CUTTING EDGE EMPLOYMENT ISSUES

Recent Employment Law Developments
Legislation and Court Decisions

April 14, 2013

Veronica M. Gray
NOSSAMAN LLP
18101 Von Karman Avenue
Suite 1800
Irvine, CA 92612
(949) 833-7800
vgray@nossaman.com

TABLE OF CONTENTS

2013 EMPLOYMENT LAW STATUTES[1] AND CASES

As we look back on 2012, it was a busy year in employment law. On balance, employee rights expanded on a state and federal level and are expected to continue to do so in 2013. And each year always means statutory changes and court decisions. Here are some of the new key employment developments to successfully navigate 2013.

I. CALIFORNIA WAGE AND HOUR LEGISLATION

A. ITEMIZED WAGE STATEMENTS AND WAGE THEFT NOTICE

AB 1744 - Amends Labor Code sections 226 and 2810.5 and adds Labor Code section 226.1)

AB 1744 is effective July 1, 2013. Current law already requires employers to provide employees with a written itemized statement containing certain required information. This amendment to Labor Code section 226 now requires that if the employer is a temporary services employer that the employee's itemized statement include the rate of pay and the total hours worked for each assignment. The new law also requires temporary staffing companies to include in a new hire notice the name, the physical address of the main office, the mailing address if different from the physical address of the main office, and the telephone number of the legal entity for whom the employee will perform work, and *any other information* the Labor Commissioner deems material and necessary.

This will result in a change to the wage and employment notice that must be used after July 1, 2013. Watch for a new template of the notice on the DLSE website.

Caveat: Security services companies that are licensed by the Department of Consumer Affairs and solely provide security services are excluded from the above requirements imposed upon temporary services employers.

B. PENALTIES FOR WAGE STATEMENT VIOLATIONS

(*SB 2155 amends Labor Code section 226)*

The purpose of this amendment is to clarify what "injury" means that will entitle an employee to damages. Employers are required to provide specified information to employees on a wage statement each time wages are paid. But what happens if some information is missing or incorrect? Has the employee "suffered an injury" entitling the employee to damages.

SB 2155 provides that an employee is considered to have "suffered an injury" with regard to employer provided itemized wage statements if the employer either:

- Fails to provide a wage statement at all to the employee; or

[1] Effective January 1, 2013 unless otherwise noted.

- Fails to provide an accurate and complete wage statement and the employee cannot "promptly and easily determine" from the wage statement alone:
    - The amount of the gross wages or net wages paid to the employee during the pay period or other specified information required on the itemized wage statement.
    - Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period.
    - The name and address of the employer and, if the employer is a farm labor contractor, the name and address of the legal entity that secured the services of the employer during the pay period.
    - The name of the employee and only the last four digits of the employee's Social Security Number or an employee identification number.

C. WRITTEN COMMISSION AGREEMENTS: TEMPORARY PAYMENT EXEMPTION
(AB 2675 – Amends Labor Code section 2751)

In 2012, the Legislature passed AB 1396 (Labor Code section 2751), which requires employers who pay commission wages to employees to put those agreements in writing by January 1, 2013.

AB 2675 amends Labor Code section 2751 to exempt certain types of wage payments from the written agreement requirement. Currently, the definition of "commissions," for purposes of this law, excludes:

- Short-term productivity bonuses
- Bonus and profit-sharing plans, unless there is an offer by the employer to pay a fixed percentage of sales or profits as compensation for work

This amendment will now also exempt:

- Temporary, variable incentive payments that increase, but do not decrease payment under the written contract.

D. WAGE AND HOUR: COMPENSATION AGREEMENTS
(AB 2103 Amends Labor Code section 515)

AB 2103 is intended to overturn *Arechiga v. Dolores Press* (2011) 192 Cal.App.4th 567, in which the court permitted an employer and nonexempt employee to agree to a fixed salary that included payment of regular and overtime wages. AB 2103 requires that a fixed salary payment to a nonexempt employee includes compensation *only* for the employee's regular, non-overtime hours, thereby invalidating any private agreement to the contrary.

E. WAGE GARNISHMENTS

(AB 1775 - Amends Code of Civil Procedure sections 706.011 and 706.050)

Effective July 1, 2013, the amount of wages protected from garnishment in California will increase.

Under existing law, the maximum amount of disposable earnings of an individual judgment debtor exempt from the levy of an earnings withholding order (for any workweek subject to the garnishment) could not exceed $217.50 per week (i.e. 30 x $7.25, the federal minimum wage).

AB 1775 increases the limit to $320 per week (i.e. 40 x $8.00, the California minimum wage). Wages exceeding $320 per week may be garnished up to a limit of 25% of the debtor's disposable income. Employers should take care to use the new threshold and keep in mind that they may be served with orders which are not up to date.

II. FAIR EMPLOYMENT AND HOUSING ACT (FEHA) AMENDMENTS

A. FEHA: BREASTFEEDING

(AB 2386 – Amends Labor Code section 12926)

FEHA currently defines "sex" to include pregnancy, childbirth, medical conditions related to pregnancy or childbirth, gender, gender identity, and gender expression. AB 2386 expands the term "sex" to include "breastfeeding or medical conditions related to breastfeeding". This legislation will require updating of employee handbooks, notices, and postings related to discrimination prevention.

