2013 Employment Legislation Highlights
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The 2013 legislative session produced a number of new employment laws in California. A few of these new legal obligations are outlined below.

Assembly Bill 218 – Restrictions on Criminal History Inquiries

Assembly Bill 218 adds section 432.9 to the *Labor Code*. Effective July 1, 2014, this section will prohibit public agencies, including charter cities, charter counties, and special districts, from inquiring about an applicant's conviction history until after the agency has determined that the applicant meets the "minimum employment qualifications, as stated in any notice issued for the position." The section does not apply to a public agency who is conducting a conviction history background check that is required by law "to any position within a criminal justice agency."

Public employers will need to revise their employment applications and determine at what point in the application process it will inquire about criminal convictions. This inquiry should come before the agency issues a conditional offer of employment pending the completion of any medical examinations to be compliant with the ADA/FEHA disability obligations.

Senate Bill 400 – Victims of Domestic Violence, Sexual Assault and Stalking

Currently, *Labor Code* sections 230 and 230.1 provide protections to domestic violence or sexual assault victims by prohibiting an employer from taking an adverse employment action against a victim who takes time off from work to attend to specified issues arising as a result of the violence or assault. Senate Bill 400, which becomes effective January 1, 2014, amends these *Labor Code* sections to extend current protections to the victims of stalking. The bill also prohibits an employer from discharging or in any manner discriminating or retaliating against an employee because of the employee's status as a victim of domestic violence, sexual assault, or stalking if the victim provides notice to the employer of the status or the employer has actual knowledge of the status. The bill would also require the employer to provide reasonable accommodations that may include the implementation of safety measures or procedures for a victim of domestic violence, sexual assault, or stalking, as specified.

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SENATE BILL 288 – TIME OFF FOR CRIME VICTIMS

Existing law prohibits an employer from discharging or in any manner discriminating against an employee for taking time off to serve on a jury, an employee who is a victim of a crime for taking time off to appear in court as a witness in any judicial proceeding, or an employee who is a victim of domestic violence or a victim of sexual assault for taking time off from work to obtain, or attempt to obtain, prescribed relief. Senate Bill 288 adds new protections for crime victims to attend court proceedings involving the victim's rights, including any delinquency proceeding, a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue. Employers may not discriminate or retaliate against an employee who is a victim of specified serious crimes for taking time off from work to appear in any proceeding. Crimes include such as offenses as solicitation for murder and vehicular manslaughter while intoxicated. Senate Bill 288 defines a "victim" as 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 a delinquent act," and a victim also includes the person's "spouse, parent, child, sibling or guardian." Employees must comply with specific requirements for requesting the leave. Violations of the law will be enforced by the Labor Commissioner. Refusal to reinstate someone wrongfully fired under this law will be a misdemeanor.

SENATE BILL 770 – PAID FAMILY LEAVE BENEFITS

Under current law, employees may seek wage replacement benefits under the family temporary disability program (also referred to as paid family leave or PFL) for taking time off to care for certain seriously ill family members. Senate Bill 770 expands paid family leave benefits for employees to include benefits for time taken off to care for a seriously ill grandparent, grandchild, sibling, or parent-in-law. PFL does not create the right to a leave of absence, but provides California workers with some financial compensation/wage replacement during a qualifying absence. This legislation will not take effect until July 1, 2014.

ASSEMBLY BILL 556 – MILITARY AND VETERAN STATUS ADDED TO THE FEHA

Assembly Bill 556 amends the FEHA to include "military and veteran's status" as a protected characteristic for purposes of workplace harassment and discrimination. Military and veteran's status is defined 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." The amendment specifically provides that it is not intended to prevent an employer to identify members of the military or veterans for the purpose of awarding a veteran's preference. Cities, counties, and cities and counties, both general and chartered, are reminded that *Government Code* section 50088 requires that the board of supervisors or city council either adopt a veteran's preference in the employment application process or adopt a resolution identifying the reasons that it does not implement a veteran's preference.

Employers will need to update their harassment and discrimination policies to reflect this new protected characteristic and should also review all application forms and procedures to ensure that the only requests for information about veteran or military status are related to a veteran's preference.

SENATE BILL 292 – SEXUAL HARASSMENT

Senate Bill 292 amends the FEHA to specify that sexual harassment does not need to be motivated by sexual desire. This bill was specifically authored by Senate Majority Leader Ellen Corbett (D-East Bay) in response to the holding in *Kelley v. Conco Companies* (2011) 196 Cal.App.4th 191. In *Kelley*, the Court found that Kelley, a male ironworker, was

"unquestionably" exposed to "graphic, vulgar, and sexually explicit" language by coworkers and that "[t]he literal statements expressed sexual interest and solicited sexual activity." However, the Court held that Kelley failed to establish a claim for sexual harassment when he was unable to establish that his male harasser was homosexual or was motivated by sexual desire.

