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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *November 2012*

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I.

LEGISLATIVE/ADMINISTRATIVE

California

Governor Signs Bill Clarifying the Definition and Scope of "Sex" Under the FEHA

Governor Brown has signed AB 2386 (Allen), which provides that for the purposes of the Fair Employment and Housing Act ("FEHA"), the term "sex" includes breastfeeding or medical conditions related to breastfeeding. The FEHA prohibits employers from discriminating against their employees on the basis of various enumerated protected characteristics, including sex. Under existing law, the term "sex" includes gender, pregnancy, childbirth, and medical conditions related to pregnancy or childbirth.

As the legislation states that it is clarifying existing law, employers should ensure immediate compliance.

Governor Signs Bill Requiring Disclosure of Additional Wage Information by Temporary Services Employers

Existing law requires every employer, semimonthly or at the time of each payment of wages, to furnish each employee with an accurate, itemized statement showing specified information. Governor Brown recently signed AB 1744 (Lowenthal), which requires that, on and after July 1, 2013, temporary services employers also include in these statements the rate of pay and the total hours worked for each assignment.

Existing law defines a "temporary services employer" as an employing unit that contracts with clients or customers to supply workers to perform services for the clients or customers, performs a variety of functions including negotiating with clients and assigning workers, pays those workers, and retains the right to hire and fire those workers.

Governor Signs Bill Imposing Stricter Penalties for Employers' Failure to Provide Accurate Itemized Wage Statements

Existing law provides that an employee suffering injury as a result of a knowing and intentional failure by an employer to provide accurate, itemized wage

statements is entitled to recover the greater of all actual damages or a specified sum, not exceeding an aggregate penalty of $4,000, and is entitled to an award of costs and reasonable attorneys' fees.

Governor Brown has signed SB 1255 (Wright), which provides that an employee is *deemed* to suffer injury for purposes of the above-referenced penalty if the employer fails to provide a wage statement. The bill also provides that an employee is deemed to suffer injury if the employer fails to provide accurate and complete information, and the employee cannot promptly and easily determine from the wage statement alone: the amount of the gross or net wages for the pay period, the deductions the employer made from the gross wages to determine the net wages paid to the employee during the pay period, the name and address of the employer or legal entity that secured the services of the employer, or the name of the employee and the last four digits of his or her social security number or an employee identification number other than a social security number.

Governor Signs Bill Excluding Overtime Compensation from Fixed Wage Agreements

Existing law, with certain exceptions, establishes eight hours as a day's work and a forty-hour workweek, and requires payment of overtime compensation for additional hours worked. Existing law further provides that for the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee's regular hourly rate shall be 1/40th of the employee's weekly salary.

AB 2103 (Ammiano), which was recently signed by Governor Brown, provides that payment of a fixed salary to a nonexempt employee shall be deemed to provide compensation only for the employee's regular, nonovertime hours, notwithstanding any private agreement to the contrary.

This new law is a response to a February 2011 California Court of Appeal decision (*Arechiga v. Dolores Press, Inc.* (2011) 192 Cal.App.4th 567) which held that a fixed salary could cover both regular time and overtime hours. In the *Arechiga* case, a janitor and his employer agreed that payment of a fixed salary of $880 a week would provide compensation for 66 hours of work each week. The Court of Appeal held that this method of payment comported with California overtime law, and that no additional overtime compensation was owed. AB 2103, however, invalidates the *Arechiga* ruling.

Governor Signs Bill Addressing Record Retention and Employees' Right to Inspect Personnel Files

Existing law requires that every employer, semimonthly or at the time of each payment of wages, furnish to each of its employees, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing specified items. Existing law also requires an employer to keep a copy of the statement and the record of deductions on file for at least three years at the place of employment or at a central location within the State of California.

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Under AB 2674 (Swanson), recently signed by Governor Brown, the term "copy," for purposes of these provisions, includes a duplicate of the itemized statement provided to an employee *or* a computer-generated record that accurately shows all of the information that existing law requires to be included in the itemized statement. The new law also requires employers to maintain a copy of each employee's *personnel* records for at least three years after termination of employment.

Under existing law, an employee has the right to inspect the personnel records that his or her employer maintains relating to the employee's performance or to any grievance concerning the employee within a reasonable time after a request. AB 2674 also requires employers to make the personnel records available for inspection, or provide a copy, to the current or *former* employee or employee's *representative* within thirty calendar days of the employer's receipt of the employee's written request. The employee and employer may agree in writing to a date longer than thirty days, but not to exceed thirty-five days, from the employer's receipt of the employee's request. The bill requires the employee to make the request to inspect or copy in writing, but provides that it may be on an employer-provided form and that the employer may designate the person to whom a request must be made. The employer may redact the name of any nonsupervisory employee contained in the personnel records prior to inspection or copying.

