Law Offices of Mary L. Topliff
Workplace Wave

New California Laws for 2013: From Social Media to Religion to Personnel Files

By Mary L. Topliff, Esq.

As the 2012 legislative session came to a close in California on September 30, a variety of new laws impacting employers and employees were enacted. A few bills, that would have expanded some employee rights, died in committee while the Governor vetoed some others.

Social Media and the Workplace

Suffice to say that during Governor Jerry Brown's first gubernatorial term back in the 1970's, the term "podcast" was a futuristic, science fiction-sounding concept. Yet, here we are in 2012, and this term is part of a new law defining "social media," including bogs, text messages, email, videos and photographs, among other things. AB1844 prohibits employers from requiring or requesting an employee or applicant to disclose a username or password for the purpose of accessing that individual's personal social media (e.g., Facebook, LinkedIn, Twitter). This new law further forbids an employer from requiring that an employee or applicant access personal social media in the employer's presence.

There is a significant exception to the prohibition of requiring employees to divulge their personal social media and that is in the context of investigations into allegations of employee misconduct or potential violations of laws or regulations when the employer reasonably believes the information is relevant and so long as the social media is used solely for purposes of the investigation or legal proceeding.

Disciplining, terminating or retaliating against an employee for refusing to provide personal social media access is prohibited, unless the aforementioned exception applies or such adverse action is otherwise permitted by law.

Finally, AB1844 creates a new Labor Code section and as such, the Labor Commissioner would typically be charged with investigating complaints of violations. This bill provides that the Labor

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Law Offices of Mary L. Topliff
555 Montgomery St.
Suite 1650
San Francisco, CA 94111
(415) 398-9597
topliff@joblaw.com
www.joblaw.com

Speaking Events

Ms. Topliff will be co-presenting a BLR webinar on 10/30/12 on "After the Investigation: HR's Action Plan for Workforce Recovery and Refocus." For more information, please email topliff@joblaw.com.

On 11/14/12, Ms. Topliff will be conducting a workshop on How to Conduct Workplace Investigations as part of BLR's CA Employment Law Update Conference in Berkeley, CA. For more information, please email topliff@joblaw.com.

Commissioner is not required to investigate or determine these violations.

A related bill, SB1349, was also signed into law, which prohibits public and private colleges and universities from requiring that students reveal their social media usernames, passwords and the like.

****Practice Tips:** Ensure that your Social Media and related policies (e.g., use of company property, internet usage and the like) are compliant with this new law. Confirm these boundary lines with front-line managers who are often connected with their direct reports through personal social media.

Protected Classes Clarified and Expanded

1. Religion. The California Fair Employment and Housing Act (FEHA) prohibits employment discrimination and harassment on the basis of a variety of protected classes or characteristics, including religion. Covered employers must also reasonably accommodate individuals' religious beliefs or observances unless the accommodation would be an undue hardship. Referred to as the "Workplace Religious Freedom Act of 2012," AB1964 expands the definition of "religion" as a protected class to include religious dress and grooming practices. This new law states that "religious dress practice" must be 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 individual's religious observance. "Religious grooming practices" include all forms of head, facial, and body hair that are part of the religious observance.

Prior to this new law, FEHA stated that when there is a conflict between the person's religious belief or observance and any employment requirement, the covered employer must explore available reasonable alternative means of accommodating, including the possibility of excusing the person from those duties that conflict with the religious belief or permitting those duties to be performed at another time or by another person unless there would be undue hardship as defined. AB1964 provides that an accommodation of religious dress or grooming practice is not reasonable if it requires segregation of the individual from other employees or the public or if it would result in a violation of other civil rights laws.

2. Gender. AB2386 expands the definition of "sex discrimination" beyond pregnancy and childbirth to include breastfeeding or medical conditions related to breastfeeding.

3. Disability. With the stated intent of increasing respect towards such individuals, SB1381 changes the term "mental retardation" to "intellectual disability." This terminology is found in a variety of laws, which are now updated by this bill, including FEHA.

****Practice Tips:** Review your dress code, EEO and religious observance policies and update as necessary. Employers are also wise to educate front-line managers on how to handle issues involving employees' religious observances and reasonable accommodations.

Wage and Hour Updates

1. Contracts for Commission Payments. This time last year, a bill was signed into law that will go into effect January 1, 2013, and requires employment contracts in which payment will be made on a commission basis to be in writing and to set forth the method of computation and payment. It excluded from the definition of "commission," short-term productivity bonuses such as those paid to retail employees and bonus and profit-sharing

plans unless there was an offer by the employer to pay a fixed percentage of sales or profits as compensation for services. This legislative session, another law was signed, AB2675, which excludes as a "commission," temporary, variable incentive payments that increase, but do not decrease payments under an employment contract.

2. Itemized Paycheck Stubs. Labor Code Section 226, which sets forth specific information that must be included on employees' paycheck stubs (aka itemized statements), has become the subject of a surprising number of class action lawsuits. Three bills (AB1744, AB2674 and SB1255) were enacted that, together, add and clarify various issues relating to these paystubs. Employers must maintain, for at least three years, copies of these statements or a record of the information, which includes either a duplicate of the statement provided to the employee or a computer-generated record that accurately reflects the required information.

