ASAP™ A Littler Mendelson **Time Sensitive** Newsletter

in this issue:

OCTOBER 2007

The net result for private sector employers of the California government's 2007 policymaking was more significant for bills that *were not* signed by the Governor, than those that were.

California Edition

A Littler Mendelson California-specific Newsletter

Playing Defense: How Private-Sector Employers Fared in the 2007 California Legislative Session

By Christopher E. Cobey and Cathy S. Beyda

It's been said that, on some days, it's just a real effort to get up and gnaw through the straps. California private sector employers might have felt that way when the Democratically-controlled state Legislature adjourned in mid-September, sending the annual flood of legislation passed at the last minute to the Republican Governor's office for review, and either approval or veto.

As has happened at the end of the past three years' legislative sessions where there has been divided power between the Legislature and the Governor, Governor Arnold Schwarzenegger vetoed a little less than one-quarter (22%) of all the bills sent to him – but the Governator's veto pen scratched particularly loudly on bills relating to labor and employment law.

When the smoke cleared from the flurry of bill-signing and vetoing, California employers could heave a sigh of relief – there really weren't that many significant new laws that would take effect as a result of the 2007 California legislative session.

The new law with the most immediate impact on most California employers is new Military and Veterans Code section 395.10 (A.B. 392). This section allows qualified employees (those working at least 20 hours a week providing services for hire, but not independent contractors) up to 10 days of unpaid leave if the employee's spouse or domestic partner (as defined by California Family Code section 297 et. seq.) is a "qualified member" on leave from deployment. A "qualified member" is a person who is a member of the Armed Forces of the United States who has been deployed during a period of military conflict to an area designated as a combat theater or combat zone by the President of the United States or a member of the National Guard or Reserves who has been deployed during a period of military conflict. The leave must take place during a period in which the qualified member is on leave from deployment. The qualified employee must submit "written documentation to the qualified employer certifying that the qualified member will be on leave from deployment during the time the leave provided for ... is requested." This leave does not bar a qualified employee from taking any other leave that the employee would otherwise be entitled to take, and an employer may not retaliate against a qualified employee for taking this leave. This statute was designated as an urgency measure, and thus took effect when it was signed on October 9, 2007. (For more information, see the full Littler ASAP: "California's New Leave Law for the Spouses of Military Members.")

A second new law (S.B. 929) of possible widespread application amended Labor Code section 515.5 to lower the exempt computer software professional overtime rate to $36, from its 2007 indexed rate of $49.77 per hour. The rationale given for this last-minute legislation was that the statutory overtime rate for qualifying computer professionals was instituted at the height of California's "dot com" boom in 2000. With the subsequent industry slump, California IT professionals are now at a competitive compensation disadvantage with non-California IT professionals because of the higher overtime rate required by the previous statute. The same bill also amended Labor Code section 1773.9 to authorize some employer discretion in allocating rate changes paid on prevailing wage projects until the Department of Industrial Relations publishes new per diem rates. The new law, passed through the Legislature without a single "no" vote, takes effect on January 1, 2008.

Among other new laws of interest to California

private sector employers are the following, which take effect on January 1, 2008:

- Assembly Bill 1126 allows a court to make an order to protect an employee who is or has been employed by a witness subject to a subpoena, and an individual who is or has been represented by a labor organization that is a witness subject to a subpoena, when the subpoena covers records pertaining to the employee. The bill makes technical changes conforming the provisions of law protecting employees whose records are subject to a subpoena to those provisions protecting consumers. The new law requires that, if the party giving notice of a deposition is a subpoenaing party, and the deponent is a witness commanded by a deposition subpoena to produce personal records of a consumer or employment records of an employee, the deposition be scheduled for a date at least 20 days after issuance of that subpoena.

- Senate Bill 354 authorizes the state registrar of contractors to order a licensee to pay a specified sum to an injured party if the registrar finds that a licensee has aided an unlicensed person in evading the Contractors' State License Law or allowed an unlicensed person to use his or her license.