B. RELIGIOUS DISCRIMINATION: GROOMING AND DRESS PRACTICES

(AB 1964 Amends Government Code sections 12926 and 12940)

Under FEHA, employers must reasonably accommodate religious beliefs and observances of their employees unless the accommodation would create an undue hardship for the employer. AB 1964 clarifies that religious dress and grooming practices are covered "beliefs and observances."

AB 1964 also specifies that segregation from the public or other employees will no longer be an acceptable religious accommodation.

AB 1964 provides the following definitions:

- "Religious dress practice" is construed broadly to include the 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.
- "Religious grooming practice" is also to be construed broadly and includes all forms of head, facial and body hair that are part of the observance by an individual of his or her religious creed. Importantly, the law specifies that an accommodation is "not reasonable" if the accommodation requires segregation of the individual from other employees or the public.

III. CIVIL PROCEDURE / DFEH REORGANIZATION

A. DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING: REORGANIZATION AND REVISION

(SB 1038 - Amends Labor Code)

SB 1038 eliminates the California Fair Employment and Housing Commission and creates the Fair Employment and Housing Council within the Department of Fair Employment and Housing. The Council will consist of seven members appointed by the Governor and will have the power to issue regulations.

With the elimination of the FEHC, SB 1038 also eliminates this administrative hearing process. Now, the DFEH will be able to bring civil actions on behalf of a complainant directly in court. Mandatory dispute resolution is required prior to the DFEH bringing a civil action.

B. CIVIL PROCEDURE: DEPOSITIONS

(AB 1875 – Amends Code of Civil Procedure section 2035.290)

AB 1875 limits the deposition of any person to seven hours of total testimony, bringing California in line with federal procedures. This expressly **does not apply** to any case brought by an employee or applicant for employment against an employer for acts or omissions arising out of or relating to the employment relationship. Other exceptions to this requirement are for expert witnesses, persons most knowledgeable, complex cases, and as otherwise provided by court order or the parties' stipulation. The court will be required to allow additional time if necessary to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

IV. EMPLOYEE PERSONAL INFORMATION LEGISLATION

A. SOCIAL MEDIA: EMPLOYER USE

(*AB 1844 – Adds Labor Code section 980*)

AB 1844 prohibits employers from requiring or requesting employees or job applicants to provide user names or passwords for personal social media accounts so employers can

gain access to those personal accounts. Specifically, AB 1844 prohibits an employer from requiring or requesting an employee or applicant to:

- Disclose a user name or password for the purpose of accessing personal social media
- Access personal social media in the presence of the employer
- Divulge any personal social media (except in relation to employer investigations, as discussed below)

The new law also prohibits employers from discharging or disciplining employees who refuse to divulge such personal social media information.

The law is not intended to infringe on an employer's existing rights and obligations to investigate workplace misconduct. The social media requested or obtained during an investigation, however, must be used solely for purposes of that investigation or a related proceeding.

B. PERSONNEL RECORDS: INSPECTION PROCEDURES, TIME, AND PENALTIES

(AB 2674 – Amends section 1198.5 of the Labor Code)

This new legislation is a sea change. Labor Code section 1198.5 provided an employee the right only to inspect, within a reasonable time after a request, his or her personnel records that the employer maintained relating to the employee's performance or to any grievance concerning the employee

Now, the employer is required to make the personnel records available for inspection, or provide a copy if the employee so requests, to the current or former employee or employee's representative within 30 calendar days of the employer's receipt of the employee's written request unless the parties agree to additional time but not to exceed 35 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 amendment also explains how, where, and when the employer must make the records available for inspection or provide a copy

There are penalties for noncompliance. An employer who does not timely comply with the statutory inspection and copying requirements is liable to the employee or the Labor Commissioner for a penalty of $750, plus injunctive relief and attorneys' fees; however, impossibility of performance is an affirmative defense to an alleged violation of this provision.

The employer must maintain a copy of the employee's personnel records for a minimum three years after termination of the employee's employment.

Caveat: These new provisions rules do not apply during the pendency of a lawsuit by an employee relating to a personnel matter against his or her employer.

V. MISCELLANEOUS LEGISLATION

A. HUMAN TRAFFICKING: PUBLIC POSTING REQUIREMENTS

(SB 1193 – Adds Labor Code section 52.6)

This is the latest of the Legislature's efforts to eradicate human trafficking. SB 1193 requires the following businesses (which were identified as being more prone to human trafficking than other enterprises) to post a notice that contains information related to slavery and human trafficking: (1) on-sale general public premises licensees under the Alcoholic Beverage Control Act; (2) adult or sexually oriented businesses; (3) primary airports; (4) intercity passenger rail or light rail stations; (5) bus stations; (6) privately owned and operated truck stops that provide food, fuel, shower or other sanitary facilities, and lawful overnight truck parking; (7) **emergency rooms** within general acute care hospitals; (8) **urgent care centers**; (9) farm labor contractors; (10) privately operated job recruitment centers; (11) roadside rest areas; and (12) certain businesses or establishments that offer massage or bodywork services for compensation.

The notice must be placed in a conspicuous location near the entrance or otherwise easily visible by the public and employees, and be printed notice in English, Spanish, and in one other language that is the most widely spoken language in the county where the establishment is located and for which translation is mandated by the federal Voting Rights Act. The notice must provide information about and contact information for specified nonprofit organizations that provide services in support of the elimination of slavery and human trafficking. Even though the statute specifies the notice's specific content, font, and size, it also requires the Department of Justice to, on or before April 1, 2013, develop a model notice and make it available for download on the department's Internet Web site.

