A Timely Analysis of Legal Developments

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While there were no major employment law bills signed into law affecting California private sector employers this year, there are still several new laws of significance, including a new leave law, that California employers should know about.

No Country For Compromise: The California Legislature's 2010 Production Affecting California's Private Sector Employers

By Christopher E. Cobey

> **UPDATE:** This ASAP's description of new California Labor Code sections 1508 et seq. was modified on October 26, 2010.

The good news? You really expected good news from Sacramento this year?

OK, there was, in a limited way: There were only a few employment law bills signed that significantly affected most California private sector employers. The most important of the new laws creates a new paid leave right for employee organ and bone marrow donors similar to that leave already allowed state employees. Another new law allows a former employee to receive unemployment insurance benefits if the employee left an employer's employ to protect his or her family from domestic violence abuse.

September 2010 represented Republican Arnold Schwarzenegger's last signing and vetoing of legislation as Governor in response to bills produced by a legislature firmly controlled by Democrats; Schwarzenegger's final term in office expires in early January 2011. California voters will select his successor – either Democrat Jerry Brown or Republican Meg Whitman – by November 2. The legislature is likely to remain in the hands of the Democratic party after next month's elections.

This year was yet another California legislative session in which both citizens' and legislators' tempers remained frayed, and the political atmosphere was unremittingly partisan. The 2010 legislative process and attitudes were exacerbated by the longest budget stalemate in California history, which at the time of publication may finally be on the cusp of a resolution – more than three months past the Constitutional deadline. The adjective "dysfunctional" was applied to the California legislature with increasing frequency.

For California private sector employers, the actual number of substantial new employment laws with which to become familiar and comply was (in some respects, thankfully) small. The major issue of meal and rest breaks for all California private sector employers, though the subject of several bills, was not settled legislatively.[1]

There was some good news, however, for employers in some industries with the passage of A.B. 569, discussed below, which eliminated the meal period requirement for a limited group of employees.

The most significant employment law changes for 2010 for most California private sector employers are the following new laws:[2]

- New Labor Code §§ 1508 *et seq*. (Senate Bill (S.B.) 1304; the "Michelle Maykin Memorial Donation Protection Act"): Requires private employers to permit employees to take a leave of absence with pay, not exceeding 30 days, for the purpose of organ donation, and not exceeding five days for bone marrow donation, as prescribed. The new law requires a private employer to restore an employee returning from leave for organ or bone marrow donation to the same position held by the employee when the leave began, or an equivalent position. The new law prohibits a private employer from interfering with an employee taking organ or bone marrow donation leave and from retaliating against an employee for taking that leave, or opposing an unlawful employment practice related to organ or bone marrow donation leave. The new law also creates a private right of action for an aggrieved employee to seek enforcement of these provisions.
- Amended Government Code § 12940 (Assembly Bill (A.B.) 1814): Provides that the California Fair Employment and Housing Act (FEHA) does not prohibit an employer from providing health benefits or health care reimbursement plans to retired persons that are altered, reduced, or eliminated when the retiree becomes eligible for Medicare benefits.
- Amended Labor Code § 98.2 (A.B. 2772): Requires an employer wishing to appeal an administrative judgment of the Division of Labor Standards Enforcement (DLSE) to first post a bond in the superior court. The bill's author stated that the purpose for amending the statute was to confirm the section requirement of an employer for a bond on appeal, which one reviewing court had said was a "directory," not a mandatory, requirement (*Progressive Concrete, Inc. v. Parker* (2006) 136 Cal. App. 4th 540, 545-552).
- Amended Labor Code § 512 (A.B. 569): Exempts, from the general requirement that employers provide a meal period within the first five hours of work, employees in a construction occupation, commercial drivers, employees in the security services industry employed as security officers, and employees of electrical and gas corporations or local publicly owned electric utilities, as defined, if those employees are covered by a valid collective bargaining agreement that expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for meal periods for those employees, final and binding arbitration of disputes concerning application of its meal period provisions, premium wage rates for all overtime hours worked, and a regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate. A *commercial motor vehicle* is defined to include vehicles that requires a class A or class B drivers license, as well as certain vehicles carrying hazardous materials that are required to display placards. The new law specifies that its provisions do not affect the requirements for meal periods for certain other employees or employers, including security officers not covered by a collective bargaining agreement. This bill was opposed by representatives of other industries on the ground that exception to the application of meal break laws should not be done on an industry-by-industry basis, and that the issue should be addressed by comprehensive legislation.
- Deleted and replaced Labor Code § 6482 (A.B. 2774): Establishes a rebuttable presumption as to when an employer commits a serious violation of Cal-OSHA provisions, and defines the term "serious physical harm." Also establishes new procedures and standards for an investigation and the determination by the Division of Occupational Safety and Health (within the Department of Industrial Relations) of a serious violation by an employer that causes harm or exposes an employee to the risk of harm.
- Amended Unemployment Insurance Code § 1030 (A.B. 2364): Revises various provisions governing eligibility for unemployment compensation benefits to specify that a claimant is eligible for benefits where he or she left an employer's employ to protect his or her family from domestic violence abuse.

