American Staffing Association
277 South Washington Street, Suite 200 ▪ Alexandria, VA 22314-3675

CALIFORNIA

Employment Law Workbook Addendum

(Update on legislation enacted from Jan. 1–Dec. 31, 2013)

Topics

I. Discrimination

Employers may not discriminate against applicants or employees on the basis of their genetic information (SB 559, Civil Code 51, effective Jan. 1, 2012).

The Fair Employment and Housing Act now defines "gender" to include both gender identity and gender expression. The Act also makes clear that discrimination on either basis is prohibited. Law requires employers to allow an employee to appear or dress in a manner consistent with the employee's gender expression or identity (AB 887, Government Code 12949, effective Jan. 1, 2012).

Employers engaged in any public contracts may not discriminate against an individual on the basis of gender or sexual orientation (SB 117, Public Contract Code 10295.2, effective Jan. 1, 2012).

The Knox-Keene Health Care Service Plan Act of 1975 was amended to require that an employer's health care plan or policy must provide the same insurance coverage for same-sex couples as it provides to spouses or domestic partners of a different sex. Additionally, the amended Act requires that this coverage to same-sex couples be applied to employees who are residents of the state of California even if the employer is located in another state, unless the employer's principal place of business is outside the state of California and the majority of the employees are located outside of California as well (SB 757, Insurance Code 10112.5, 10112.7, effective Jan. 1, 2012).

- The Fair Employment and Housing Act was amended to add breastfeeding and conditions related to breastfeeding to the definition of "sex," making it clear that discrimination against a woman based on breastfeeding is unlawful.

  Religious dress practice and grooming have been added to the definition of "belief" and "observance" to protect wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item, as well as head, facial, and body hair that is part of a religious observance.

Comprehensive new disability and pregnancy discrimination regulations became effective December 30, 2012. The disability regulations (published at 2 CCR §§ 7293.5 - 7294.4) aim to comport with the federal ADA Amendments Act, defining mental and physical disability broadly. The pregnancy-related regulations (published at 2 CCR §§ 7291.2 - 7291.16) provide more detail regarding "pregnancy disability leave" which is required independently of job-protected leave under the California Family Right Act of the federal Family and Medical Leave Act. The regulations further provide examples of reasonable accommodations and mandate written notice of rights and obligations be provided.

Military and Veteran Status: the FEHA was amended to add "military and veteran status" to the list of categories protected from employment discrimination under the act. The new law also provides an exemption for an inquiry by an employer regarding military or veteran status for the purpose of awarding a veteran's preference as permitted by law. "Military and veteran status" means 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. (Ch. 691, effective January 1, 2014).

Unfair Immigration-Related Practice: law now prohibits an employer from retaliating or taking adverse action against any employee or applicant for employment because the employee or applicant has engaged in protected conduct. "Protected conduct" was expanded to include: complaint by an employee that he or she is owed unpaid wages and employee "updates or attempts to update his or her personal information, unless the changes are directly related to the skill set, qualifications, or knowledge required for the job." Employees who are undocumented at the time of hire, but who later receive work permits and social security cards, can provide corrected information. Employers must not take any adverse action against the employee for providing false documentation in the beginning. The new law also prohibits employers from reporting, or threatening to report, the suspected citizenship or immigration status of an employee or prospective employee because the person has exercised a right under the labor code or other laws. (Ch. 732, effective January 1, 2014).

Whistleblower Protection: new law expands the protections of Labor Code section 1102.5(a), (b) to internal whistleblowers. It also legislatively overturns case law exempting employees who have legal compliance duties. The law prohibits an employer from adopting any rule, regulation, or policy preventing an employee from disclosing reasonably-believed violations of law or regulations to a person with authority over the employee or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, regardless of whether disclosing the information is part of the employee's job duties. It also prevents retaliation 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 or noncompliance, if the employee has reasonable cause to believe that the information discloses a violation of law or regulations, regardless of whether disclosing the information is part of the employee's job duties. Finally, it makes it illegal to take specified actions designed to prevent an employee from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry where the employee reasonably believes the information or testimony discloses a violation of law or a regulation, and prohibits retaliation against an employee who provides such information or testimony. (Ch. 781, effective January 1, 2014).

