



# New California Sick Leave Law – Assembly Bill 1522

Procopio's Annual Labor and Employment Seminar

11.17.14

Hollis Peterson, *Senior Counsel*

# New California Sick Leave Law – Assembly Bill 1522 (Effective July 1, 2015)

- All California Employers
- Must provide minimum of 3 days (24 hrs) of paid sick leave per year
- For all employees who work in CA 30 days or more per year



## Excluded employees:

- Union employees covered by CBA with paid sick leave where CBA provides for “final and binding” arbitration of sick leave disputes
- Unionized construction employees
- In-home supportive services employees
- Employees of air carrier flight deck or cabin crew members with paid time off



# Specific Requirements of New Law

- Accrual: At least 1 hr leave for every 30 hrs worked
  - 1.3 hrs per week or 5.3 hrs per month of sick leave for 40-hr/wk employees
  - Employees can use sick leave beginning on 90<sup>th</sup> day of employment
  - Minimum use increment of 2 hrs
  - Employee must provide reasonable advance notice (can be oral) as soon as practicable
  - Cannot force ee to find someone to cover work in order to take leave

# Specific Requirements of New Law

- Unused sick days must carry over up to cap of 6 days (48 hrs).
- UNLESS employees are given total amount of sick leave (3 days) up front at the beginning of each year. Then no accrual or carry over is required.
- Must be paid at current employee's hourly rate.
- Used for "diagnosis, care or treatment of existing health condition or preventative care for an employee or an employee's family member".

(includes parent-in-law, grandparent/child, sibling)



# Specific Requirements

- No pay-out of sick leave upon termination
- Must display poster, provide notice to new ees (provided by Labor Commissioner), and include amount of sick leave available on wage statements
- Must keep sick leave records for 3 years
- No discrimination or retaliation – rebuttable presumption if adverse action w/in 30 days of ee:
  - Filing complaint with Labor Commissioner
  - Cooperating w/investigation
  - Opposing policy or act prohibited by new law

# Not required for employers who already have PTO or sick leave policy IF:

- Current policy provides at least 3 days of leave for same purposes and under same conditions as new law, and either:
  1. Satisfies accrual, carry-over requirements; or
  2. Provides 3 days (24 hrs) leave up front at beginning of each year of employment.
- If PTO provided, still must pay out on termination.
- Must still comply with all posting and notice requirements.



## Legal Updates: Section II – page 10

- Employers May Not Shorten Statutes of Limitation in an Employment Agreements.
- California Court of Appeal held that an employment agreement limiting the statute of limitations to six months for all claims brought by an employee against employer was unreasonable and contrary to public policy.



# Court of Appeal Expands Mixed Motive Defense to Wrongful Termination Claims.

- “Mixed motive” defense in discrimination cases asserts that the employer had both legitimate and discriminatory reasons for taking an adverse action against an employee; based on legit reason, employer not liable.
- Change from requiring a jury to find that discrimination was “a *motivating* factor” to requiring that jury find discrimination to have been “a *substantial* motivating factor.”
- Now applies to wrongful termination claims.
- **BIG WIN FOR EMPLOYERS!**



# After-Acquired Evidence

- Immigration: Relief under FEHA is not barred for an undocumented immigrant who misrepresents immigration status to employer.
- Employee's relief limited to compensation for damages *prior* to employer's actual knowledge of undocumented status.
- Prevents the employee from obtaining relief based on time during which s/he would not likely have been employed.



# A Longer Commute May Render a Higher Paying Job in the Same Business Inferior and Hinder Reliance on the Mitigation of Damages Doctrine

- Terminated employee has duty to mitigate damages and find a new job. If the new job is inferior, the wages may not be used to mitigate damages. ☹️
- 120-mile commute to new job was enough to render the employee's new job "inferior"
- Means employees can receive indefinite lost wages, even if they find employment in the same field at a higher salary.



# Whistleblowing Employees Are Still Protected Even If They Are Not the First to Report the Misconduct.

- Labor Code section 1102.5(b) protects employees who disclose potential violations *already known by or disclosed to the employer*.
- Problematic for employers.



# California Laws re School Teacher Tenure Unconstitutionally Deprive Students of Right to Equal Education

- Vergara v. State of California, No. BC484642, 2014 WL 2598719 (Cal. Super. Ct. June 10, 2014).
- California Superior Court struck down five provisions of the CA Education Code, holding school teacher tenure procedures unconstitutional.
- Found statutes adversely affected quality of education of students by continuously employing ineffective teachers, which is a violation of students' right to equal education.
- Teachers Unions are appealing.