- Amended Civil Code § 1786.16(a)(2)(B)(vi) (S.B. 909): Effective January 1, **2012**, requires additional disclosures by an employer to an applicant or employee in connection with a background check through a third party "investigative consumer reporting agency" regarding the website address for the agency's privacy practices, including whether the individual's personal information will be sent outside of the U.S.[3]
- New Business and Professions Code § 7127 (S.B. 1254): Authorizes the registrar of contractors to issue a stop order, effective immediately upon service, to any licensed or unlicensed contractor who as an employer has failed to secure workers' compensation insurance coverage for his or her employees. Makes a failure to comply with the stop order a crime. Specifies procedures for the payment of employees during a work stoppage subject to a stop order, as specified, and for an employer to request a hearing to protest a stop order. Upon that request, the registrar of contractors must hold a hearing to affirm or dismiss the stop order and issue and serve on all parties to the hearing a written notice of findings and those findings. Authorizes a writ of mandate to be taken from the findings to the appropriate superior court.

A new law not directly involving employment law, but perhaps of interest to employers involved in state court litigation is the Expedited Civil Jury Trial Act (A.B. 2284; new Civil Code §§ 630.01- 630.12). This new statute permits litigants to agree to a dramatically shortened civil jury trial by eight or fewer jurors. The process envisions a jury trial being completed in one day, with each side being given three hours each to present their cases (including opening statements and argument). Both post-trial motions and appeals are significantly limited. The parties are permitted to agree in advance of trial to maximum and minimum recoveries ("high/low" results), about which limits the jury is not told. For smaller employment cases, this expedited jury trial would allow the litigants to have their "day in court" in a significantly shorter period of time. The expedited jury trial process would "sunset" on January 1, 2016, unless reinstituted.

Another area of legislative activity was on bills crafted and passed by the legislature, but then vetoed by Schwarzenegger. These employment law bills vetoed in 2010, if enacted, would have:

- Prohibited the use of consumer credit reports for employment purposes (A.B. 482).[4]
- Established requirements for safety plan and fatalities reports for ski resorts (A.B. 1562).
- Doubled the amount of liquidated damages that can be assessed against an employer for violating the minimum wage laws (A.B. 1881).
- Imposed criminal penalties for nonpayment of final wages within 90 days of an employee's resignation or termination (A.B. 2187).
- Prohibited an employer from discharging, disciplining, or in any way discriminating against an employee for inquiring about, requesting, or taking up to three days of unpaid bereavement leave upon the death of a spouse, child, parent, sibling, grandparent, grandchild, or domestic partner; would have allowed an employee who believed he or she has been discharged, disciplined, or discriminated against to file a complaint with the Division of Labor Standards Enforcement or bring a civil action in court (A.B. 2340). (The Governor's veto message noted in part that "During this challenging economic period, I am unwilling to add new burdens on [California businesses] and subject them to new grounds for lawsuits.")
- Authorized an employer to use the designation "Breast-Feeding Mother-Friendly Workplace" in its promotional materials if it complied with specific workplace amenities (A.B. 2468).
- Created a pilot program to investigate employment and payment practices within the swimming pool and spa construction industry; and required the Employment Development Department, in consultation with the Franchise Tax Board, the Department of Justice, the Department of Insurance, the Labor and Workforce Development Agency, and industry representatives, to develop and implement a set of criteria that, if met by an employer, would trigger a recommendation for an audit or investigation by the appropriate state tax authorities (A.B. 2770).

- Extended from one year to three years the period within which the Division of Labor Standards Enforcement (DLSE; "Labor Commissioner") could commence a collection action of a statutory penalty or fee (S.B. 903).
- Provided overtime premiums to agricultural workers (S.B. 1121).
- Required employers to post information related to slavery and human trafficking, including information related to nonprofit organizations that provide services in support of the elimination of slavery and human trafficking (S.B. 1230).
- Required that, beginning in 2012, all employment contracts for services rendered within California in which the method of payment involves commissions be in writing and set forth the method by which the commissions shall be computed and paid (S.B. 1370).

As with all vetoed bills where control of the legislature is unlikely to change, it is quite possible that the 2011-2012 legislature will pass many of these proposals again next year. Any of these laws could become law once the new Governor is in office.

Although not required by the new law, California employers should consider updating their employee handbooks and policies to reflect the additional leave rights for organ and bone marrow donor employees.

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[1] The issue of an employer's obligation to either provide meal breaks, or to ensure that employees take meal breaks, has been at the California Supreme Court for two years in the case of *Brinker Restaurant Corporation v. Superior Court*. *See* Littler ASAP, *California Supreme Court Grants Review to Brinker - Employers Await Answer on Meal Period Obligations.*

[2] Full text of all legislation, and any available committee report analyzing the bills, available at www.leginfo.ca.gov. All new statutes take effect January 1, 2011, unless otherwise noted.

[3] Based on this new law, employers are advised to update their background check consent forms effective January 1, 2012.

[4] Employers should be aware that there is still legislation pending at the federal level, and some states such as Oregon and Illinois have enacted such laws limiting the use of consumer credit reports in the hiring process. *See* Littler ASAPs, *New Illinois Law Puts Credit Reports and Credit History Off Limits for Most Employers and Most Positions and Oregon's Job Applicant Fairness Act Update – BOLI Issues Final Rules.*