Sexual Harassment: the FEHA was amended to specify that, for purposes of the definition of harassment because of sex, that sexually harassing conduct need not be motivated by sexual desire. (Ch. 88, Cal. Gov. Code § 12940, effective January 1, 2014).

Elimination of Requirement to Exhaust Administrative Remedies: new section of the Labor Code provides that it is not necessary for an employee to exhaust administrative remedies in order to bring a civil action for violation of any provision of the Labor Code unless the section under which the action is brought expressly requires exhaustion of an administrative remedy. (Ch. 577, Cal. Labor Code § 244, effective January 1, 2014).

II. Pre-Employment Inquiry Guidelines

An employer may not use an applicant's or employee's credit history in making employment decisions unless the report sought is for one of the following:

(A) A managerial position;

(B) A position in the state Department of Justice;

(C) A law enforcement position;

(D) A position for which the information contained in the report is required by law to disclose;

(E) A position that involves regular access to confidential information (e.g., credit card account, social security number, or date of birth);

(F) A position which the person can enter into financial transactions on behalf of the company; or

(G) A position that involves regular access to cash of $10,000 or more of the employer, customer, or client.

If an employer procures a consumer report for one of these exceptions, it must provide the individual with written notice that a report will be requested, the specific reasons for

obtaining the report, and a check box allowing the individual to request a copy of credit report at no charge (AB 22, Civil Code 1785.20.5, 1024.5, effective Jan. 1, 2012).

California State agencies, cities and counties cannot require private employers to use the federal E-Verify System to confirm the legal immigration status of workers, except when required by federal law or as a condition of receipt of federal funds (AB 1236, effective Jan. 1, 2012).

An employer may not require or request an employee or applicant: to disclose a user name or account password for a social media account; to access social media in the employer's presence; or to divulge personal social media (AB 1844 Campos, new Labor Code §§ 980-982). Exception is allowed for a request reasonably believed to be related to an investigation of employee misconduct or unlawful activity so long as any information is used solely for purposes of the investigation.

Temporary services employers now have additional notice obligations at the time of hire. The notice must include the name, physical address of the main office, mailing address if different, and the telephone number of the legal entity for whom the employee will perform work (AB 1744, effective Jan. 1, 2013).

Employment Applications: Criminal History. New law extends criminal history pre-employment inquiry prohibitions to state and local agencies. State and local agencies may not ask an applicant for employment to disclose, orally or in writing, information concerning the conviction history of the applicant, including any inquiry about conviction history on any employment application, until the agency has determined the applicant meets the minimum employment qualifications, as stated in any notice issued for the position. The prohibition does not apply to a position for which a state or local agency is otherwise required by law to conduct a conviction history background check, or to any position within a criminal justice agency. (Ch. 699, Cal. Labor Code § 432.9, effective July 1, 2014).

III. Family and Medical Leave

Under the California Family Rights Act and Pregnancy Disability Leave ("CFRA") statute, it is now illegal for an employer to interfere with, restrain, or deny the exercise of rights under these Acts (AB 592, Government Code 12945, 12945.2, effective Jan. 1, 2012).

After the first year of employment, employers must provide pregnant employees the same level of insurance benefits during pregnancy leave as provided prior to taking leave. In no event may an employer maintain the health benefits for less than a four-month period. However, employers may recover the premium expenses paid if the employee fails to return to work, unless the reason for failing to return to work is due to CFRA leave or a health condition that prompted the initial leave. Under this new law, an employee who begins a pregnancy leave, but does not become eligible for leave under FMLA or CFRA until after the pregnancy leave has begun, could be eligible for continued health benefits

for up to seven months (four months under the new law and 12 weeks of FMLA). This amendment will also require small employers (with five or more employees) to provide continued health benefits to individuals on pregnancy-related disability leave, which is significantly different from the FMLA, which requires that such benefits be provided by employers with 50 or more employees (SB 299, Government Code Section 12945, effective Jan. 1, 2012).