A business or establishment that fails to comply with these requirements is liable for a civil penalty of $500 for a first offense and $1,000 for each subsequent offense, enforceable by the Attorney General and local prosecutorial agencies if the business fails to correct the violation within 30 days from the date a regulatory agency sent the business or establishment notification of the offense.

B. FALSE CLAIMS ACT

(AB 2492 - Amends Government Code sections 12650, 12651, 12652, and 12654, adds 12654.5, and adds and repeals section 12653)

California's False Claims Act, *inter alia*, prohibits employers from engaging in certain acts that prevent employees from disclosing information to the government or law enforcement agency or from acting in furtherance of a false claims action. This bill expands California's False Claims Act to ensure that the state continues to receive federal dollars for Medicare programs. It also removes conditions on the availability of relief to an employee who is discharged, demoted, suspended, or in any other manner discriminated against in the

terms and conditions of his or her employment because of the employee's acts to stop one or more violations of the False Claims Act. The legislation also authorizes the employee to bring an action in Superior Court within three years of the alleged retaliation.

C. MULTIPLE EMPLOYER WELFARE ARRANGEMENTS: BENEFITS

(SB 615 - Amends Insurance Code section 74f2.40)

Commencing January 1, 2014, the federal Patient Protection and Affordable Care Act (PPACA), requires a health insurance issuer that offers coverage in the small group or individual market to ensure that such coverage includes the "essential health benefits package". Existing state law places certain requirements on a self-funded or partially self-funded multiple employer welfare arrangement (MEWA) to provide benefits to any eligible California residents. Existing law limits those MEWA's to providing certain benefits, including medical, dental, and surgical.

Commencing January 1, 2014, a MEWA will be prohibited from offering, marketing, representing, or selling any product, contract, or discount arrangement as minimum essential coverage or as compliant with the essential health benefits requirement under the federal Patient Protection and Affordable Care Act, unless it meets the applicable requirements under the PPACA.

D. WORKERS' COMPENSATION REFORM

(SB 863 - Amends Sections 11435.30 and 11435.35 of the Government Code, and to amend Sections 62.5, 139.2, 3201.5, 3201.7, 3700.1, 3701, 3701.3, 3701.5, 3701.7, 3701.8, 3702, 3702.2, 3702.5, 3702.8, 3702.10, 3742, 3744, 3745, 3746, 4061, 4062, 4062.2, 4062.3, 4063, 4064, 4453, 4600, 4603.2, 4603.4, 4604, 4604.5, 4605, 4610, 4610.1, 4616, 4616.1, 4616.2, 4616.3, 4616.7, 4620, 4622, 4650, 4658, 4658.5, 4658.6, 4660, 4701, 4903, 4903.1, 4903.4, 4903.5, 4903.6, 4904, 4905, 4907, 5307.1, 5307.7, 5402, 5502, 5703, 5710, and 5811 of, to add Sections 139.32, 139.48,139.5, 3701.9, 4603.3, 4603.6, 4610.5, 4610.6, 4658.7, 4660.1, 4903.05, 4903.06, 4903.07, 4903.8, 5307.8, and 5307.9 to, to add and repeal Section 3702.4 of, and to repeal Sections 4066 and 5318 of, the Labor Code, relating to workers' compensation, and making an appropriation therefore.)

This workers' compensation legislation addresses issues with liens, shortens the medical-legal process, implements an independent medical review system and streamlines the permanent disability schedule. According to the Department of Industrial Relations, these changes are expected to provide $740 million a year in new benefits for permanently disabled workers, starting next year, while reducing overall medical and compensation costs by 4 percent.

VI. PREGNANCY DISABILITY NEW REGULATIONS

The California Fair Employment and Housing Commission (FEHC) proposed new and amended regulations addressing employers' obligations and employees' rights and responsibilities regarding pregnancy. The regulations became effective December 30, 2012 and can be found at Title 2, California Code of Regulations, Sections 7291.2 et seq.

The regulations make substantial changes in the areas of leave, benefits, and reinstatement and impose a new requirement that employers provide notice to employees of their rights to take pregnancy disability leave.

What you need to know about the new pregnancy regulations

Definition of "disabled by pregnancy." The regulations expand the definition of "disabled by pregnancy" to beyond being unable to perform one or more of the essential functions of the job or being unable to perform one or more such functions without undue risk to the employee, the pregnancy's successful completion, or other factors. "Disabled by pregnancy" also includes severe morning sickness or needing to take time off for pre- or postnatal care, bed rest, and/or post-partum depression. Section 7291.2(f).

Amount of available leave. The regulations clarify that "four months leave" means time off for the number of days or hours the employee normally would work within 17.3 weeks (1/3 of one year). A full-time employee who works 40 hours a week would be entitled to 693 hours of leave (40 hours x 17.3 weeks). Section 7291.9(a)(1).

Some employees could be entitled to *more* than 693 hours of leave. If, for example, an employee generally works 48 hours a week, that same employee would be entitled to 832 hours of leave (48 hours x 17.3 weeks). Section 7291.9(a)(2)(A). And, it also follows, if the employee works less than 40 hours a week, it would be entitled to less leave.

