwithstanding the verdict, lost, and then appealed. The Appellate Court upheld the verdict, reasoning that it would only be appropriate to reduce the jury's verdict if Plaintiff had failed to mitigate his damages for past lost earnings.

The general rule is that an employee cannot recover past lost wages if the employer proves that a plaintiff could earn a similar amount with "reasonable effort." An employer must show that this new employment was "substantially similar" to the plaintiff's prior job. The mitigation argument can be defeated if the plaintiff's new position is "inferior" to his original job. There are multiple factors that the jury must consider to determine if the new job is "inferior" – including location.

Here, Plaintiff's new job – while in Southern California – was approximately 120 miles from his previous job. The Court ruled that this distance was sufficient to render the new job "inferior." Thus, no mitigation of damages was possible.

The practical implications of this ruling are astounding. Consider this absurd example: a VP for a small Los Angeles software company is fired. He sues for wrongful termination. While suit is pending, he obtains the job as CEO of Apple Computers, with a 300% salary increase. However, he must relocate to the Bay area. Under Villacorta, the relocation alone could be sufficient to deem the new job "inferior" – hence no mitigation or setoff.

Granted, the above example stretches the holding in Villacorta mightily. But the Villacorta holding undoubtedly raises the potential recovery for lost wages in a wrongful termination suit, and highlights one of the many hurdles that employers must overcome to obtain a reasonable result.

What then, can be done? First, efforts to safeguard against employment lawsuits – through legally sufficient policies/procedures, continuous education and follow through with staff must be implemented. Second, when employment suits arise despite these efforts, outside counsel must be directed to target discovery towards the employee's new line of employment. Outside counsel should make every effort to obtain evidence and admissions demonstrating that the new line of work is equal to/better than the prior job. Finally, the risk of a jury determination that the new employment is "inferior" must be considered at an early stage by the risk management department. This factor must be weighed in making the appropriate business decision in relation to litigation risks/costs.

California is unlikely to become more employer friendly in the near future. The Villacorta holding is simply another example demonstrating that is imperative for employers to remain alert to the ever changing litigation landscape, and ensure that they are making the correct choices moving forward.

Grant Waterkotte is a shareholder and founding member of Pettit Kohn Ingrassia & Lutz, PC. His employment practice is primarily focused on litigation, but also includes general counseling in relation to the broad spectrum of legal issues that employers wrestle with on a daily basis. Grant's extensive and successful trial experience led to his induction into the Los Angeles Chapter of the American Board of Trial Advocates at the age of 35. He routinely tries cases for his clients across Southern California, and is now licensed in Arizona as well. Grant can be reached at (310) 649-5772 or via email at gwaterkotte@pettitkohn.com.

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EMPLOYMENT & LABOR

A Rising Tide: Navigating the Rules for Immigration Compliance for U.S. Employers

By AUDREA J. GOLDING and JEFFREY H. KIKUTA

U.S. Department of Homeland Security statistics indicate that the number of foreign workers hired in the U.S. continues to grow annually. Regardless of size or industry, U.S. companies are increasingly hiring foreign workers currently in the domestic labor market and foreign-born graduates of U.S. colleges and universities, and recruiting globally to secure the best talent for today's jobs. Accordingly, the federal government has increased worksite enforcement efforts to ensure that U.S. companies comply with the myriad of rules and regulations governing the employment of foreign workers. Multiple government agencies with jurisdiction in this area are vigilantly using investigative powers, civil and administrative tools, civil fines, and debarment to ensure compliance.

In recent years U.S. employers have experienced an increase in government enforcement of immigration laws that guard against hiring unauthorized workers in the U.S. and ensure that legally hired workers adhere to the terms and conditions of their work visas. In these key areas, employers must adopt best practices to ensure compliance with immigration laws. In particular:

• *I-9/E-Verify Compliance:* All U.S. employers must verify the identity and employment authorization of all employees, using Form I-9, and maintain verification documentation for inspection. Additionally, certain federal contractors and employers in several states are required to use the E-Verify web-based verification system to confirm the work authorization of employees. Although I-9 forms are not submitted to any agency for review, the government may randomly audit employers' I-9 forms to ensure compliance. Upon a finding that an employer has committed any number of technical or procedural violations, the employer may be liable for significant monetary penalties that are assessed on a "per violation" basis. For example, knowingly hiring and continuing to employ unauthorized workers may lead to fines as high as $16,000 *per violation*. In fiscal year 2012, the federal government issued 3,004 Notices of Inspection of I-9 forms to employers. That same year, approximately $12.5 million in administrative fines were issued, and 376 business/individuals were debarred for administrative and criminal violations.