The calculation for the amount of leave allowed for bone marrow or organ donation is now calculated in business days, not calendar days, and the one-year period is measured from the date the employee's leave begins and consists of 12 consecutive months. The leave is not a break in the employee's continuous service for purpose of Personal Time Off (PTO) and an employer may condition the initial receipt of leave on use of specified number of earned but unused PTO days (S. 272, Labor Code 1508-1512, effective Jan. 1, 2012).

No new laws or regulations enacted in 2012.

Paid Family Leave: the definition of family was expanded for purposes of paid family leave wage replacement to include a seriously ill grandparent, grandchild, sibling, and parent-in-law. (Ch. 350, effective July 1, 2014).

San Francisco Family Friendly Workplace Ordinance: permits employees to request "flexible or predictable working arrangements" to assist with care giving. Creates right to request a flexible working arrangement when needed to assist with child care, a family member with a serious health condition, or a parent age 65 or older. Requires meeting with employee within 21 days, and responding in writing within 21 days after meeting. Allows denial of request for bona fide business reasons (identifiable costs, inability to meet customer demands, and insufficiency of work to give the employee during the period of proposed work). Any denial must explain in detail the business reasons, and also inform the employee of the right to request reconsideration. Covers employers with 20 or more employees; employees working within the City limits for 6 months or more, regularly working at least 8 hours per week. (Ch. 12Z of the Admin. Code, effective January 1, 2014).

IV. Wage and Hour Laws

Certain employees covered by a valid collective bargaining agreement that are employed in construction occupations, as commercial drivers, security officers, or electrical and gas corporations may be exempted from the meal period requirement (after five hours) (Labor Code 512, AB 569, effective Jan. 1, 2011).

An employer who is found to have engaged in the willful misclassification of independent contractors is subject to increased penalties between $5,000 to $25,000 (SB 459, Labor Code Sections 226.8, 2753, effective Jan. 1, 2012).

Employers engaged in commission pay agreements with their employees must put these agreements into a signed written contract that sets forth methods in which commissions will be computed and paid (AB 1396, Labor Code Section 2751, effective Jan. 1, 2012).

Under the new Wage Theft Prevention Act of 2011, employers must provide each employee, at the time of hire, with a notice that specifies the rate and the basis, whether hourly, salary, commission, or otherwise, of the employee's wages and to notify each employee in writing of any changes to the information set forth in the notice within seven calendar days of the changes unless such changes are reflected on a timely wage statement or another specified writing. The Act also creates new disclosure requirements, document retention requirements, and imposes new penalties (AB 469, Labor Code Sections 2810.5, 226, 1197.1, 1174, effective Jan. 1, 2012).

The minimum hourly rate exemption for computer software employees increased from $38.89 per hour to $39.90 per hour. This results in an increase of the annualized full-time salary equivalent from $81,026.25 to $83,132.93 and the minimum monthly salary exemption, from $6,752.19 to $6,927.75 (effective Jan. 1, 2013).

All employers entering into a contract of employment involving commissions as a method of payment for services rendered in California must put the contract in writing, specify the method of computation and payment of the commission, and obtain a signed acknowledgement of the employee (AB 1398, effective Jan, 1, 2013).

Labor Code § 515 was amended to expressly state that payment of a fixed salary to a non-exempt employee is deemed payment only for regular, non-overtime hours, regardless of any agreement with the employee. (The legislation overturns the *Arechiga v. Dolores Press* case wherein the court recognized such an agreement.)

The California Supreme Court clarified in *Brinker Restaurant Corp. v. Superior Court,* 53 Cal. 4th 1004, 273 P.3d 513 (Cal. 2012), that employers must relieve employees from their duties during meal breaks, but need not "ensure" that they do no work. One 30 minute meal period must be provided no later than the end of the 5th hour of work, with a second meal period no later than the 10th hour of work. These first and second meal breaks may be waived where employees work less than 6 and 12 hours respectively, by mutual agreement of the employee and employer.

Temporary services employers that issue itemized wage statements must include the rate of pay and the total number of hours worked for each temporary services assignment (AB 1744, effective Jan. 1, 2013).