Measuring intermittent/reduced schedule leave. An employer may account for leave using the shortest period of time payroll accounts for other leave or one hour, *whichever is less*. Section 7291.9(a)(4).

Right to reinstatement to the same position or to a comparable position after leave or transfer. The employer must reinstate the employee to the *exact same position* and the employer must guarantee reinstatement in writing if the employee asks for a written guarantee. Section 7291.10(a). The employer is excused from reinstating the employee to the exact same position *only* if the employer can prove by a preponderance of the evidence that the employee would not have been employed for reasons unrelated to the leave, such as a layoff or plant closure. Section 7291.10(c)(1).

Even if the employer can prove that it need not reinstate the employee to the *same* position, the employee may still be entitled to reinstatement to a *comparable* position. Section 7291.10(c)(2). A comparable position is one that is virtually identical to the employee's previously held position, including wages, benefits, working conditions, and

shift. Additionally, the position must be at the same or a "geographically proximate" worksite. Section 7291.2(j).

The new regulations eliminate a prior regulation that allowed an employer to refuse to reinstate an employee to the same position if the means of keeping the position open "would substantially undermine the employer's ability to operate the business safely and efficiently." This defense is no longer available.

In order to be excused from reinstating the returning employee to a comparable position, the employer must be able to show by a preponderance of the evidence that: (1) the employer would not otherwise have offered the employee a comparable position had she not taken leave; or (2) a position for which the employee is qualified is not available on the scheduled date of reinstatement **or within 60 days thereafter**. Section 7291.10(c)(2).

The new regulations eliminate a prior regulation that allowed an employer to refuse to reinstate an employee to the same position if the means of keeping the position open "would substantially undermine the employer's ability to operate the business safely and efficiently." This defense is no longer available.

Reinstatement after combined pregnancy/CFRA leave. If an employee takes California Family Rights Act (CFRA) leave after pregnancy leave, CFRA controls reinstatement, and the employer must reinstate the employee to the same *or* comparable position. Section 7291.10(e).

Employers may have to maintain health insurance coverage for up to seven months if an employee takes pregnancy and CFRA leave. The employer must maintain health insurance coverage for the entire period of pregnancy disability leave (up to four months) under the same conditions as if the employee had not taken leave. The regulations are very clear that the employer cannot count *any* of the coverage continuation towards its obligations to maintain health coverage under CFRA. This means that an employer is obligated to maintain coverage for a period of up to seven months if the employee takes the maximum pregnancy disability and CFRA baby-bonding leave. Notwithstanding the regulations are inconsistent with the CFRA statutory and regulatory provisions. *See* Cal. Gov't Code § 12945.2(f)(1); Cal. Code Regs. tit. 2, § 7297.5(c)(2), (4).

An employee who exhausts pregnancy disability leave may be entitled to more leave as a reasonable accommodation. The regulations also make clear that an employer may have to offer additional leave as a reasonable accommodation for a pregnancy-related disability even after the employee has exhausted her right to four months of pregnancy disability leave. Section 7291.14.

Transfers. An employee is entitled to a transfer to a less strenuous or hazardous position if the employee's health care practitioner states that it is medically advisable and the employee is qualified for the position. Section 7291.8(a)(2)(A). An employer can deny the transfer only if it proves by a preponderance of the evidence that it cannot reasonably accommodate the request. Section 7291.8(b).

Reasonable accommodation of a medically-advisable transfer request does not include creating a job the employer otherwise would not have created, discharging another employee, or violating a collective bargaining agreement. Section 7291.8(a)(2)(B).

Although the regulations state that the employer need not create a job it would "not otherwise have created," the Department of Fair Employment and Housing (DFEH) has taken the position that an employer must create a light duty job for pregnant employees if it does so for occupationally-injured employees. In other words, the DFEH asserts that an employer cannot refuse to create a light duty position for a pregnant employee even if the employer creates such positions only for occupationally-injured employees and not for employees who are otherwise disabled.

The regulations prohibit an employer from transferring an employee over her objections. Section 7291.6(a)(1)(G). The only exception is if the employee's health care practitioner states that a reduced schedule or intermittent leave is medically advisable and the employer temporarily transfers the employee to a position that better meets the needs of the employer. Section 7291.8(c).

Other reasonable accommodation. The regulations mandate that employers also provide reasonable accommodations other than transfers and leave. Section 7291.7(a). Reasonable accommodations can include modifying work schedules, allowing more frequent restroom breaks, and/or providing stools or chairs. Section 7291.2(s). The employee is required to provide the employer with 30 days advance notice of the need for accommodation, unless it is not practicable to do so. Section 7291.17(a)(2),(3). The employer must respond to the employee within 10 calendar days (Section 7291.17(a)(5)) and must engage in the good faith interactive process to identify and implement a reasonable accommodation. Section 7291.7(b)(2)(B).

Employers must give advance written notice to employees of rights and responsibilities. Employers are required to give employees advance notice of their rights and responsibilities. Section 7291.16(a). The notice must include very specific information. Section 7291.16(b). Although an employer may create its own notice, the regulations also provide template notices that employers can use. The regulations provide one notice template for employers that are not covered entities under the CFRA and a separate notice template for covered employers.

Employers must distribute the notice in *all* of the following ways: (1) via posting in a conspicuous space (electronic posting is acceptable); (2) by giving it to an employee who notifies the employer of her pregnancy; and (3) by publishing it in the next edition of the employee handbook or, alternatively, distributing it annually (electronic distribution is acceptable). Section 7291.16(d).