Senate Bill 496 – Whistleblower Protections

This new legislation amends several existing statutes, including *Labor Code* section 1102.5 which prohibits an employer from retaliating against an employee who reports any suspected violation of state or federal law or regulation to any government or law enforcement agency. Senate Bill 496 expands *Labor Code* section 1102.5 to prohibit an employer from retaliating against an employee because the employer believes that the employee disclosed or may disclose information to a government or law enforcement agency, or to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation. The bill would also prohibit an employer from retaliating against an employee for disclosing, or refusing to participate in an activity that would result in, a violation of or noncompliance with a local rule or regulation. In addition, Senate Bill 496 exempts this cause of action from the presentation requirements set forth in the Government Claims Act.

Assembly Bill 263 – Protections for Exercising Rights under the Labor Code

Assembly Bill 263 amends various *Labor Code* provisions regarding retaliation. Existing law prohibits an employer from discharging or discriminating against an employee who seeks to enforce their rights under the *Labor Code*. Effective January 1, 2014, *Labor Code* sections 98.6 and 98.7, among others, will be amended to prohibit any adverse employment action or retaliation because the employee has engaged in protected conduct. The new legislation also expands protected conduct to include a written or oral complaint that the employee is owed unpaid wages. The bill also provides that an employee who was retaliated against or otherwise was subjected to an adverse action is entitled to reinstatement and reimbursement for lost wages. Violations of section 98.6 are already deemed misdemeanors; the amendment subjects a person who violates these provisions to a civil penalty of up to $10,000 per violation. The bill also provides that it is not necessary to exhaust administrative remedies or procedures in the enforcement of specified provisions.

Assembly Bill 263, Senate Bill 666, and Assembly Bill 524 – Protections for Immigration Status

Assembly Bill 263 prohibits an employer from engaging in "unfair immigration-related practices" when an employee asserts protected rights under the *Labor Code*. Under the new legislation, employers cannot use immigration law to retaliate against employees who exercise their employee rights. For instance, an employer may not threaten to contact, or contact, immigration authorities because an employee complained that he/she was paid less than the minimum wage. Employers who engage in unfair immigration-related practices will face various penalties, including an employee's right to bring a civil action and potential suspension of certain business licenses.

On a related note, Senate Bill 666 permits the state to suspend or revoke an employer's business license when that employer reports, or threatens to report, the immigration status of any employee because the employee makes a complaint about employment issues. It also allows for disbarment of attorneys for similar conduct against witnesses or parties in a lawsuit.

The law covers reports, or threats to report, employees, former employees, prospective employees or family members, as defined, to immigration authorities. Employers are not subject to the suspension or revocation of a business license for requiring a worker to verify eligibility for employment under the Form I-9. Similarly, Assembly Bill 524 clarifies that a person may be guilty of criminal extortion if the person threatens to report the immigration status or suspected immigration status of an individual, or his/her relative or a member of his/her family.

Senate Bill 462 – Attorneys' Fees Limited for Prevailing Employer in Wage Claims

Currently, the law requires a court in any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, to award reasonable attorney's fees and costs to the prevailing party if a party requests attorney's fees and costs upon initiation of the action. Senate Bill 462 amends *Labor Code* section 218.5 to provide that, where the prevailing party is the employer, attorney's fees and costs shall only be awarded if the court finds the employee brought the action in bad faith.

Assembly Bill 537 – MMBA

Assembly Bill 537 amends the MMBA in the following two ways: (1) it requires that a tentative agreement be accepted or rejected by the governing body within 30 days of presentation at a public meeting; and (2) makes contractual arbitration subject to the California Arbitration Act.

With respect to the first amendment, the use of "tentative agreement" ("TA") in the MMBA is new. Typically, parties will "TA" on certain provisions in the contract during the course of negotiation, evidencing their agreement on that topic. Once the parties have reached agreement on all the provisions of the contract, there is a TA on the memorandum of understanding ("MOU"). The TA is then typically presented to the union membership for ratification by the union membership, and then a final MOU is drafted and presented to the governing body for final approval. While more often than not, the final TA and the MOU are the same, the TA is not usually presented to the governing body – only the MOU in final draft form is presented to the governing body.

Assembly Bill 537 also confuses this traditional process by adding a requirement that the parties shall jointly prepare the MOU if the governing body accepts the TA. However, there is no requirement that the governing body must also adopt the MOU. A dispute could potentially arise after a TA is approved by the governing board, but before the MOU is adopted, and the MMBA is silent on how such a situation would be resolved. As a practical matter, agencies may wish to consider whether the TA and the MOU can be presented to the governing board at the same time, so that the actual contract is approved by the governing board in a timely manner. There is nothing in the language of the statute that expressly prohibits this.