Some legislation that was passed before 2007, will become effective in 2008. For example, employers should know by now that, by January 1, 2008, only the last four digits of an employee's social security number or an employee identification number other than a social security number may be shown on an employee's itemized wage statements ("pay stubs"). (Labor Code section 226(a)(7); S.B. 101, 2005 Legislative Session.) In addition, effective July 1, 2008, drivers may use cellular telephones while driving only if they utilize a hands-free feature to do so. (California Vehicle Code section 23123; S.B. 1613, 2006 Legislative Session.)

In regulatory actions, the Fair Employment and Housing Commission during this summer issued its final regulations implementing mandatory training of supervisors of qualified employers. The California Division of Labor Statistics and Research specified the 2008 wage rate for exempt licensed physicians and surgeons will be $65.59 per hour.

Employers should feel relief knowing what new laws might have been taking effect on the first of next year, but for the Governor's veto of them. It can be expected that many of these proposals will resurface in the Legislature next year – which will be an election year. Shot down were employment-related proposals which would have: (I know you did this by bill number, but is there any way to change the order – the paragraph talks about how lucky we are that the Governor vetoed these bills, but the first two most would not even care about – maybe just reversing the order?)

- Required employers to maintain wage and job classification records for five years, would have increased the statute of limitations from two to three years in the case of willful violation by the employer, and would have extended the statute of limitations to four years for a civil action by an employee to recover wages and to five years for actions in which there is willful misconduct of the employer (A.B. 435).

- Permitted employees to recover liquidated damages in complaints brought before the Labor Commission alleging payment of less than the state minimum wage (A.B. 448).

- Required employers that are convicted of a crime involving fraud, misrepresentation, or misconduct related to a lockout to make restitution to employees for lost wages and benefits (A.B. 504).

- Expanded the circumstances under which an employee is entitled to protected leave pursuant to the Family Rights Act by (1) eliminating the age and dependency elements from the definition of "child," thereby permitting an employee to take protected leave to care for his or her independent adult child suffering from a serious health condition, (2) expanding the definition of "parent" to include an employee's parent-in-law, and (3) permitting an employee to also take leave to care for a seriously ill grandparent, sibling, grandchild, or domestic partner (A.B. 537).

- Made void and unenforceable as against public policy any provision in an employment contract that requires an employee, as a condition of obtaining or continuing employment, to use a forum other than California, or to agree to a choice of law other than California law, to resolve any dispute with an employer regarding employment-related issues that arise in California (A.B. 1043).

- Removed the exemptions that permit smoking in specified bars, warehouses, hotel lobbies, employee breakrooms, and meeting and banquet rooms, while retaining exemptions for other types of businesses (A.B. 1467).

- Required employers to maintain employment records for a specified time and to provide inspection and copies within a specified time to current and former employees or their representatives. The bill would have authorized those employees to recover a $750 penalty from an employer for failure to do so and to bring an action to obtain compliance, and it would have provided that a violation of its provisions constituted an infraction (A.B. 1707).

- Provided that for employees of temporary services employers, wages should be paid weekly, or daily if an employee is assigned to a client on a day-to-day basis or to a client engaged in a trade dispute. This bill would have provided that if an employee of a temporary services employer is assigned to a client, and neither the client nor the temporary services employer has secured payment for workers' compensation, the employee may sue both the client and the temporary services employer. Finally, the bill would have applied existing civil and criminal penalties to the wage payment requirements established by this bill (A.B. 1710).

- Permitted agricultural employees, as an alternative procedure, to select their labor representatives by submitting a petition to the Labor Board accompanied by representation cards signed by a majority of the bargaining unit (S.B. 180).

- Added the right to inquire about, request, and take time off for bereavement leave (S.B. 549).

- Prohibited willful misclassification of employees as independent contractors, and would have authorized the Labor and Workforce Development Agency to assess specified civil penalties from persons or employers violating the bill. The bill would have authorized employees who suffer actu-

al harm or a labor union or organization to bring actions to recover these civil penalties (S.B. 622).

And, just in case you were thinking of using more innovative methods to track your employees during the workday, be aware of S.B. 362, which was signed by the Governor and prohibits a person from requiring, coercing, or compelling any other individual to undergo the subcutaneous implanting of an identification device, such as a radio frequency identification device (RFID).

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