The bill also specifies the location for provision of the records. For an employee who was discharged for a violation of law or an employment-related policy involving harassment or workplace violence, the employer may make the records available at a location a reasonable driving distance from the former employee's residence or mail the records to the employee. The employer is only required to comply with one request per year by a former employee. These provisions do not apply during the pendency of a lawsuit an employee files relating to a personnel matter against his or her employer.

The above provisions also do not apply with respect to employees covered by a valid collective bargaining agreement if the agreement provides for a procedure for inspection and copying of personnel records.

In the event an employer violates these provisions, the new law permits a current or former employee or the Labor Commissioner to recover a penalty of $750 from the employer, and further permits a current or former employee to obtain injunctive relief and attorneys' fees.

Governor Vetoes Bill Preventing Discrimination on the Basis of Unemployed Status

Governor Brown has vetoed AB 1450 (Allen), which would have made it unlawful, unless based on a bona fide occupational qualification or any other provision of law, for an employer, an employment agency, or a person who operates an internet website for posting jobs in this state to publish an advertisement or announcement for any job that includes provisions pertaining to an individual's current employment or employment status. This bill would have subjected violators of the law to civil penalties.

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II.

JUDICIAL

California

California Court Holds that Narrow Arbitration Clause in Independent Contractor Agreement Does Not Cover Wage and Hour Claims

In *Elijahjuan v. Superior Court*, the plaintiffs, owner-operator truck drivers who made deliveries for Michael Campbell Associates ("Campbell"), filed a putative class action against Campbell for wage and hour violations, alleging that it misclassified them as independent contractors. The trial court granted Campbell's motion to compel arbitration, and the plaintiffs appealed.

In reversing the trial court's ruling, the Court of Appeal noted that the Broker/Carrier Agreement (the "Agreement") between the plaintiffs and Campbell contained a provision requiring arbitration of any dispute that arose "with regard to its application or interpretation." Because the dispute did not pertain to the application or interpretation of the Agreement, and the plaintiffs were instead attempting to enforce their rights under the Labor Code, the arbitration clause did not apply. The court found that statutory rights were distinct from contractual rights under the Agreement, and the "ultimate issue" was whether Campbell had satisfied the Labor Code's requirements—an assessment that was "extra-contractual."

Class Certification Denied In Wage and Hour Case; Court Rules That Individual Issues Predominate

In *Tien v. Tenet Healthcare Corporation*, the California Court of Appeal denied class certification of the plaintiffs' wage and hour claims, ruling that individual issues predominated.

The plaintiffs were hourly employees of Tenet or one of its 37 subsidiaries (collectively, "Tenet"), consisting of hospitals throughout California. The plaintiffs, who alleged that Tenet had committed several wage and hour violations, sought certification of four classes: (1) employees who had not been properly compensated for missed meal periods; (2) employees who had not been properly compensated for missed rest breaks; (3) employees who were entitled to waiting time penalties; and (4) employees who were provided improper pay stubs.

The trial court denied certification of all four classes, and the appellate court affirmed.

With respect to the meal period class, the court relied largely on *Brinker v. Superior Court* and found that the plaintiffs' definition of membership for the class required analysis of predominately individual questions as to each employee's eligibility for compensation for missed meals, thereby making the plaintiffs' definition of the class overly broad and inappropriate for class treatment. The court noted that there were several factors requiring an individual analysis, including: 1) whether all employees were in compliance with Tenet's electronic time-keeping record system; 2) whether some employees signed waivers or correction slips for

missed meals; and 3) whether some employees shorted the clock by starting meals before clocking out. The court noted that the class definition provided by the plaintiffs did not take those issues into account.

With respect to the missed rest break class, the court found that individualized assessment of the reasons employees did not take their breaks was required. Finally, with respect to the pay stub violations class, the court found that the trial court would have to determine whether each individual class member actually suffered injury or damages as a result of the pay stubs lacking the information required under the Labor Code, which was an individualized determination.

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This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Jenna Leyton-Jones, Christine Mueller, Hazel Ocampo or Heather Stone at (858) 755-8500; Eric De Wames, Mark Bloom, Jennifer Weidinger or Edgar Martirosyan at (310) 649-5772.