The employer must provide a translated version of the notice if 10 percent or more of its workforce has a primary language other than English. Section 7291.16(d)(4).

Medical certification. An employer may require medical certification for leave, transfer, or other reasonable accommodation. Section 7291.17(b). Although an employer may

develop its own form, the regulations provide a medical certification form for pregnancy-related issues that the employer may use. Section 7291.17(b)(1). The employer must give the employee at least 15 calendar days to return the form. Section 7291.17(b)(2).

VII. NEW REGULATIONS UNDER FEHA – REASONABLE ACCOMMODATION

The California Fair Employment and Housing Commission's (FEHC) regulations became effective December 30, 2012. These regulations clarify an employer's obligations to provide reasonable accommodation. The regulations also emphasize that employers must engage in a prompt, good faith interactive process in order to reduce the risk of liability. The regulations may be found at 2 Cal. Code Reg. Sections 7293.5 et seq.

What you need to know about the new FEHC regulations are:

Assumption that individuals have a disability. The regulations make clear in the Statement of Purpose that employers should focus on engaging in the interactive process and providing a reasonable accommodation. "[T]he primary focus in cases brought under the FEHA should [not] be . . . whether the individual meets the definition of disability, which should not require extensive analysis." Section 7293.5(b). The agency will focus on whether the employer reasonably accommodated the employee and not on whether the employee actually had a medical condition that falls within the statutory definition of disability.

Dogs will join the workforce. Animals welcome in the workplace. The regulations specifically mandate that employers may have to allow "assistive animals" into the workplace as a reasonable accommodation. Section 7293.6(p)(2)(B). Assistive animals include not only "guide" and "signal" dogs for the visually and hearing impaired but also "support" animals that provide emotional support to individuals with disabilities such as depression. Section 7293.6(a)(1)(D).

Employers must keep job descriptions up to date. The regulations require that employers can rely only on "accurate, current job descriptions" as evidence that a job function is essential. Section 7293.6(e)(2)(B).

Performance reviews can help establish essential job functions. Employers also can rely on "[r]eference[s] to the importance of the performance of the job function in prior performance reviews." Section 7293.6(e)(2)(H). The Initial Statement explains, "The [FEHC] believes that such references in performance reviews will give a more realistic view of evolving job functions actually performed by an employee than a job description written years before."

Employees must show that leaves likely will be effective in allowing the employee to return to work within a reasonable time period. Employers may have to provide leaves of absence for treatment and recovery as a reasonable accommodation. Section 7293.6(p)(2)(M). However, the regulations imply and the Initial Statement expressly states that the employee has the burden of showing that the leave is "likely to be effective in

allowing the employee to return to work at the end of the leave, with or without further accommodation." Section 7293.9(c).

The FEHC explicitly rejected a "bright line" test of how much leave is too much, preferring to rely on "undue hardship" on a case-by-case basis as the determining factor. The regulations acknowledge that an employer need not provide indefinite leave. Section 7293.9(c).

Making a light duty position permanent is not a reasonable accommodation. The regulations clarify that creating a new position for a statutorily disabled employee is not a reasonable accommodation. Section 7293.9(d)(4). In adding this section, the FEHC relied on case law holding that an employer need not transform a temporary light duty position into a permanent one.

Lowering quality or quantity standards is not a reasonable accommodation. The regulations clarify that an employer need not lower quality or quantity standards as a reasonable accommodation. The employer, however, maintains its obligation to reasonably accommodate the employee to meet its standards.

Employers must exclude leave time for productivity and bonus purposes. Although an employer need not lower its quality or quantity standards, the FEHC in its Initial Statement of Reasons takes the position that any leave time taken must be excluded from assessing productivity. Similarly, the employer must exclude the leave time in distributing bonuses based on productivity.

The employee must establish the effectiveness of the accommodation sought. The regulations recognize that the employee bears the burden of establishing that he or she is a "qualified individual with a disability." This means that the employee must show that he or she can perform the position's essential functions with or without accommodation. Section 7293.7(a). If the employee is a qualified individual with a disability, the employee need only show that the disability was a factor, not the sole or dominant one, in the adverse employment action. Section 7293.7(b).

The employer can assert safety and health defenses only if the employer has engaged in the interactive process. The regulations also recognize that employers legitimately can defend themselves by showing that no accommodation exists that would allow the employee to perform the position's essential functions without imposing an "imminent and substantial degree of risk" to the employee or others. However, the FEHC takes the position that an employer forfeits these defenses if the employer has not engaged in the interactive process. Section 7293.8(b)(c).

Employers may not ask about the specific underlying medical condition. The Initial Statement and the regulations make it clear that the FEHC is adamant that an employer *cannot* ask for medical information that identifies the underlying disability. Section 7294.0(c)(2),(3); 7294.0(d)(1). The FEHC states that it believes that such a prohibition is consistent with California's medical privacy laws, including the California Family Rights Act's prohibition against disclosure of the underlying "serious health condition." The FEHC

also expressed concern about the stigma associated with certain conditions. However, this makes it difficult for employers to assess risks to health and safety if it does not know the underlying condition.

Medical marijuana use is not protected. The regulations confirm that "[a]n applicant or employee who currently engages in the use of . . . medical marijuana is not protected as a qualified individual under the FEHA." Section 7294.2(d)(2)(A).

