

THE DEVELOPING LABOR LAW: WHAT CALIFORNIA EMPLOYERS NEED TO KNOW FOR 2011

by Travis M. Gemoets

The good news? There were only a few employment law bills signed that significantly affect most California private sector employers. Good for unionized employers in certain industries, is the passage of A.B. 569 (see below) which modified the meal requirement. Although the issue of meal and rest breaks was the subject of several bills, a legislative solution was not reached and it is likely that the Supreme Court of California will resolve the issue in 2011.

The most substantial of the new laws, the "Michelle Maykin Memorial Donation Protection Act," creates a new paid leave for employee organ and bone marrow donors similar to the leave already allowed state employees (see S.B. 1304 below).

Employment law changes for most California private sector employers include:

- **Paid Leave. New Labor Code (S.B. 1304):** The "Michelle Maykin Memorial Donation Protection Act" requires private employers with at least 15 employees to allow those who have already used all available sick time to take a leave of absence with pay for no more than 30 days for organ donation, and up to five days for bone marrow donation. Employees returning from bone marrow or organ donation must be returned to their original job or an equivalent, and employers are prohibited from retaliating against an employee for taking the leave. The new law also establishes a process for employees to seek enforcement of these provisions.
- **Meal Periods. Amended Labor Code (A.B. 569):** Exempts some employees in certain industries from the requirement that meal periods occur within the first five hours worked, including security services, construction, commercial driving, and electric and gas corporations and public utilities. This amendment only applies if the employees are covered by a valid collective bargaining agreement that specifies wages (including overtime premiums), work hours, working conditions and an hourly rate of at least 30 percent more than the state minimum wage. 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.
- **Cal-OSHA. Deleted and Replaced Labor Code (A.B. 2774):** Establishes a rebuttable presumption when an employer commits a serious California Division of Occupational Safety and Health (Cal-OSHA) violation, and defines the term "serious physical harm." This code also provides new procedures and standards for a Division of Occupational Safety and Health investigation for serious violations by an employer that causes harm or places an employee at risk.
- **Retiree Benefits. Amended Government Code (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.
- **Unemployment Benefits. Amended Unemployment Insurance Code (A.B. 2364):** Revises provisions governing eligibility for unemployment compensation benefits to specify that an employee is eligible for benefits if he or she leaves a position to protect his or her family from domestic violence abuse.
- **Background Checks. Amended Civil Code (S.B. 909):** As of January 1, 2012, employers are required to provide an applicant or employee with the addresses of the webpage containing the privacy policy of a third party "investigative consumer

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reporting agency" performing a background check, disclosing whether the individual's personal information will be sent outside of the U.S.

- **Workers' Compensation. New Business and Professions Code (S.B. 1254):** Allows the registrar of contractors to issue a stop order, effective immediately, to any contractor who, as an employer, has failed to secure workers' compensation insurance coverage for his or her employees, and makes failure to comply with the stop order a crime. Procedures are specified for employee payment during a work stoppage and for an employer to request a hearing to protest a stop order
- **DLSE Appeals. Amended Labor Code (A.B. 2772):** Requires an employer wishing to appeal an administrative judgment of the Department of Labor Standards Enforcement (DLSE) to first post a bond in the superior court. The purpose for amending the statute is to confirm the section requirement of an employer for a bond on appeal, which one court ruled as a "directory," not a mandatory, requirement (*Progressive Concrete, Inc. v. Parker* (2006)).

STATE COURT LITIGATION UPDATE: THE EXPEDITED CIVIL JURY TRIAL ACT

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. This new statute permits litigants to agree to a dramatically shortened civil jury trial by eight or fewer jurors. The process envisions the completion of a jury trial in one day, with each side given three hours each to present their case (including opening statements and argument). Both post-trial motions and appeals are significantly limited. The parties are allowed to agree in advance to maximum and minimum recoveries ("high/low" results), which are not disclosed to the jury. 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.

VETOED BILLS

Employment law bills crafted and passed by the California legislature this year, but then **vetoed** by Governor Schwarzenegger would have:

- Prohibited the use of consumer credit reports for employment purposes (A.B. 482).
- Imposed criminal penalties for nonpayment of final wages within 90 days of an employee's resignation or termination (A.B. 2187).
- 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 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).

Since we have a new governor in Sacramento, it is safe to assume that the legislature will attempt to reintroduce some if not all of the above in the coming year.

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Travis Gemoets, an experienced trial lawyer, is a partner in the Labor and Employment Group of JMBM's Los Angeles office. He represents management in all facets of labor and employment law, including claims of discrimination, harassment, wrongful termination, wage/hour class actions, trade secrets, unfair competition, union/management relations and workplace violence. Travis advises employers nationwide on these areas as well as on disability and religious accommodation, protected absences, personnel policies and handbooks, employee discipline and discharge, and labor relations.