The amount of wages protected from garnishment was increased to $320 per week (wages above $320 per week may be garnished up to 25% of disposable income).

Minimum Wage: on and after July 1, 2014, the minimum wage for all industries is increased to $9.00 per hour, and on and after January 1, 2016, the minimum wage for all industries shall be $10.00 per hour. (Ch. 351, Cal. Labor Code § 1182.12, effective January 1, 2014). Another new law clarifies that the civil penalties available under Section 1197.1 are in addition to any awarded liquidated damages and that the Labor Commissioner can assess liquidated damages as part of a citation issued for underpaid wages. (Ch. 735, Cal. Labor Code §§ 1194.2, 1197.1, effective January 1, 2014).

Meal and Rest Periods: Labor Code section 226.7 was amended to provide premium pay (one hour of pay for a mixed break) for missed "recovery" periods. A "recovery period" is a cool down period of at least 5 minutes on an "as needed" basis that must be afforded to employees who work outside. (Ch. 719, effective January 1, 2014).

Court Leave: Employers must not discriminate against employees who take time off to appear in court because they or a relative has been victimized by specified crimes: vehicular manslaughter while intoxicated, felony child abuse likely to produce great bodily harm or a death, assault resulting in the death of a child under eight years of age, felony domestic violence, felony physical abuse of an elder or dependent adult, felony stalking, solicitation for murder, "serious felony", hit-and-run causing death or injury, felony driving under the influence causing injury, and sexual assault. Employee must give reasonable advance notice unless not reasonable to do so. "Victim" includes the employee or the employee's spouse, parent, child, sibling, or guardian. (Ch. 756, Cal. Labor Code § 230.5, effective January 1, 2014).

Victims of Stalking: Cal. Labor Code was amended to extend prohibition of adverse employment actions against victims of domestic violence and sexual assault who take time off from work to also apply to victims of stalking. Employers must engage in the interactive process and provide reasonable accommodation to victims of stalking who request accommodations for safety at work. Employee must disclose status as victim to trigger the process. Employer may require certification of the continued victim status. Employees who are discharged, discriminated, or retaliated against can seek reinstatement & reimbursement for lost wages and work benefits. (Ch. 759, Cal. Labor Code §§ 230, 230.1, effective January 1, 2014).

Expanded Leave for Volunteers: Cal. Labor Code §230.4 was amended to require employers to permit an employee who performs emergency duty as a volunteer firefighter, reserve peace officer, or as emergency rescue personnel to take temporary leaves of absence, not to exceed an aggregate of 14 days per calendar year, for the purpose of engaging in fire, law enforcement, or emergency rescue training. Employer Action: Employers must recognize the expansion of such leave and amend their policies if addressed. (Ch. 120, Cal. Labor Code § 230.4, effective January 1, 2014).

Domestic Worker Bill of Rights: A domestic work employee who is a personal attendant shall not be employed more than nine hours in any workday or more than 45 hours in any workweek unless the employee receives one and one-half times the employee's regular rate of pay for all hours worked over
nine hours in any workday and for all hours worked more than 45 hours in the workweek. (Ch. 374, Cal. Labor Code § 1450 *et seq.*, effective January 1, 2014).

Court Recovery of Unremitted Employee Wage Withholdings: new law makes it a crime for an employer to fail to remit withholdings from an employee's wages that were made pursuant to state, local, or federal law, e.g., for taxes. The new law also provides for any recovery or restitution obtained in the criminal proceeding to be paid to the agency, entity or person to whom it is owed. (Ch. 718, Cal. Labor Code § 227, effective January 1, 2014).

Limitation on Employer's Right to Recover Attorneys' Fees and Costs in Certain Wage and Benefit Lawsuits: Cal. Labor Code § 218.5 was amended to allow an award of attorneys' fees and costs to a prevailing employer only if the court finds that the employee brought the court action in bad faith. The new law does not define "bad faith." (Ch. 142, Cal. Labor Code § 218.5, effective January 1, 2014).