Employers must implement an interactive process. The regulations underscore the importance of the interactive process and include a lengthy section explaining and detailing the interactive process. Thus, employers that fail to engage in a prompt, good faith, documented interactive process will find themselves at a substantial disadvantage in administrative and court proceedings.

VIII. DOL REGULATIONS – FMLA

On February 6, 2013, the U.S. Department of Labor (DOL) published new regulations that implement the federal Family and Medical Leave Act (FMLA) amendments made by the National Defense Authorization Act for FY 2010 (FY 2010 NDAA) and the Airline Flight Crew Technical Corrections Act. Both laws were enacted in 2009 and entitle more employees to family and medical leave under the FMLA. The regulations become effective on **March 8, 2013.**

A. MILITARY SERVICE MEMBER EXIGENCY LEAVE

The FY 2010 NDAA expanded the military leave provisions that had been added to the FMLA by the National Defense Authorization Act for FY 2008. The FY 2010 NDAA permits the family of regular Armed Forces members, as well as the family of Reserve and National Guard members, to take up to 12 weeks of job-protected leave in a 12-month period for a "qualifying exigency" arising out of the active duty or call to active duty status of a spouse, son, daughter, or parent. A broad range of events and activities are considered qualifying exigencies, including short-notice deployment, childcare and school activities, financial and legal arrangements, rest and recuperation, post-deployment activities, counseling, and military events and related activities.

The new regulations add language to ensure that for purposes of exigency leave related to childcare and school activities the military member must be the spouse, parent, or child of the employee seeking leave, but the child for whom the leave is sought need not be the child of the employee requesting leave. For example, an employee that is the mother of a military member is eligible for leave to deal with the childcare of the military member's child (his or her grandchild). The new regulations also expressly provide for exigency leave for parental care for a military member's parent or a person that stood *in loco parentis* when the parent is incapable of self-care and the need for leave arises out of the military member's active duty or call to active duty. For example, exigency leave may be available to arrange for alternative care for the parent that is required due to the call to active duty.

Prior to the FY 2010 NDAA, exigency leave was limited to the families of Reserve and National Guard members only. The FY 2010 NDAA extended such leave to eligible employees with family members serving in the regular Armed Forces, but it added the requirement that the military member must be deployed to a foreign country. The new regulations incorporate these changes, and further clarify that deployment in international waters is considered deployment to a foreign country.

The new regulations also expand from five to 15 calendar days the amount of FMLA leave an eligible employee is able to take to spend with a covered family member during rest and recuperation periods, with the length of the leave tied to the length of the military member's rest and recuperation leave.

B. MILITARY CAREGIVER LEAVE

The FY 2010 NDAA extended FMLA military caregiver leave to include leave to care for certain veterans, in addition to active members of the Armed Forces. It also expanded such leave to cover serious injuries or illnesses that are aggravated – rather than just initially incurred – during the service member's active duty. Military caregivers may take up to 26 workweeks of leave in a 12-month period to care for a covered service member or veteran with a serious service-related injury or illness. This leave may be taken up to five years after the service member leaves the military with other than a dishonorable discharge.

The FY 2010 NDAA required the DOL to define what constitutes a "serious injury or illness of a veteran." Consequently, the extension of military caregiver leave to the family members of veterans will not be in effect until March 8, 2013 – 30 days after the final regulations were published. Because of the delay in implementing these regulations, however, the regulations specifically state that the period between October 28, 2009, the date the FY 2010 NDAA was enacted, and March 8, 2013, the effective date of the regulations, may not be counted when considering the five-year eligibility period for such leave.

The DOL has adopted four alternative definitions of "serious injury or illness" for veterans. The first definition covers veterans whose serious injury or illness was incurred or aggravated in active duty, rendered the servicemember unable to perform the duties of his or her office, grade, rank or rating, and is a continuation or manifestation of such injury or illness after the servicemember was discharged. The second definition covers servicemembers with a physical or mental condition that have received a Department of Veterans Affairs Service Related Disability Rating of 50% or higher when the rating is at least in part based on the condition that has created the need for leave. The DOL believes that this rating closely approximates a condition that substantially impairs a veteran's ability to work without requiring that the veteran be totally disabled under the U.S. Department of Veterans Affairs' (VA) regulations.

Since the DOL recognizes that not all veterans will satisfy these two criteria and many obtain medical care outside of the VA system, its third definition includes a physical or mental condition that either: (1) substantially impairs the veteran's ability to secure or

follow a gainful occupation due to the service-related disability; or (2) would do so absent treatment. Finally, an injury, including a psychological injury, that led to a veteran being enrolled in the VA's Program of Comprehensive Assistance for Family Caregivers will be considered to be a "serious injury or illness."

The regulations permit employers to seek second and third opinions at the employer's expense if a certification in support of military caregiver leave is provided by a healthcare provider that is not affiliated with the Department of Defense, the VA, or TRICARE.

Military caregiver leave may be taken in a single 12-month period that begins on the first day the employee takes leave and ends 12 months later. In the regulations, the DOL explains that as long as the leave begins at any point within the five-year period, it can extend beyond the five-year period. The regulations also make it clear that a military caregiver may take leave for a servicemember when she or he is on active duty, as well as for the same servicemember when she or he subsequently becomes a veteran.

