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Retaliation Protection for Employees Expands and New "Unfair Immigration-Related Practices" Created

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In our October 18, 2013 email, we summarized some of the employment laws passed this year that will become effective in 2014. While many of these new laws will increase the cost and burden of doing business in California, we want to expand on the law that may have the most significant and complicated impact on the day-to-day management of employees.

Employment Retaliation & Unfair Immigration-Related Practices

AB 263

This legislation amends existing Labor Code provisions section 98.6 and 98.7 and enacts new section 1019 related to immigration-related protections. In short, the bill significantly increases employee rights, the difficulty in managing employees and the exposure to employee claims.

Labor Code section 98.6 previously made it illegal for a person to discharge or discriminate against an employee (or applicant) for engaging in certain protected activities, such as filing claims for unpaid wages. AB 263 broadened the employer conduct that is prohibited and expanded the employee activities that are considered protected activities. This double whammy will make it even easier for employees to bring and win these cases.

Under AB 263, a person now is prohibited from discharging, discriminating, retaliating or taking any adverse action against the employee or applicant. While the addition of the retaliation language is consistent with many other statutes, the "adverse action" language pitches employers into the uncharted territory of figuring out what an adverse action is for the purpose of the statute.

Is a demotion in pay and stature an adverse action? Likely. How about the denial of a raise? What if you change the employee's work schedule? Will every workplace slight be deemed an adverse action? Because the amendment itself does not define the term, employees are sure to push the meaning of that phrase to its outer limits.

The previous list of protected activities under section 98.6 included making a "bona fide" complaint that the employee's rights under the Labor Commissioner's jurisdiction were violated. That provision anticipated the filing of a complaint with the Labor Commissioner or at least contact with the agency. Further, the term "bona fide" required some semblance of reasonable belief by the employee that a violation occurred in order for liability to attach.

Although those safeguards were maintained, an employee has engaged in a new form of protected activity when the employee "[makes] a written or oral complaint that he or she is owed unpaid wages." There is no modifier of "bona fide" nor is there any requirement that the complaint be communicated to the Labor Commissioner or any government agency. This is specifically designed to apply to internal workplace complaints that your employees make about their pay.

A saving grace to the amendment is that the new language did not get added to the part of the existing statute that requires reinstatement of the employee and reimbursement for lost wages. However, all violations of section 98.6

will now include a civil penalty of up to $10,000 per employee for each violation, which amount is in addition to any other remedy the employee may have.

A small but important change was also made to section 98.7. Previously, when employees took their section 98.6 discrimination complaint straight to court, instead of to the Labor Commissioner, employers were able to use as a defense that the employee failed to exhaust the required administrative procedures. Now, the statute specifically provides that there is no requirement to exhaust administrative remedies or procedures.

AB 263 also adopted new Labor Code section 1019, which provides an extensive list of prohibited Unfair Immigration-Related Practices.

The term "Unfair Immigration-Related Practices" is defined to include:

- Requesting more or different documents for I-9 compliance
- Refusal to honor I-9 documents that reasonably appear genuine
- Using the federal E-Verify system to check the employment authorization status in a time or manner not authorized by law
- Threatening to file or filing a false police report
- Threatening to contact or contacting immigration authorities

This conduct is prohibited if the intent or purpose is to retaliate against an employee who has exercised any right protected by the California Labor Code or local ordinance applicable to employees. The protected activity includes, but is not limited to:

- Filing a good faith complaint or disclosing to others in good faith that the employer violated the code or local ordinance
- Seeking information regarding whether an employer is in compliance with the code or local ordinance
- Informing a person of potential rights and remedies and assisting in asserting those rights

The new statute also establishes a presumption that an unfair immigration-related practice was in retaliation for the employee's exercised rights, if the practice occurred within 90 days of the protected activity. That presumption is rebuttable, but it is the employer's burden to prove the employer's action was not retaliatory.

Not only may a civil action be filed for equitable relief, damages or penalties, the violating employer's licenses may be suspended. That suspension may last up to 14 days for the first violation, up to 30 days for the second violation and up to 90 days for the third or more violations. This could be a devastating blow to a business because the licenses that can be suspended are "all licenses held by the violating party specific to the business location . . . where the unfair immigration-related practice occurred." In deciding upon the suspensions, the court shall consider such things as whether the employer knowingly violated the law, made good faith efforts to rectify the situation and the harm that may befall the employees as a result of the suspension of all licenses.

Beginning in 2014, employers must be even more careful managing employees and making employment-related decisions. With AB 263 the California Legislature has taken one more significant step in reducing an employer's operational efficiency and increasing the gravy train for plaintiff's lawyers.

As always, if you have questions or concerns about how the law may specifically affect your organization, Holden Law Group is here to support you.

Sincerely,

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