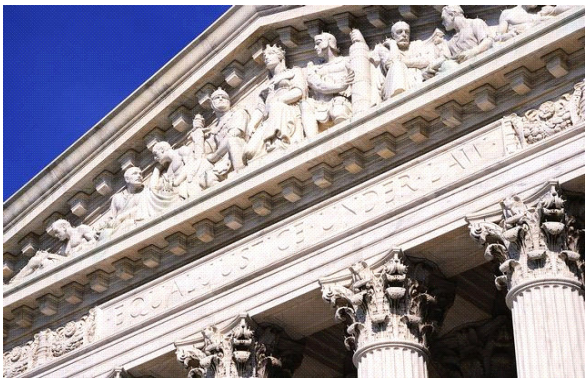
KOUMAS LAW GROUP

Employment Law Update

December 2012

110 West "C" Street, Suite 1300, San Diego, CA 92101/ (619) 682-4811/ www.koumaslaw.com



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LOOKING FORWARD: LEGISLATIVE DEVELOPMENTS IN CALIFORNIA– FALL 2012

Every year, the Governor of California wades through a large number of employee-friendly bills placed on his desk by our California Legislature. This year was no different. This fall, Governor Jerry Brown signed into law a number of employment related statutes, many of which are summarized here.

PERSONNEL FILES

Labor Code Section 1198.5(a) currently allows "every employee" to inspect the personnel records maintained by the employer and pertaining to that employee. As a result of the amendments passed by the Legislature, section 1198.5(a) will permit "current and former employees, or his or her representative," to inspect and receive a copy of those personnel records. "Representatives" making Section 1198.5 requests must be authorized to do so in writing by the current or former employee.

Section 1198.5(b) currently requires employers to make the contents of personnel records available to requesting employees "at reasonable intervals and at reasonable times". The new Section 1198.5(b)(1) specifies that the personnel records must be made available no later than 30 calendar days from the date the employer receives a written request from a current or former employee (or his or her representative) unless the employee and employer agree to extend the deadline to 35 days. The employer must also provide a copy of the personnel records by this deadline.

Under a new Section, 1198.5(b)(2)(A), all requests to inspect or receive a copy of personnel records must now be in writing. Under the current law, employers have the option of (1) keeping a copy of personnel records at the place the employee reports to work, (2) making the records available at the place the employee reports to

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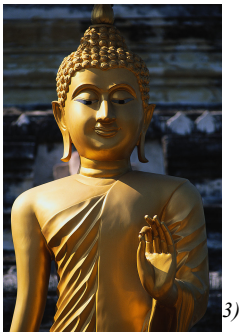
work within a reasonable time of the request for inspection, or (3) permitting inspection at the location where the employer stores the records). Under the amendments, employers must:

- Maintain a copy of each employee's personnel records for no less than three years after termination.
- Make personnel records of current employees available for inspection (and provide a copy thereof) at the place where the employee reports to work, or another location if agreed upon.
- Make personnel records of former employees available for inspection (and provide a copy thereof) at the location is where the employer stores the records, unless the parties mutually agree in writing to a different location. (A requesting employee may receive the copy by mail if he or she reimburses the employer's postal expenses.)

It is important to note that if a former employee was terminated for a violation of law or employment-related policy involving harassment or workplace violence, the employer may instead (1) make the records available at a location other than the workplace that is within reasonable driving distance of the employee's residence; or (2) provide a copy of the records by mail. Access to personnel record information will be restricted in certain ways:

- A former employee may only make one Section 1198.5 request per year.
- An employer must only comply with up to fifty (50) Section 1198.5 requests per month.
- Employers may take reasonable steps to verify the identity of the current or former employee or his or her representative.
- Employers may designate the person to whom a request is made.
- Employers may redact names of any nonsupervisory employees contained in the records prior to inspection or copying.

The penalty for noncompliance with new Section 1198.5(k) and (l) is $750. An employee may also seek injunctive relief and request attorney's fees and costs in connection with any noncompliance action. A violation of this section is no longer a misdemeanor. Where a suit is pending for noncompliance with Section 1198.5, the right of the employee or representative to inspect or copy personnel records under this section ceases during the pendency thereof if the personnel records are relevant to the lawsuit. Finally, employees subject to certain covered collective bargaining agreements (which must contain specific information, including wages, hours of work, and working conditions, and provide a procedure for the inspection and copying of personnel records) may not make requests pursuant to Section 1198.5.



