

Recently Enacted Legislation of Interest to California Employers

by Ellen C. Cohen and Thomas N. Makris

September 30 was the last day for California Governor Edmund G. Brown, Jr. to sign or veto bills passed by the State Legislature during its 2011-2012 Regular Session. Governor Brown signed several bills of interest to California employers, including an overhaul of the Workers' Compensation system, elimination of the Fair Employment and Housing Commission, new laws requiring accommodation of employees' religious dress and grooming practices, restrictions on access to employees' social media accounts, expanded state law protections for whistleblowers, and new rules governing employees' rights to inspect their personnel files.

A.B. 1844: Employer Use of Social Media

This legislation responds to concerns that employers are forcing workers to turn over passwords to their personal social media accounts¹. The law prohibits an employer from requiring or requesting that an employee or applicant do any of the following: (1) disclose usernames or passwords for the purpose of accessing social media; (2) access personal social media in the presence of the employer; or (3) divulge any personal social media, except in cases where the information is reasonably believed to be relevant to an investigation of employee misconduct or illegal activity, provided the social media is used solely for purposes of that investigation. The law does not prohibit an employer from requiring an employee to turn over usernames, passwords, or other information needed to access an employer-issued electronic device.

A.B. 1964: Accommodation of Religious Dress & Grooming Practices

Under California's Fair Employment and Housing Act ("FEHA"), employers are required to accommodate employees' religious beliefs and practices, unless doing so would cause an undue hardship. A.B. 1964 amends FEHA to require that employers accommodate employees' "religious dress and grooming

¹ Client Alert – [Employ Me, Don't Friend Me: Privacy in the Age of Facebook](#)

practices,” which are broadly defined. Religious dress practices 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 grooming practices include “all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed.”

The law expressly provides that an accommodation of an individual’s religious dress or grooming practices is not reasonable “if the accommodation requires segregation of the individual from other employees or the public.” A.B. 1964 also defines “undue hardship” in the accommodation of religious dress and grooming practices as it is defined elsewhere in FEHA. This means that an employer claiming undue hardship must show that accommodation of an employee’s religious dress and grooming practices would entail “significant difficulty or expense.” In contrast, under the more liberal standard applied under federal law, the employer could establish undue hardship by showing that accommodation would involve more than “de minimis” expense.

The new legislation may give rise to an increase in the number of lawsuits claiming religious discrimination.

A.B. 2386: Discrimination on the Basis of Breastfeeding

Under FEHA, it is unlawful for employers to discriminate on the basis of sex. A.B. 2386 provides that the term “sex” also includes breastfeeding or medical conditions related to breastfeeding. The bill states that it is declarative of existing law, meaning that its effect would be immediate.

A.B. 2492: Expanded Protections for Whistleblowers

This law amends various provisions of California’s False Claim Act (“CFCA”) to conform to the federal False Claim Act. The CFCA provides protection and financial incentives for employees who oppose or report fraudulent claims made by their employers in connection with work performed for the state and its political subdivisions. Supporters argued that the legislation was necessary to maintain California’s eligibility for tens of millions of dollars in federal bonuses for Medicaid-related false claims recoveries.

The CFCA amendments expand whistleblower protections to include contractors and agents who pursue false claims actions, expand the definition of a false claim, amend the statute of limitations, and authorize courts to award attorneys’ fees in more cases, all consistent with federal law. The new law also increases civil penalties by 10%, now ranging from \$5,500 to \$11,000 per false claim.

The new law may lead to increased scrutiny for government contractors and a rise in claims of retaliation by their employees.

A.B. 2674: Right to Inspect Employment Records

A.B. 2674 expands employers’ existing obligation to allow employees to inspect their personnel records. The new law requires employers to maintain personnel records for a minimum of three years after termination of employment. Employers must make personnel records available to current and former employees for inspection within 30 calendar days from the date the employer receives a written request. The date may be extended by agreement, not to exceed 35 calendar days from the employer’s receipt of the request. Personnel records may be inspected by the employee or his or her representative. Upon written request, employers must provide a copy of the personnel records, at a charge not to exceed the

cost of copying. Prior to making the records available, the employer may redact the name of any nonsupervisory employee contained in the records.

The law provides that with respect to requests by a former employee, employers are required to comply with only one request per year to inspect or receive a copy of the former employee's personnel records. Additionally, employers are not required to comply with more than 50 requests filed by employee representatives in one calendar month. The law also provides that if a current or former employee files a lawsuit in a personnel matter against an employer, the right to inspect and copy personnel records ceases during the pendency of the lawsuit.

Violations of the law can result in a penalty of \$750, to be recovered by the Labor Commissioner, in addition to injunctive relief and reasonable attorney's fees. The law expressly provides that impossibility of performance may be asserted as an affirmative defense in any action alleging violation of this legislation.

S.B. 863: Reform of Workers' Compensation System

S.B. 863 reforms the Workers' Compensation system, implementing changes in multiple areas including: medical provider networks, independent medical and bill reviews, lien reform, fee schedules, medical care reforms, permanent disability claims, and return to work rules.

Among other changes, the reforms eliminate permanent disability claims related to sleep disorders, sexual dysfunction, and psychological "add-ons." Supporters of the legislation argue that these changes should narrow litigation over frequently disputed claims, resulting in cost savings and increased aggregate benefits of approximately \$740 million per year.

The new law aims to eliminate waste and inefficiency in resolving coverage disputes. The reforms adopt an independent medical review system patterned after the process used to resolve disputes in the health insurance system. Independent medical experts will issue final, binding decisions in coverage disputes, which can only be appealed on limited grounds, such as fraud, conflict of interest, discrimination, or clear mistakes of fact that do not involve medical expertise.

Supporters contend that the reforms will lead to cost savings for insurance companies, which could be passed on to employers. The State Compensation Insurance Fund said that it will likely recommend a five-to-seven percent reduction in insurance rates as a result of the legislation.

S.B. 1038: Eliminates Fair Employment and Housing Commission

California's budget crisis has spurred efforts to cut spending, eliminate duplication, and increase efficiency wherever possible. S.B. 1038 eliminates the Fair Employment and Housing Commission, the administrative adjudicatory agency created under the FEHA. The law constructs a Fair Employment and Housing Council within the Department of Fair Employment and Housing ("DFEH"). The Council's seven members, appointed by the governor, will conduct public hearings and take regulatory action when necessary.

In recognition of the fact that key developments in California employment law are made in the courts, rather than before administrative agencies, the law allows the DFEH to file cases directly in court. Before instituting any civil action, however, the DFEH will require all parties to undergo free dispute resolution through its in-house Dispute Resolution Division. The law also authorizes the courts to award reasonable attorney's fees and costs to the DFEH.

Except as noted these laws all become effective January 1, 2013.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Ellen C. Cohen [\(bio\)](#)
Los Angeles
+1.213.488.7313
ellen.cohen@pillsburylaw.com

Thomas N. Makris [\(bio\)](#)
Sacramento
+1.916.329.4734
tmakris@pillsburylaw.com

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.

© 2012 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.