



California Employment Law Update

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January 2013

New Laws Impacting California Employers in 2013

While businesses across the country have been tuned in to federal lawmakers' efforts to avoid the dreaded "fiscal cliff" over the last few months, the California Legislature implemented many new changes for 2013 of which employers doing business in California should take particular note. Although the Legislature made some changes that expand protections for employees, there have also been changes which should provide employers more flexibility in complying with employment laws, such as a provision permitting electronic maintenance of personnel files rather than hard copies, and clarification that written commission agreements are not required for certain employee incentive payments. The changes discussed below will take effect January 1, 2013 unless otherwise stated.

- **Social Media.** Labor Code §980(a) will prohibit employers from requiring or requesting employees or job applicants to 1) provide user names or passwords for personal social media accounts; 2) access personal social media in the employer's presence; and 3) disclose whether they use personal social media at all. There will be exceptions, such as where the employer needs to conduct an internal investigation, or where employer-owned electronic devices are used to access personal social media.
- **Reasonable Accommodation for Religious Observance.** The Fair Employment & Housing Act (FEHA) will be amended to provide additional protections for religious dress and grooming practices, including, for example, religious head coverings and facial hair. Government Code §§ 12926 and 12940 will provide that employer efforts to segregate an individual from other employees or the public cannot be considered a "reasonable accommodation" for that individual's religious dress or grooming practices.
- **Breastfeeding and Sex Discrimination.** FEHA (Gov't Code §12946(q)(1)(c)) will be amended to expand the definition of "sex" discrimination to include breastfeeding and related medical conditions as protected characteristics.
- **Inspection of Personnel Records.** Labor Code §§ 226 and 1198.5 will be amended to permit employers to keep a "copy" of employee personnel records by maintaining the required information electronically, rather than in hard copy. They will also impose limits on the number of inspection requests an employee may make in a given month and reduce the severity of the penalty for an employer's failure to comply with such a request. Although the severity of the penalty will be reduced from a misdemeanor to an "infraction," the scope of what constitutes an "infraction" will be expanded.
- **Penalties for Wage Statement Violations.** Labor Code §226 will be amended to more specifically define the "injury" suffered by an employee where the employer violates the itemized wage statement requirement. The new law will clearly state that an employer's failure to provide an accurate wage statement or a failure to provide a wage statement at all constitutes an "injury" entitling the employee to a monetary penalty, costs, and attorney's fees.
- **Commission Agreements.** Labor Code §2571, which requires that written commission agreements be in writing, will be amended to provide an exception for temporary, variable incentive payments that increase, but do not decrease, payment under the contract. Thus, agreements to make such payments need not be separately stated in writing.

- **Fixed Salaries and Overtime.** Labor Code §515 will be amended to state that payment of a fixed salary to a nonexempt employee will be deemed to be payment only for the employee's regular non-overtime hours notwithstanding any private agreement to the contrary.
- **Elimination of FEHC.** The Fair Employment and Housing Commission (FEHC) will be eliminated and its duties assumed by the Department of Fair Employment and Housing (DFEH). Instead of holding administrative hearings as the FEHC did, the DFEH will be empowered to bring civil actions on behalf of a complaining party directly in court and provide mandatory dispute resolution.
- **Human Trafficking Posting.** Civil Code §52.6 will require specified businesses to post an 8.5" x 11" notice containing information about organizations that provide services to eliminate human trafficking. Covered businesses include on-sale general public premises licensees under the Alcoholic Beverage Control Act, adult or sexually oriented businesses, airports, intercity rail stations, bus stations, truck stops and roadside rest areas, emergency rooms and urgent care centers, farm labor contractors, private job recruitment centers, and certain businesses offering massage or bodywork services for compensation. The Department of Justice will develop a compliant notice which will be available for download on its website. This law goes into effect on April 1, 2013.
- **Prevailing Wages.** Labor Code §§ 1773.1 and 1773.8 will be amended such that employer payment contributions that result in a lower hourly straight time or overtime wage will not constitute a violation of the applicable prevailing wage determination, so long as 1) the increased employer payment is made pursuant to criteria set forth in a collective bargaining agreement; 2) the basic hourly rate and increased employer payment are no less than the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the director's general prevailing wage determination; and 3) the employer payment contribution is irrevocable unless made in error. These amendments codify the position the Department of Industrial Relations already takes with respect to this issue. Many collective bargaining agreements allow members to elect to have a percentage or a set amount deducted from their paycheck and deposited in a union pension/health care account. The DIR has taken the position this does not constitute a violation of the prevailing wage as long as the total hourly package equals or exceeds the correct prevailing wage.
- **Farm Labor Contractors – Increased Penalties.** Labor Code §1683 will be amended to provide for additional, progressive monetary penalties against farm labor contractors who violate licensing requirements based on the number of farm workers employed during the period of noncompliance. An initial violation of the licensing requirement can result in a penalty of up to \$10,000, with successive maximum penalties of \$20,000 and \$50,000 for second and third violations.
- **Warehouse Workers.** The prior version of Labor Code §2810 prohibited a person or entity from entering into an agreement with contractors in the construction, farm labor, garment, janitorial, and security industries where the person or entity knew or should have known that the agreement did not include funds sufficient to comply with all applicable laws and regulations. As of January 1, 2013, Labor Code §2810 will additionally apply to persons or entities contracting with warehouse workers.
- **Itemized Wage Statements.** Effective July 1, 2013, Labor Code §§ 226 and 2810.5 will require temporary services employers ("temp agencies") to provide additional information in their wage statements, including rate of pay and total hours worked for each assignment, and the name, physical address, and mailing address of the physical location where the employee performs work.

- **Wage Garnishment.** Effective July 1, 2013, Code of Civil Procedure §§ 706.011 and 706.050 will be amended to increase the amount of wages exempt from garnishment. The amendment redefines “disposable earnings” which are subject to garnishment as those earnings which are calculated immediately after standard deductions are withheld by the employer.
- **Unemployment Insurance Overpayments.** Several provisions of the Unemployment Insurance Code will be amended to permit the Employment Development Department (EDD) to deny reimbursement to an employer for any overpayments by the employer made to an unemployment insurance reserve account if the EDD determines that the overpayment resulted from an employer’s failure to respond to or provide adequate information to the EDD. This law applies to overpayments established on or after October 22, 2013.

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