• *Department of Homeland Security Worksite Audits:* Through its creation of the Administrative Site Visit and Verification Program in 2009, the Department of Homeland Security's Office of Fraud Detection and National Security ("FDNS") has taken a more aggressive stance in enforcing compliance with immigration laws, visiting tens of thousands of worksites in an effort to combat fraud and ensure national security, public safety, and fair working conditions. In fiscal year 2011, 23,204 site visits were conducted. These often unannounced on-site investigations are conducted to verify the existence of business operations, employers' financial viability and to ensure the terms and conditions of employment are consistent with employers' representations on work visa petitions. Where fraud is established the government may apply severe monetary penalties and/or debarment.

The FDNS also works with the Department of Labor, to ensure that working conditions for lawful U.S. workers are not adversely affected by the hiring of foreign workers by verifying the wages and/or benefits offered to employees sponsored for H-1B work visas. Penalties for noncompliance can be civil monetary penalties of up to $35,000 *per violation*, and/or requiring the payment of back wages and unpaid benefits, reinstatement of displaced or terminated workers and/or debarment among other penalties.

What Should Employers Do?

Employers are advised to take note of recent trends in immigration enforcement as well as work with knowledgeable immigration counsel to aid in adopting and implementing appropriate internal immigration policies, procedures and best practices. By doing so, and continuously revisiting existing policies, employers may minimize the risk of violating immigration laws and potential liability.

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EMPLOYMENT & LABOR

Businesses Should Look to Brokers for Exchange Insight

By JESSICA WORD

With the Affordable Care Act having moved from concept to authorization to implementation, employers are still seeking clarity as to what reform really means, what insurance rates will look like, and how health insurance exchanges are going to work moving forward.

Uncertainty surrounding the impact of healthcare reform remains the No. 1 issue facing small to mid-size business owners. And it's no wonder. With the Affordable Care Act having moved from concept to authorization to implementation, employers are still seeking clarity as to what reform really means, what insurance rates will look like, and how health insurance exchanges are going to work moving forward. A 2013 poll of more than 1,200 respondents conducted by the Small Business Authority found that 65 percent of business owners had not yet decided upon a course of action to manage their healthcare costs heading into this year.

On average, small businesses pay about 18 percent more than large firms for the same health insurance policy. And small businesses lack the purchasing power that larger employers have. Business owners are hopeful that reform will lead to greater affordability and cost predictability while providing their workforce easier access and more choice. In reality, however, there are more questions than there are answers. Among the questions being asking most often are: What kind of coverage will be sold through health insurance exchanges? What happens if I do not offer health insurance to my workforce? What are the long-range implications of the delay in the employer mandate? What coverage options will be available to employees who have a pre-existing condition? Will my rates be going up or down? How are tax credits and subsidies really going to work? Where can I find clarity on the "grandfathering" rules that allow some businesses to keep their current insurance? And, how easy will it be to buy insurance under healthcare reform?

Encircling many of these questions is the anticipated impact of health insurance exchanges. The Affordable Care Act mandates that all states establish and run a health insurance exchange or default to a federal fallback program (as many states are choosing to do). These exchanges create an online, one-stop shopping mall where employers, consumers, insurance brokers and others can easily view competing health plans side by side, comparing benefits, costs, provider networks and other features.

Exchanges are designed to provide small employers the same advantages commonly available to larger groups by organizing the private insurance market in ways that create a more stable risk pool; greater purchasing power; and more competition among insurers when it comes to price, quality and service. And small businesses that purchase their health coverage through an exchange may become eligible under the Small Business Health Option Program for annual tax credits.

Employers would do themselves and their employees well by learning all they can about exchanges and, in those markets where options do exist, weighing the merits of public vs. private exchanges in determining what works best for them. The best way to avoid information overload and really get to the crux of the matter is to turn to a licensed, independent broker.