RELIGIOUS DISCRIMINATION

FEHA regulates employment discrimination based on race, *religious creed*, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age or sexual orientation. As of January 1, 2013, FEHA's definition of "religious

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creed" will be amended to explicitly include "religious dress practice" and "religious grooming practice" as a belief or observance to existing protections against religious discrimination in the FEHA. The amendment states that the terms "religious dress" and "grooming practices" should be broadly construed and "to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed." Religious artifacts and jewelry may apply to the wearing of ceremonial swords by employees. In addition, an accommodation of an individual's religious dress or grooming practice that would require that person to be segregated from other employees or the public because of religious dress or grooming practices is not a reasonable accommodation. AB 1964 codifies existing California interpretations of religious discrimination into law. (A.B. 1964; amended Government Code sections 12926 and 12940.)

LACTATION

The Fair Employment and Housing Act (FEHA) is amended to provide that, for purposes of the Act, the term "sex" also includes breastfeeding or medical conditions related to breastfeeding. The new law states that the changes made by this bill to the above provisions are declaratory of existing law. (AB 2386; amended Government Code § 12926(q).)

WRITTEN COMMISSION AGREEMENTS

In our January 2012 legal update, we informed you about a new obligation that will be imposed on employers which requires commissions agreements to be in writing effective January, 1, 2013. The Labor Code amendment clarifies that "commissions" requiring written commission agreements do **not** include short-term productivity bonuses such as are paid to retail clerks, temporary incentive payments that increase, but do not decrease payment under a written contract, and bonus and profit-sharing plans, unless there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed. (A.B. 2675; amended Labor Code section 2751.)

PAY NOTICE

As previously reported to you in our January legal update, as of January 1, 2012, Labor Code Section 2810.5 imposes a requirement that employers provide a written notice describing rates of pay which included the name, address, and telephone number of the employer and the employer's workers' compensation insurance carrier. Effective January 2013, as a result of the newly amended section, a temporary services employer will also have to include in such notice the name, physical address of the main office, mailing address of the main office (if different from the physical address), and the telephone number of the legal entity for whom an employee performs work.

ITEMIZED WAGE STATEMENTS

In addition to the information that is already required to be included on itemized wage statements, amendments to Labor Code Section 226(a)(9) will soon require that itemized wage statements issued by temporary service employers must include the rate of pay and total hours worked for each temporary service assignment. Notably, the new Section 226.1 specifies that security services companies

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that are licensed by the Department of Consumer Affairs and solely provide security services are **not** bound by this new Section 226(a)(9) requirement.)

After the amendments, an employer may satisfy the record retention requirements under Section 226(a) by maintaining a copy of the itemized statement provided to an employee **or** a computer-generated record that accurately shows **all** of the information required by that section.

Finally, Section 226(e) is amended to further define what is meant by "an employee suffering an injury" under this section, which will now include:

- An employee suffers injury if the employer fails to provide a wage statement; or
- An employee suffers injury if the employer fails to provide accurate and complete information as required by any one or more items listed in section 226(a)(1)-(9) and the employee cannot "promptly and easily" ascertain one or more of the following without reference to other documents or information:
  - o the amount of gross wages or net wages paid during the pay period;
  - o the total number of hours worked if the employee is not salaried;
  - o the number of piece-rate units earned and the piece rate;
  - o deductions made;
  - o the dates of the pay period;
  - o all applicable hourly rates in effect during that pay period;
  - o the name and address of the employer (as well as certain additional information if the employer is a farm labor contractor as defined in section 1682); or
  - o the name of the employee and either the last four digits of his or her social security number or an employee identification number other than the social security number.

SUMMARY CRIMINAL HISTORY INFORMATION

Effective January 1, 2013, AB 2343 creates new disclosure requirements for employers who receive summaries of criminal history information directly from California's Department of Justice. This new law will require any entity or individual that receives "[s]tate summary criminal history information" or subsequent arrest notification information from the California Department of Justice to *expeditiously* provide a copy of the information to the person to whom the information relates if the information is a basis for an adverse employment, licensing or certification decision. "State summary criminal information," is a master record summary of information gathered by California's attorney general pertaining to the identification and criminal history of any person (such as the name, physical description, fingerprints, dates of arrests and charges against that person).