Liens on Real Property by Labor Commissioner: existing law was amended to provide that as an alternative to obtaining a court judgment for violation of wage or other employment law, upon the Labor Commissioner's order becoming final, the Labor Commissioner may create a lien on the employer's real property by recording a certificate of lien with the county recorder of any county in which the employer's real property may be located. Unless the lien is satisfied or released, the lien will continue until 10 years from the date of its creation. (Ch. 750, Cal. Labor Code § 98.2, effective January 1, 2014).

V. Drug Testing

No new laws or regulations enacted in 2012 or 2013.

VI. Noncompete and Other Employment Agreements

No new laws or regulations enacted in 2012 or 2013.

VII. Workplace Safety

There is now a rebuttable presumption that a serious violation exists if the California Division of Occupational Safety and Health (DOSH) shows that there is a "reasonable possibility" that death or serious physical harm could result from the hazard. Current language states that a serious violation exists if DOSH demonstrates that there is a "substantial probability" that death or serious physical harm could result from the

violation. Additionally, there are new procedures and standards for conducting an investigation (Labor Code 6432, AB 2774, effective Jan. 1, 2011).

No new laws or regulations enacted in 2012 or 2013.

VIII. Workers' Compensation

The workers compensation system was reformed to address issues with liens, to shorten the medical-legal process, and to implement an independent medical review system. The stated goal of the reform was to increase benefits to those permanently disabled while reducing overall medical and compensation costs by 4%.

Professional Athletes: new law exempts professional athletes hired outside of the state from the requirements of the workers' compensation law. (Ch. 653, Cal. Labor Code § 3600.5, effective January 1, 2014).

Qualified Interpreter: If an injured employee cannot effectively communicate with his or her treating physician because he or she cannot proficiently speak or understand the English language, the injured employee is entitled to the services of a qualified interpreter during medical treatment appointments. To be "qualified" the interpreter must meet any requirements established by rule by the administrative director that are substantially similar to the requirements set forth in Section 1367.04 of the Health and Safety Code. Upon request of the injured employee, the employer or insurance carrier shall pay for interpreter services. (Ch. 793, Cal. Labor Code § 4600, effective March 1, 2014).

Miscellaneous

A new amendment to the state's security breach notification statute establishes specific content requirements for data breach notifications. Specifically, the amendment lists the type of information that should be contained in the notification to individuals of a data breach. The act requires that all breach notifications include the name and contact information of the notifying person or entity, and a list of the types of personal information that was compromised or was reasonably believed to have been compromised. The notification must also include the toll-free telephone numbers and addresses of the three major credit-reporting agencies—TransUnion, Equifax and Experian—if the breach exposed a Social Security number, driver's license, or California card identification number. Additionally, notifications must be written in plain language and provide a general description of the breach if this information has been determined (SB 24, Civ. Code §§ 1798.29, 1798.82, effective Jan. 1, 2012).

Under California Transparency in the Supply Chains Act, large retailers and manufacturers in the state must disclose information on their Web sites about what they do to eradicate slavery and human trafficking from their supply chains (Civ. Code 1714.43, Jan. 1, 2012). California now requires certain businesses to post information regarding slavery and human trafficking, including privately owned recruitment centers, premises licensed under the Alcoholic Beverage Control Act, primary airports, intercity

rail transportation and bus stations, emergency rooms, and urgent care centers. (SB 1193 effective upon availability of a model notice from the State's Department of Justice anticipated in April 2013.)

Labor Code § 1198.5 regarding an employee's right to inspect his or her personnel records was amended to require maintenance of records for 3 years, to set a 30-day deadline for the employer to allow the inspection, and to permit an employer to redact names of non-supervisory employees in the records.

Protection for Good Samaritan Employees: prevents an employer from prohibiting an employee from providing voluntary emergency medical services, including cardiopulmonary resuscitation, in response to a medical emergency. However, an employer may adopt and enforce a policy prohibiting an employee from performing emergency medical services on a person who has expressed the desire to forgo resuscitation or other medical interventions through legally recognized means. The new law does not impose any express or implied duty on an employer to train its employees regarding emergency medical services or cardiopulmonary resuscitation. (Ch. 591, Cal. Health and Safety Code § 1799.103, effective January 1, 2014).