

Hot Employment Issues For Software Companies

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As a parting shot to California employers, Governor Davis signed a series of laws expanding employees' rights and creating new challenges for businesses operating in this State. In addition to the well publicized legislation that requires California employers to provide their employees with health care coverage, the outgoing Governor also armed every employee with a private right of action to enforce California's Labor Code. Labor Code section 2698 — the so-called "bounty hunter" statute — empowers employees to bring a civil action on behalf of themselves and all other employees for any violation of California's wage and hour laws. The best (and perhaps only) defense to this devastating new weapon is full compliance with the Labor Code, i.e. even with the comparatively inconsequential rules governing matters such as posting and pay stub regulation. The Legislature also created new protections for employees who report suspected illegal conduct to law enforcement and mandated reciprocity in benefits to domestic partners. While an exhaustive discussion of every new California law is beyond the scope of this article, the following provides a summary of the most dramatic changes.

It is recommended that your employee handbook be reviewed and updated, as some of these changes currently impact existing policies. Failure to update employee handbooks will cause the loss of opportunities and potential liability for the employer.

Bounty Hunter Law: Before Labor Code section 2699 (effective January 1, 2004), the bulk of the California's wage and hour laws were solely enforced by administrative agencies which assessed and collected civil penalties. Section 2699, which has been dubbed the "bounty hunter" law, dramatically alters this structure by permitting "aggrieved employees" to sue on behalf of themselves and other employees for any violation of California's Labor Code (with the exception of the recently enacted workers compensation reform laws) provided a state agency has not already cited the employer and initiated proceedings to collect applicable penalties.¹ The law does not require aggrieved employees to meet the strict standards that typically govern class certification.

Employees may also recover attorney fees and enhanced penalties. If the Labor Code does not specify a penalty for a violation, the law creates a default penalty of \$100 for each employee per pay period for the initial violation and \$200 per employee for each subsequent pay period.² Unlike other sections of the Labor Code, Section 2699 does not give Courts discretion to award less than the full penalty or permit a reduction in fines if the violation is not willful. Penalties can add up quickly. For example, if an employer with 40 employees fails to post the regulations concerning the new PFL law described above, it is liable for \$4,000 (40 X \$100) in

penalties the first pay period and \$8,000 (40 X \$200) in penalties for every subsequent pay period.

The suing employee keeps 25% of the penalties. The law distributes 50% of any award to the General Fund and the remaining 25% to the Department of Labor and Workforce Development to fund labor education programs. Given the litigation incentives for employees, it is critical for employers to consult with employment counsel and conduct a full scale audit of their compliance with the Labor Code to reduce the risks of falling prey to this new law.

Employee Health Care Benefits: The Health Insurance Act of 2003 mandates that employers provide health insurance to eligible employees or make contributions to a state entity that will obtain insurance.³ Effective January 1, 2006, employers with 200 or more employees in the State are required to pay at least 80 percent of the health insurance premiums for eligible workers and their dependents or contribute amounts yet to be determined to a state purchasing agency.⁴ By the following year, employers with 20 to 199 California employees must provide such insurance benefits or make payments to the Program, for employees but not their dependents.⁵ The law allows penalties of up to 200% of the cost of the coverage.⁶ Employers with between 20 and 49 employees in the state have been given a reprieve from the new law until the Legislature first authorizes a tax credit equal to 20% of the employer's net cost of the fee.⁷ Only employers with fewer than 20 employees in California are exempt.⁸

Although Governor Schwarzenegger has not sought to repeal this law, its opponents will likely seek a statewide voter referendum and/or challenge it in court.

Domestic Partner Coverage: The Domestic Partner Rights and Responsibilities Act requires employers to grant to registered domestic partners all of the same rights and responsibilities afforded to married spouses under State law.⁹ If an employer offers employer-provided health care coverage to spouses, it must provide the same benefits to an employee's registered domestic partner. Similarly, the law expands the prohibition against discrimination on the basis of "marital status" in the Fair Employment & Housing Act¹⁰ to include domestic partners. Although the bill is designed to provide reciprocity to registered domestic partners, in some situations, it provides greater benefits than are available to spouses. For example, if an employee takes a leave under the California Family Rights Act (CFRA) to care for a domestic partner with a serious health condition, the employer is not entitled to concurrently designate the leave under the FMLA because domestic partners are not permitted leave under the federal law. As a result, an employee

could potentially take 12 workweeks of CFRA¹¹ leave to care for a domestic partner and still be eligible to take 12 additional weeks of FMLA leave.

Paid Family Leave: Effective July 1, 2004, the “paid family leave” (PFL) act provides up to six weeks of wage replacement benefits to employees who take time off to care for a seriously ill child, spouse, parent or domestic partner or to bond with a new child.¹² For now, the law is funded entirely through employee contributions to State Disability Insurance (SDI).

Although eligible employees may not begin recovering until after July 1, 2004, the PFL imposes certain obligations on employers effective January 1, 2004. First, employers must provide all new employees with a brochure on PFL. Second, employers must provide the brochure to all employees who leave work on or after July 1, 2004, for a PFL qualifying leave. Finally, employers must display a new poster describing the PFL program. The brochure and poster are available at www.edd.ca.gov.

Employers should consult employment counsel when determining whether an employee who is receiving PFL benefits is entitled to reinstatement rights to avoid a wrongful termination and/or retaliation claim. The new law does not address the “right” of an employee to take a leave, and/or be reinstated. Such rights remain the province of the FMLA, CFRA and/or Pregnancy Disability Leave Law. The PFL merely provides for wage-replacement benefits.

Employers who wish to require their employees to use their accrued vacation time must provide notice to their employees of the requirement in an employee handbook or similar document. The law does not allow employers to require employees to use sick leave. We suggest an immediate review and update of employee handbooks to address the PFL/vacation issue.

Whistle-Blower Protection: In the wake of Enron, Worldcom and other corporate scandals, the Legislature amended the Labor Code to increase protection for employees who blow the whistle on their employers to state or federal agencies. The employees need

only reasonably believe that their employer violated the law. The law also adds protection to employees who refuse to participate in an activity the employee believes is unlawful. Employers charged with retaliation under this statute must prove by “clear and convincing” evidence that any adverse employment action was taken for a legitimate reasons. The law directs the California Attorney General to establish a “whistleblower hotline.” Employers must post a list of employee rights and responsibilities under the statute, including the telephone number of the whistleblower hotline, (800) 952-5225.

Notes

1. Cal. Lab. Code § 2699(g).
2. Cal. Lab. Code § 2699(e).
3. Cal. Lab. Code §§ 2120 et seq.
4. Cal. Lab. Code §§ 2120.1(a), 2122.3, 2140, et seq.
5. Cal. Lab. Code §§ 2120.1(b), 2122.4, 2140 et seq.
6. Cal. Lab. Code § 2140.8.
7. Cal. Lab. Code § 2120.1(b).
8. Cal. Lab. Code §§ 2120.1, 2122.5.
9. Cal. Fam. Code 297.5(a).
10. Cal. Gov't Code § 12940.
11. Cal. Gov't Code §§ 12945.1-12945.2.
12. Cal. Unemp. Ins. Code § 3301(a)(1).

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