C. AIRLINE FLIGHT CREW FMLA ENTITLEMENT

The Airline Flight Crew Technical Corrections Act (AFCTCA) allows more airline employees to avail themselves of leave under the FMLA. The Act's intent was to close a perceived loophole in the FMLA's hours of service requirements for pilots and flight attendants whose unconventional work schedules often failed to qualify them for FMLA leave. To be entitled to FMLA leave, employees must have worked for their employer for at least 12 months and for at least 1,250 hours during the previous 12-month period, which equates to at least 60 percent of a standard 40-hour work week. Under the Fair Labor Standards Act, which is used to determine the number of hours worked for FMLA purposes, some courts concluded that the time pilots and flight attendants spent on the job between flights and on mandatory standby duty did not count as "hours worked."

The AFCTCA provided that the hours pilots or flight attendants work or for which they are paid – not just those spent in actual flight – count toward the minimum hours calculation. Under the revised eligibility rules, flight crew employees meet the hours of service requirement if they have worked or been paid for not less than 60 percent of the applicable total monthly guarantee and have worked or been paid for not less than 504 hours during the 12 months prior to the start of their leave.

The regulations establish a special rule for flight crews' use of intermittent or reduced-schedule leave, stating that employers may account for such leave in increments as large as, but no greater than, one day. Because of their unique and widely varying scheduling patterns, flight crews are entitled to 72 days of leave in any 12-month period for FMLA-qualifying leave other than military caregiver leave, and 156 days of leave during any single 12-month period for military caregiver leave. The regulations also impose special recordkeeping obligations on employers of flight crew employees.

IX. U.S. SUPREME COURT EMPLOYMENT LAW CASES TO WATCH IN 2013 (PENDING)

Genesis HealthCare Corp v. Symczyk – Oral argument December 3, 2012
Pending: Mootness of FLSA Section 216(b) collective action

Vance v. Ball State University – Oral argument November 26, 2012
Pending: Scope of the "supervisor" liability rule under Title VII

United States v. Windsor– Oral argument March 27, 2013
Pending: Constitutionality of Defense of Marriage Act; jurisdiction; standing

Oxford Health Plans v. Sutter– Oral argument March 25, 2013
Pending: Authority of arbitrator to order class action arbitration

University of Texas Southwestern Medical Center v. Nassar – Oral argument to be scheduled
Pending Issue: Standard of proof in Title VII retaliation cases

Sandifer v. United States Steel – Oral argument to be scheduled
Pending: What constitutes “changing clothes” within the meaning of Section 203(o) of the Fair Labor Standards Act?

X. U.S. SUPREME COURT RECENT EMPLOYMENT LAW DECISIONS

Kloeckner v. Solis – Decided December 10, 2012
Held: MSPB "mixed case" appeals are filed in district court, not in the Federal Circuit

Arizona v. United States – Decided June 25, 2012
Held: State statute criminalizing unauthorized aliens who work is preempted.

Knox v. Service Employees Int’l Union – Decided June 21, 2012
Held: Mid-year union dues increase requires Hudson notice; nonmembers must affirmatively consent.

Christopher v. SmithKline Beecham Corp – Decided June 18, 2012
Held: Pharmaceutical sales representatives are FLSA exempt as outside salesmen; DOL's interpretation given no deference

Elgin v. Department of the Treasury – Decided June 11, 2012
Held: No district court jurisdiction for federal employee challenging adverse employment action.

Filarsky v. Delia – Decided April 17, 2012
Held: Private lawyer retained by government is entitled to seek qualified immunity

Coleman v. Maryland Court of Appeals – Decided March 20, 2012
Held: FMLA self-care leave provision is not enforceable against states.

Hosanna-Tabor Evangelical Lutheran Church and School – Decided January 11, 2012
Held: Ministerial exception bars minister's termination suit against church

Borough of Duryea v. Guarnieri – Decided June 20, 2011
Held: First amendment retaliation liability under the Petition Clause is limited to matters of public concern

Wal-Mart Stores v. Dukes – Decided June 20, 2011
Held: 1.5 million member class cannot be certified

Chamber of Commerce of the United States v. Whiting – Decided May 26, 2011
Held: Arizona statute that imposes sanctions on employers who hire unauthorized aliens is not preempted

CIGNA Corporation v. Amara – Decided May 16, 2011
Held: ERISA relief is possible without showing detrimental reliance

AT&T Mobility v. Concepcion – Decided April 27, 2011
Held: Federal Arbitration Act preempts state law that made class action waiver unconscionable.

Kasten v. Saint-Gobain Performance Plastics Corp – Decided March 22, 2011
Held: Oral complaint is protected conduct under FLSA's anti-retaliation provision

Staub v. Proctor Hospital – Decided March 1, 2011
Held: If a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA

Thompson v. North American Stainless, LP – Decided January 24, 2011
Held: Title VII creates a cause of action for third-party retaliation for persons who did not themselves engage in protected activity

National Aeronautics and Space Administration v. Nelson – Decided January 19, 2011
Held: NASA's background investigations did not violate federal contract employees' constitutional right to informational privacy

Granite Rock Company v. International Brotherhood of Teamsters – Decided June 21, 2010
Held: Court, not arbitrator, decides CBA's ratification date; new cause of action for tortious interference rejected

Rent-A-Center West v. Jackson – Decided June 21, 2010
Held: Arbitrator, not court, decides whether arbitration agreement is unconscionable.