The new laws provide employees with an easier avenue to prove damages when the employer has failed to comply with the itemized paystub requirements. Employees will be deemed to be injured if the employer fails to provide a wage statement, if the employer fails to provide accurate and complete information and the employee cannot promptly and easily determine from the wage statement the amount of the gross or net wages, what deductions were made, the name and address of the employer or the name and identifying number of the employee. However, there is an exception for an isolated and unintentional payroll error due to a clerical or inadvertent mistake. The new law specifies that a relevant factor in determining compliance and whether an isolated mistake occurred is whether the employer had implemented a set of policies, procedures and practices designed to fully comply with the Labor Code requirements.

3. Temporary Services Employer Requirements. Beginning July 1, 2013, "temporary services" employers must include the rate of pay and total hours worked for each temporary services assignment, in addition to the other itemized pay statement requirements described in Labor Code Section 226. "Temporary services employers" are defined by the Labor Code as entities that contract with clients to supply workers to perform services for the clients. Further, these employers must include on the New Hire Disclosure form the name, physical address of the main office (and mailing address if different), and the telephone number of the legal entity for whom the employee will perform work. Security services companies that are licensed by the Department of Consumer Affairs are not considered "temporary services employers" for these purposes.

4. Overtime Pay. AB2013 was enacted to overturn a California Court of Appeal decision in Arechiga v. Dolores Press. The new law specifies that payment of a fixed salary to a nonexempt (i.e., overtime-eligible) employee shall be deemed to provide compensation only for the employee's regular, nonovertime hours, regardless of any private agreement to the contrary. The Arechiga court had sanctioned the employer's agreement with the employee to pay a fixed salary that was to include overtime hours.

5. Wage Garnishment. AB1775, operative July 1, 2013, changes the amount of earnings that may be subject to wage garnishment to the lesser of 25% of the individual's disposable earnings (defined as the portion of earnings that remains after deducting all amounts required to be withheld by law) or the amount that disposable weekly earnings exceed 40 times the state minimum hourly wage.

Practice Tips: Review all commission arrangements to determine if this new law applies and, regardless, take the opportunity to ensure that everything is clearly defined. Set up or revisit paycheck statement procedures.

Personnel File Requests

Labor Code Section 1198.5 has long provided that private sector employees have the right to inspect their personnel records and a separate statute provided employees the right to receive copies of items in their files that they signed relating to the obtaining or holding of employment. This new law makes these rights more definitive and expansive. It now provides not just the right to inspect but also to receive a copy of personnel records relating to employees' performance and any grievances, and extends these rights to current and former employees or their representatives (i.e., attorneys and the like who are authorized in writing by the employee). It further requires that the employer must provide the documents for inspection as well as a copy within 30 calendar days from a written request (with a potential extension of up to 35 days). Employers may charge the employee for the actual copying cost. Failure to timely provide the records results in a $750 penalty and enables the individual to bring an action for injunctive relief and recovery of attorney's fees.

The written request may be required to be submitted on an employer-provided form so long as it is made available to the employee. The employer may designate a person to whom the request must be made.

The employer is also required to maintain a copy of each employee's personnel records for at least three years after termination. For current employees, the inspection or copy provided must occur at the location where the employee reports to work or a mutually agreeable location. If the latter, the employee may not incur a loss of pay. For former employees, the inspection or copies may be provided at the location where the employer stores the records or they may be mailed at the employee's expense. In either case, employers may redact the name of any nonsupervisory employee in the records.

The new law clarifies that if a former employee was terminated for a violation of law or an employment-related policy involving harassment or workplace violence, the employer may make the records available for inspection at a location that is within a reasonable driving distance of the former employee's residence (rather than at an employer's work or storage site) or by mail.

Former employees may only inspect or copy their file once per year. Employers are not required to comply with more than 50 requests in one calendar month for inspection or copies by current employees' representatives. If a current or former employee files a lawsuit in which personnel records are relevant, the right to inspect or copy personnel records ceases during the pendency of the lawsuit.

The new law does not apply to an employee covered by a collective bargaining agreement if the agreement contains a procedure for inspection and copying of personnel records, among other things. The prior law's provisions relating to exclusions for certain public sector employees, as well as documents pertaining to investigations of potential criminal offenses, letters of reference and related items are continued.

**Practice Tips: Create a "Personnel File Review Request" form and update your policy and procedures to ensure timely compliance with employee requests. Human Resources will be well-served by clarifying in advance what personnel file documents are required to be disclosed.

Bills that Died or Were Vetoed

For a number of years, the California legislature has drafted bills that would include "caregivers" as a new protected class for discrimination and harassment purposes and various expansions of California's family and medical leave statute (the California Family Rights Act). Once again, these bills have died in committee.

The Governor vetoed a bill (AB1450) that would have prohibited employers from discriminating against the unemployed by stating in employment ads that applicants must be employed. He also vetoed AB889 that would have led to overtime pay requirements for domestic workers, stating that various questions required further study and review.

For more information about any of these issues, please contact Ms. Topliff at topliff@joblaw.com.