More than anyone else, brokers and general agents can provide the unbiased information needed for employers to make intelligent health insurance decisions as well as to provide service for everything from routine issues to serious policy interpretation issues. Brokers can also ease employers through the enrollment process and can help show how to take advantage of the superb online tools and technology that can help with an informed insurance selection. Smart brokers have been educating themselves for the past 18 months on the implications of the Affordable Care Act and truly are the "go-to" people for information and sound advice.

There's a lot of noise in the marketplace, but there's also a ticking clock for business owners who must make sense of it all. By working with brokers and leveraging the right tools, employers and their employees can take the guesswork out of their insurance selection and lessen the uncertainty that's inherent in these times of change.

Jessica Word is president of Word & Brown General Agency and *has a RHU (registered health underwriter) designation.*

EMPLOYMENT & LABOR

Six Reason Employees Need Not Fear Electronic Health Records

By BRIAN O'NEILL

THERE'S a good chance your doctor's office is going digital.

As part of the national push to make healthcare work better for everyone, physician offices and hospitals alike are beginning to turn to technology to keep track of a patient's medical history, treatments and other health information. But while electronic data keeping has become commonplace in most facets of society, some fear that having something as personal as health records available at the touch of a button raises all kinds of issues regarding privacy and confidentiality.

It's likely that many an HR exec has heard concerns about this issue from multiple employees. In reality, thanks to safeguards and very stringent federally mandated regulations that address this very issue, we can all rest assured. In fact, there are many reasons for employees and the American public at large to welcome and embrace electronic health records.

Safe and Secure: All electronic health records must comply with the rules of the federal Health Insurance Portability and Accountability Act (HIPAA), which protects patient privacy and the security of health information in any form. These national standards require appropriate administrative, physical and technical safeguards to ensure the confidentiality, integrity and security of electronic health records so patients can feel at ease.

While electronic data keeping has become commonplace in most facets of society, some fear that having something as personal as health records available at the touch of a button raises all kinds of issues regarding privacy and confidentiality.

Better Care: Many people see more than one doctor, and when your electronic record is accessible by all of your providers, better health decisions can be made. As patients move from primary care doctor to specialist to hospital to outpatient status, too often the doctors may not have the chance to communicate or send updated medical records to each touch point along the way. But when doctors share records electronically, a new doctor only needs to ask the patient's name, birthdate and possibly another piece of identifying information to access the individual's complete health record. Diagnosis and treatment decisions could be altered based on the information found there, which is far more complete and trustworthy than what might be written down on paper.

Better Efficiencies: Since EHRs make information easy to access, the need for patients to repeat expensive and often uncomfortable tests is greatly minimized. And patients don't need to give the same information, answer the same questions or fill out the same forms over and over. With EHRs you also don't need to remember the name and dosage of every prescription you're taking. This not only saves time and makes it easier on you, but it also reduces costs for everyone.

Organization and Standardization: Paper files can be lost or misplaced, but electronic health records are always accessible. EHRs allow for better standardization when it comes to record-keeping because they provide a uniform way of filling out information that makes it easier for all doctors and nurses to quickly and confidently find what they need.

Keeping Up With Our Mobile Society: If you are ill or injured while away from home or move to a new city, the importance of electronic health records becomes magnified as your electronic patient record can easily move with you. And if a doctor retires or moves, no longer do you have to worry about tracking down records so long as your records are kept electronically.

Patient Access: The busier your life the more important accessing medical records quickly and efficiently becomes. An ever growing number of EHR systems allow patient access to a secure website to learn about test results and other important information stored in your individual medical record, which can serve as a tool for you to document your own medical history. The more informed you are, the more you'll be able to ask the right questions and make intelligent, proactive decisions about your own health and healthcare options.

Already many hospitals and large physician groups have made significant progress in implementing EHRs and are now doing so with increased frequency. Fortunately, systems are now in place that make it easy and affordable for smaller groups or independent physician offices to convert from paper to EHR as well.

Medical records have always been an essential part of the relationship between patients and their doctors. By tapping into today's technology, understanding the privacy and security controls in place, and embracing all of the benefits that electronic health records bring, you can let go of your fears and, just like your doctors, make use of the best that modern technology has to offer.

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