The change regarding contractual arbitration addresses the issue of what happens when a grievant misses a contractual deadline in the processing of a grievance. Commonly, the employer will refuse to arbitrate the grievance based on that failure, and then the union must bring a motion to compel arbitration in superior court. Assembly Bill 537 changes this by requiring that the defense be submitted to the arbitrator.

Interestingly, an earlier version of Assembly Bill 537 had a provision that would have prohibited ground rules that limit the ability of union negotiators to communicate directly with the governing body, but that provision was deleted from the final version that was submitted to the Governor for signature.

ASSEMBLY BILL 1181 – UNION RELEASE TIME

Assembly Bill 1181 amends the MMBA to require employers to give paid time off (commonly referred to as "release time") to a reasonable number of employees for the following activities:

1. Formally meeting and conferring with the public agency on matters within the scope of representation.
2. Testifying or appearing as the employee organization designated representative in conferences, hearings, or other proceedings before PERB or a PERB agent in matters related to charges filed by the employee organization or public agency against the other.
3. Testifying or appearing as the employee organization designated representative in matters before a personnel or merit commission.

The union must provide reasonable notice to the employer of the need for release time.

The MMBA has always required a reasonable number of employees with release time for negotiations, so the only change is to the attendance at PERB proceedings and personnel/merit commission proceedings. Many agencies have negotiated release time in their MOUs, and it is important to consider those provisions during negotiations to determine if any changes are necessary and if it is appropriate for the parties to agree to further details on release time, such as what is a "reasonable" number of employees and what is "reasonable" notice.

SENATE BILL 313 – BRADY LIST

Senate Bill 313 prohibits a public agency from taking any punitive action or denying a promotion on grounds other than merit, against a public safety officer, because the officer's name was placed on the "Brady List." The Brady List is a term commonly used to describe officers whose personnel files contain evidence of dishonesty or bias, which is maintained by the prosecutor's office in accordance with *Brady v. Maryland* (1963) 373 U.S. 83. An agency may still take punitive action against the officer because of the underlying acts or omissions that caused the officer's name to be placed on the Brady List.

Senate Bill 313 also limits the introduction of evidence that an officer's name is on the Brady List during administrative appeals of a punitive action against an officer. According to Senate Bill 313, evidence may only be introduced if, "the underlying act or omission for which that officer's name was placed on a Brady List is proven and the officer is found to be subject to some form of punitive action." Further, evidence that a public safety officer's name was placed on a Brady List may only be used for the sole purpose of determining the type or level of punitive action to be imposed.

BILLS VETOED BY GOVERNOR BROWN

Assembly Bill 729 would have established an evidentiary privilege for communications between a union representative and the represented employee. Governor Brown made the following statement regarding his decision to veto: *"I don't believe it is appropriate to put communications with a union agent on equal footing with communications with one's spouse, priest, physician or attorney. Moreover, this bill could compromise the ability of employers to conduct investigations into workplace safety, harassment and other allegations."*

Senate Bill 655 would have modified and limited the California Supreme Court's controversial holding in *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203. In *Harris,* the Supreme Court held that where an employee demonstrates the employer's adverse action was substantially

motivated by discrimination but the employer demonstrates the employee would have been discharged even in the absence of any discriminatory intent, then a court cannot award back pay, damages, or reinstatement. However, where the unlawful discrimination was a "substantial motivating factor" in the employment decision, the court held that the employee may be entitled to other remedies in the form of declaratory relief, injunctive relief, and attorney's fees and costs.

The backlash against the *Harris* opinion by the plaintiff's bar and employee advocates statewide was immediate. Just shortly after the *Harris* opinion was issued, California Senator Roderick Wright proposed Senate Bill 655, which would have amended the Fair Employment and Housing Act to require a plaintiff to prove that the employer's discriminatory motive was a "substantial motivating factor," which would have been defined under the legislation as one that is "more than a remote or trivial factor" contributing to the employment decision, but "need not be the only or main cause of the employment action." In cases like *Harris*, where an employer is then able to show it would have made the same employment decision without regard to the discriminatory motive, Senate Bill 655 would have foreclosed the possibility of reinstatement or back pay. However, Senate Bill 655 would have significantly departed from *Harris* in that, in addition to authorizing attorney's fees and injunctive relief in these cases, it would also allow the employee to recover "noneconomic damages caused by the adverse action" and would impose a mandatory statutory penalty of $15,000 against the employer.

In rejecting this proposed legislation, Governor Brown stated, "I think Supreme Court Justice Goodwin Liu got it right in his well-reasoned opinion in that case and I see no reason for further legislative intervention."

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