While this new law applies only to specific information received from the California Department of Justice, employers may wish to review the criminal information they receive from all governmental and

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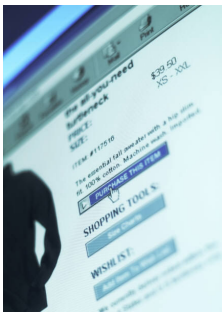
private agencies, since the federal Fair Credit Reporting Act and the California Investigative Consumer Reporting Agencies Act also contain regulations that apply to the disclosure and dissemination of criminal information.

The New Burden Placed on An Employer's Access to Social Media



With the innovative technology available in the 21st Century, many employers wish to utilize information made accessible through social media sites, to vet recruits and investigate current employees. However, all inquires must be work-related and must acknowledge privacy rights of the individual. Basic questions that should be asked before embarking on a background check which intends to explore social media, include but are not limited to: "Why do you want to use social media?" "What information are you hoping to find?" "Is a candidate's use of social media an advantage or disadvantage to the hiring decision?" Because you have no control what you will learn once you go online, searches should not be conducted until after an offer of employment is made, contingent on passing a background check.

Those involved in the hiring process and background checks should be trained on the organization's policy. A list of specific information that the organization wants to know from a search of social media should be identified, to include items such as: expressions of hate, drug use, sexual content, good judgment, good writing, volume of online activity (updating status frequently and during work hours). Protected characteristics should not be reported upon and the person conducting the search should not be the same person making the hiring decision. Notwithstanding the foregoing value of social media, employers are now limited in how they can access such information.

Governor Brown signed both A.B. 1844 and S.B. 1349, this creating a new Labor Code section 980. Under new Labor Code Section 980, effective January 1, 2013, an employer may not require or request that an employee or applicant for employment (1) disclose a user name or password for the purpose of accessing a person's social media, (2) access personal social media in the employer's presence, or (3) divulge any personal social media. An employer is also prohibited from discharging, disciplining, threatening to discharge or discipline, or otherwise retaliating against an employee or applicant for not complying with a request or demand that violates Labor Code section 980.

Additionally, an employer may not require an employee or applicant to divulge any personal social media unless the employer reasonably believes such disclosure is relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws or regulations, "provided that the social media is used solely for purposes of that investigation or a related proceeding." Under the new law, however, an employer may require the disclosure of a username or password for the purpose of accessing an employer-issued electronic device.

Although employees may sue employers in court for a violation of the new law, the California Labor Commissioner , who typically enforces many of the California employment laws, is specifically ex-

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empted from investigating or determining any violation of the Act. Therefore, it will remain to be seen what remedies, short of a court action, an employee or applicant could pursue for alleged violations. Further, the language of the bill did not limit the ability of an employer to request discovery of personal

Just a Reminder:
How to Legally Survive The Holiday Season

Recommendations For Reducing Risks Associated with Holiday Parties

Employers hosting events, such as upcoming holiday parties, should be concerned with issues such as sexual harassment, discrimination, liability for acts of employees against third parties, and workers' compensation claims. First and foremost, the party should not be labeled with a reference to a particular religion (*i.e.,* "Christmas") but rather "Holiday Party." All employees should feel comfortable and welcome to attend. Should the event be sponsored such that it allows the employee to bring someone with them, the invitation should not refer to a "spouse" but rather guest.

To help reduce or eliminate some of these potential legal pitfalls, employers should consider eliminating and/or reducing the availability of alcohol at the event. Perhaps a lunch party instead. Utilizing drink tickets or a cash bar can also minimize alcohol consumption. Additionally, hiring professional bartenders who have authority to cut off employees who appear to have had too much, as well as require identification from those who look under the legal age to drink alcohol can assist with the goal.

To establish the right environment, any applicable employee handbook policies should be reviewed that pertain to alcohol and drug use, harassment, discrimination, and other improper conduct. Employees, including supervisors, should be reminded of policies relating to discrimination, harassment and retaliation. For obvious reasons, mistletoe is strongly advised against. Further, a reminder of the hands-free cellular phone use policy and law, while driving, should be redistributed to avoid any desire for calls/texting after an employee has imbibed any alcohol at a company sponsored event. Last, but certainly not least, it should be made perfectly clear that attendance at any company sponsored event is purely voluntary.