City of Ontario v. Quon – Decided June 17, 2010
Held: Search of police pager text messages was reasonable, so no 4th amendment violation

Lewis v. City of Chicago – Decided May 24, 2010
Held: In disparate impact case, the use of an earlier unlawful employment practice states a claim.

Hardt v. Reliance Standard Life Insurance Company – Decided May 24, 2010
Held: ERISA claimant can get attorney fees if there is "some degree of success on the merits."

Stolt-Nielsen S.A., et al. v. Animal Feeds International Corp.– Decided April 27, 2010
Held: Imposing class arbitration on parties who have not agreed to it violates Federal Arbitration Act. [Not an employment law case but applied to them.]

Conkright v. Frommert – Decided April 21, 2010
Held: ERISA Plan administrator's interpretation is entitled to deference even after reversal for violating ERISA.

XI. CALIFORNIA SUPREME COURT EMPLOYMENT LAW CASES TO WATCH IN 2013 (PENDING)

Duran v. U.S. National Bank Association: The Court will address what is required to properly certify wage and hour class actions and the appropriate use of representative testimony and statistical evidence at trial.

Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8: The Court will decide whether the parking area and walkway in front of a grocery store is a public forum where employees may picket during labor disputes.

Sanchez v. Valencia Holding Co. LLC: The Court will determine whether the Federal Arbitration Act, as interpreted in by the United States Supreme Court in AT&T Mobility LLC v. Concepcion, preempts state law rules invalidating mandatory arbitration provisions in a consumer contract.

Salas v. Sierra Chemical Co.: The Court will decide whether a court may properly dismiss an employee's claims under the Fair Employment and Housing because the employee used false documentation to obtain employment.

Sonic – Calabasas v. Moreno: The Court will decide whether requiring employees to waive their right to an administrative hearing before the California Labor Commissioner (a "Berman" hearing) is against public policy and therefore unconscionable.

Wisdom v. Accentcare, Inc.: The Court will address whether an employment application stating, "I agree to submit to binding arbitration all disputes and claims arising out of the submission of this application," creates a mutual agreement to arbitrate all employment disputes.

XII. CALIFORNIA SUPREME COURT RECENT EMPLOYMENT LAW CASES

Harris v. City of Santa Monica - February 7, 2013.

The California Supreme Court ruled that even when an employee proves that a discriminatory motive was a "substantial factor" in an adverse employment decision, the employee is not entitled to damages, reinstatement, or backpay, if the employer can show that the same employment decision would have resulted from non-discriminatory factors at the time. However, the Court also held that employees under these circumstances may still be entitled to reasonable attorneys' fees, as well as declaratory or injunctive relief requiring employers to halt discriminatory practices.

Brinker Restaurant Corp. v. Superior Court – April 12, 2012

The Supreme Court determined that to comply with California's meal break statutes, employers must only provide employees with a 30-minute, uninterrupted meal period by relieving employees, "of all duty for the designated time period." Employers do not have to "ensure" that the employee does no work."

With respect to the timing of meal breaks, the Court held that unless the employees waive their meal period, Labor Code section 512 requires employers to provide a meal period no later than the end of the employees' fifth hour of work, and a second meal period no later than the end of the employees' tenth hour of work. The Court rejected the rolling five hour approach proffered by the plaintiffs.

The Court also held that California law requires employers to "authorize and permit rest breaks." Determination of the appropriate rest period is based on the total hours worked in a day at a rate on ten minutes net rest for every four hours, or major fraction thereof, worked. Thus, to comply, employers must permit 10-minute, uninterrupted rest periods for shifts from three and one-half to six hours in length, 20-minute rest periods for shifts lasting more than six hours and up to ten hours, 30-minute rest periods for shifts of more than ten hours and up to 14 hours in length, and so on. The Court

concluded that employers should make a good faith effort to make rest breaks available on either side of a meal break for employees working an eight- hour shift.

Finally, the Court ruled that trial courts may determine whether common issues of law and fact exist in a class action suit, without deciding whether the class claims have any legal merit. The plaintiffs' bar believes this part of the court's ruling opens up new doors for class action claims, even as the Court's discussion of meal and rest period law may close them.

Kirby v. Immoos Fire Protection, Inc. – April 30, 2012

The California Supreme Court issued its unanimous opinion holding that prevailing parties in rest or meal break actions may not recover attorney fees under California Labor Code Sections 218.5 and 1194. In reversing the Court of Appeal's decision, the Court analyzed the interplay of California Labor Code Section 226.7, which provides for the payment of an additional hour of pay as compensation for meal and rest break violations; Section 218.5, which provides for attorney fees and costs to the prevailing party (employer or employee) in an action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, but not in an action for which attorney fees are recoverable under Section 1194; and Section 1194, which provides for attorney fees to prevailing employees only (not employers) in claims for unpaid minimum wages.

Thus, the Supreme Court held that section 218.5 does not apply to claims under section 226.7 because claims under section 226.7 are not "action[s] brought for the nonpayment of wages" within the meaning of section 218.5. Rather, in the Court's view, section 226.7 is "primarily concerned with ensuring the health and welfare of employees by requiring that employers provide meal and rest periods as mandated by the [Industrial Welfare Commission]." Thus, an action brought under section 226.7 is for the "nonprovision of meal and rest periods, not for the 'nonpayment of wages.'" Accordingly, attorney's fees and costs are not available under section 218.5 for violations of section 226.