# New Immigration Retaliation Bill Provides Additional Protections for Employees and Employers.

- Prohibits employers from threatening to file or filing an immigration complaint with any state/fed agency.
- Employers are no longer prohibited from taking action against an employee for updating previous misrepresentations about personal information, such as educational qualifications or criminal records.
- Employees are still protected from lawful change of name, social security number, or a federal employment authorization document.



## New Legislation

- Assembly Bill 1443 extends FEHA's unlawful harassment and discrimination protections to unpaid interns.
- Senate Bill 400 prohibits employers from discharging, discriminating against, or retaliating against employees who are victims of stalking.
- Effective January 1, 2015, employers with 50 or more employees will be required to train supervisors on "abusive conduct," or bullying, as part of their mandatory sexual harassment training. (conduct "that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests.")

# Sanity Prevails (for once)

Montague v. AMN Healthcare, Inc., 223 Cal. App. 4th (2014).

- The Court of Appeal held that the plaintiff, who was poisoned by a co-worker, could not maintain a claim against the staffing agency because the employee it had placed acted outside the course and scope of her employment when she placed acid in a colleague's water bottle.
- Also, the staffing agency could not be held liable for failure to adequately train the tortfeasor.
- *Apparently we don't have to train employees not to poison others.* 😊

# What “Misconduct” Disqualifies an Employee from Eligibility for Unemployment Benefits?

- “Misconduct” under section 1256 requires that an employee acted with “wrongful intent.” In the absence of prior discipline or warnings, a single act of disobedience does not constitute misconduct unless the act is substantially detrimental to the employer.
- Exceeding meal periods and falsifying time records related to those meal periods = misconduct.
- Refusal to sign disciplinary notice arising from a customer complaint = good faith error in judgment, not misconduct.



# California Supreme Court Reiterates Proper Test for Independent Contractor Status: Ayala v. Antelope Valley Newspapers, Inc., 59 Cal. 4th 522 (2014).

- One of the most important factors that courts and enforcement agencies use to analyze whether an individual is properly classified as an independent contractor is whether the individual has the “right to control” the work and the manner and means in which the work is performed.
- The main difference between an “employee” and an “independent contractor” is not how much control a business exercises, but how much the business *retains the right* to exercise control over the individual.
- Analyzed employer’s form agreements, but agreements do not control.



# 2014 FedEx Case Illustrates the Importance of Properly Classifying Employees.

- Court looked beyond the language of the 2,300 FedEx driver IC agreements.
- FedEx drivers were not involved in distinct occupations or businesses.
- Drivers had mandatory appearance guidelines:
  - employee uniforms
  - truck color and truck dimensions;
  - all drivers had to use FedEx logos;
  - FedEx dictated when the drivers could leave and return to the terminals.

- Under California Labor Code section 1194.2, an employee is entitled to liquidated damages in “an amount equal to the wages unlawfully unpaid and interest thereon.” Liquidated damages are in addition to damages for unpaid wages and penalties.
- Assembly Bill 2074 amends section 1194.2 to allow employees to recover liquidated damages for the entire three-year statute of limitations period for the underlying minimum wage action.



# California Raises Minimum Wage in Two Steps: Assembly Bill 10

- Increased the minimum wage on July 1, 2014, to \$9.00 per hour.
- Effective January 1, 2016, the minimum wage will again increase, to \$10.00 per hour.
- Increases pay rates for overtime, vacation, sick leave, PTO, and meal and rest period premiums.
- Exempt employee salary requirement increased to \$37,440 per year, and will go to \$41,600 per year in January 2016.
- Commissioned inside sales employee exemption: must earn more than 1.5 times the minimum wage for all hours worked (now \$13.50, and \$15.00 per hour as of January 2016).



# Senate Bill 1360: Employers Will Be Required to Pay Employees for Time Spent on Heat-Related Recovery Breaks.

- Employers with work environments where high risk of heat-related illness and injury must allow employees to take recovery breaks throughout the day to prevent heat exhaustion.
- Regulations do not expressly limit how many recovery breaks an employee may take throughout the day.
- Recovery breaks are separate from rest periods.
- Fully compensable time.