Office Shutdowns and Paying Exempt Employees

In general, as a result of the salary basis rules, a White Collar Exempt employee performing *any amount* of work in a workweek is to be paid for a full workweek. Where absolutely no work is performed in a workweek, no pay is required. However, there are several exceptions to the general rule, which permit an employer to dock pay (pay less than the full salary) for certain absences. Where an exempt employee is absent for a **full day** under certain limited circumstances, the weekly salary can be

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docked. Under certain scenarios, **partial day** absences may result in the ability of the employer to require the employee to use accrued paid benefits in order for employee to be compensated for such absence. Employers cannot dock an exempt employee's pay for any absences during a week that result from jury duty, serving as a witness, or temporary military leaves of absence.

Exempt employees are not permitted to be subject to partial *pay* deductions based on the number of hours worked, *except*:

- for full day personal absences other than sickness or disability; (partial day deductions from an employee's vacation leave bank for partial day absence of at least 4 hours)
- for full day sickness or disability if pursuant to a bona fide plan for paid benefits for illness and no accrued time on books; (can charge sick account for partial day absence)
- hours taken as unpaid FMLA leave;
- offsets for jury fees, witness fees and military pay; (no partial pay deductions for partial week absence due to jury or military duty)
- initial or terminal weeks of employment;
- deductions for penalties imposed for violations of significant safety rules.

Employers often wonder whether they can require an exempt employee to use vacation benefits to be paid during partial or full week office closings. If a business shuts down for *less than a full week* (even for a holiday), all exempt employees must receive their full salary. The same would apply if the employer does not have work available for the employee. Full week closures do not require paying exempt wages unless vacation/ PTO benefits are used by the employee. Non-exempt employees need only be paid for hours worked and can be required to use paid benefits during office closings.

Take Away Tip: Issue clear guidelines for employee attendance at company-sponsored holiday events. Before docking any exempt employee's paycheck for full and partial day absences, see Exemption Chart located on our website and/or contact Elizabeth Koumas with any additional questions.

Looking Back: California Laws Significantly Changed Construction Payment Forms & Requirements

This past year, effective July 1st, our California legislature rewrote statutes relating to Preliminary Notices, Payment Releases, Mechanics Liens, Payment Bond Claims, and Prompt Payment and Retention requirements. Organizations in the construction industry expose themselves to significant financial loss because failure to know and comply with these new requirements can result in a forfeiture of a company's statutory payment remedies. In the face of our ongoing economic challenges, statutory payment

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remedies may be a business' only hope of getting paid if the party with whom it contracted does not have the money to pay. Go to: http://www.koumaslaw.com/pdf/Carlinconstructionupdate2012.pdf

Employee or Independent Contractor? The IRS Offers Relief

The misclassification of employees as independent contractors keeps large sums of money out of the federal funds because the employer is not paying payroll taxes for those workers. The Voluntary Classification Settlement Program (VCSP) is a program that provides an opportunity for taxpayers currently classifying their workers as independent contractors who want to reclassify their workers as employees for employment tax purposes for future tax periods with partial relief from federal employment taxes. A taxpayer must have consistently treated the workers as nonemployees, and must have filed all required Forms 1099 for the workers to be reclassified under the VCSP for the previous three years to participate in VCSP. Additionally, the taxpayer cannot currently be under audit by the IRS and the taxpayer cannot be currently under audit concerning the classification of the workers by the Department of Labor or by a state government agency. In order to participate in the VCSP, an eligible taxpayer must complete and submit an application, using Form 8952, Application for Voluntary Classification Settlement Program (which is available on our firm's website). The application should be filed at least 60 days from the date the taxpayer wants to begin treating its workers as employees.

The Internal Revenue Service and the State of California Employment Development Department offer **free seminars** to help employers comply with the federal and state of California employment tax laws. Call (949) 389-4609 for a current schedule or visit www.irs.gov for more information.

FUTURE PRESENTATIONS

Employment Law Update: From A to Z

Date December 14, 2012 **Time:** 8:30a.m. to 4:30p.m.

Location: Homewood Suites by Hilton San Diego, Del Mar 11025 Vista Sorrento Parkway

Sponsored By: Lorman Educational Services

Prevent the financially crippling employee claims and lawsuits that plague employers in hard financial times. Register for this seminar and get the money-saving employment savvy your company has been looking for. Continuing education credits available. A 20% registration discount will be honored to clients of the firm.

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