AGRICULTURAL PERSONNEL MANAGEMENT ASSOCIATION

Forum 2013

HOT TOPICS IN LABOR AND EMPLOYMENT LAW

Ronald H. Barsamian
BARSAMIAN & MOODY
A Professional Corporation
Attorneys at Law
1141 W. Shaw Ave., Ste. 104
Fresno, CA 93711-3704
Tel: (559) 248-2360
Fax: (559) 248-2370
Cell: (559) 269-2560
rbarsamian@theemployerslawfirm.com

Robert P. Roy
President/General Counsel
VENTURA COUNTY AGRICULTURAL ASSN.
916 W. Ventura Blvd.
Camarillo CA 93010
Tel: (805) 388-2727
Fax: (805) 388-2767
Cell: (805) 320-5102
Rob-VCAA@pacbell.net

Human Trafficking—SB 1193

- Effective January 1, 2013, certain California employers, have to conspicuously post a notice that contains information related to slavery and human trafficking.
- This law applies to businesses involved in the transportation and services sector, including farm labor contractors.

Human Trafficking—SB 1193

- Failure to comply with the posting requirements may result in a $500 civil penalty for a first offense, and a $1,000 penalty for each subsequent offense.
- The new law will require these businesses to post the notice in English, Spanish and, in an additional language that is most widely spoken in that county, if otherwise mandated by federal law.

Human Trafficking—SB 1193

- The poster will include information regarding victims existing rights under the law, including the ability to seek court remedies for damages.
- The notice may not be available prior to April 1, 2013, although the law was effective as of January 1. Specified employers, including farm labor contractors, will be required post the notice upon its availability.

Patient Protection Affordable Care Act Update

- Under the Patient Protection and Affordable Care Act (PPACA), the health benefit exchange will be operational on January 1, 2014. However employers will be required to provide notice prior to the beginning date of the exchange.

Patient Protection and Affordable Care Act Update

- By March 1, 2013,
- 1. Employers will be required to distribute a letter to employees explaining what Exchanges are and how they work.
- This date has been delayed, due to the challenges in establishing the exchanges.

Patient Protection and Affordable Care Act Update

- W-2 reporting: Employers must report on W-2's for 2012 income, due out by January 31, 2013, any expenditures made for employee health care.
- Dental and vision premiums need not be reported.
- The W-2 reporting requirement is optional for employers that had fewer than 250 employees in 2011.
- Employers must report the aggregate cost of employer-sponsored group health plan coverage on their employees' W-2 forms.

California Adopts New Disability Regulations

- The Fair Employment and Housing Commission ("FEHC"), prior to being dismantled, approved amendments to the California Fair Employment Housing Act's ("FEHA") disability regulations. The amendments became effective December 30, 2012.

California Adopts New Disability Regulations

- The regulations define mental and physical disability broadly to include any disorder that affects a person's mental or bodily functions and limits a major life activity. The regulations list new examples of disabilities, such as autism, clinical depression, post-traumatic stress disorder, obsessive compulsive disorder, cerebral palsy, HIV/AIDS, seizure disorder, multiple sclerosis and heart disease. The new regulations also provide standards for determining if a job function is essential, and provide detail on employer and employee responsibilities in engaging in the interactive process and providing reasonable accommodation.

California Adopts New Disability Regulations

- The regulations also set out examples of potential reasonable accommodations, such as permitting employees to work from home. They address the circumstances in which employers may require additional medical documentation to support a request for reasonable accommodation.

California Adopts New Pregnancy Disability Regulations

- The FEHC also proposed new and amended regulations addressing employers' obligations and employees' rights and responsibilities regarding pregnancy under the FEHA. The regulations became effective December 30, 2012. Please refer to Notices "A" and "B" on the DFEH website at www.DFEH.ca.gov/forms.

California Adopts New Pregnancy Disability Regulations Cont'd.

- The definition of "disabled by pregnancy" has been expanded. "Disabled by pregnancy" also includes severe morning sickness or needing to take time off for pre- or postnatal care, bed rest, and/or post-partum depression.

California Adopts New Pregnancy Disability Regulations Cont'd.

- The regulations clarify that "four months leave" means time off for the number of days or hours the employee normally would work within 17.3 weeks (1/3 of one year.)

California Adopts New Pregnancy Disability Regulations

- The FEHC also proposed new and amended regulations addressing employers' obligations and employees' rights and responsibilities regarding pregnancy under the FEHA. The regulations became effective December 30, 2012.

Wage Garnishments – AB 1775

- Effective July 1, 2013, the amount of wages exempt from a garnishment is increased from the federal standard, which is the lesser of 25% of an individual's weekly "disposable earnings" or the amount by which the individual's disposable earnings for the week exceed 30 times the federal minimum hourly wage.

Wage Garnishments – AB 1775

- Under the new higher California standard, the maximum deduction is the lesser of 25% of an individual's weekly disposable earnings or the amount by which the individual's disposable earnings for the week exceed 40 times the California minimum hourly wage. The amendment also provides new definitions and formulas to determine "disposable earnings."

FEHA Amended to Protect Breastfeeding– AB 2386

- California's Fair Employment and Housing Act's ("FEHA") definition of "sex" is amended to include breastfeeding and medical conditions related to breastfeeding. It is unlawful to discriminate against an employee because she breastfeeds, or because she has a medical condition associated with breastfeeding.

Protections for Religious Creed Expanded– AB 1964

- The FEHA is revised to include "religious dress practice" and "religious grooming practice" as a belief or observance to the existing protections against religious discrimination. "Religious dress practice" is broadly construed "to include the wearing or carrying of religious clothing, head or fact coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed."

Protections for Religious Creed Expanded– AB 1964

- Also, the amended Act states that "Religious grooming practice" is broadly construed "to include all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed." Employers have a duty to provide a reasonable accommodation for religious artifacts and jewelry and may not segregate employees from the public or other employees.

Social Media and Personal Passwords—AB 1844

- This law prohibits employers from requiring or requesting employees or job applicants to provide user names or passwords for personal social media accounts and from requesting an employee or applicant to divulge personal social media.

Social Media and Personal Passwords—AB 1844

- This restriction does not apply to passwords or other information used to access employer-issued electronic devices. The bill stipulates that nothing in its language is intended to infringe on employers' existing rights and obligations to investigate workplace misconduct.

Retirement Savings Plans – SB 1234

- The California Secure Choice Retirement Savings Act creates the California Secure Choice Retirement Savings Program, which requires eligible employers to offer a payroll deposit retirement savings arrangement to allow eligible employees to contribute a portion of their salary or wages to a retirement savings account in the Program. The statute only applies to California workers who do not have access to an employer-sponsored retirement plan.

Governor's Cost-Cutting Reorganization Plan

- The governor's cost-cutting reorganization plan eliminates the Fair Employment and Housing Commission ("FEHC") and creates the Fair Employment and Housing Council ("Council") under the Department of Fair Employment and Housing ("DFEH").

Governor's Cost-Cutting Reorganization Plan

- The Council will consist of seven members appointed by the governor and will have the power to issue regulations. The DFEH will now be able to bring civil actions on behalf of complainants, after first engaging in mandatory dispute resolution. The court is now authorized to award attorneys' fees and expert witness fees in successful civil actions.

Fines for Failing to Pay Labor Commissioner Awards Increased– SB 1144

- The fines are increased for employers who willfully fail to pay a final court judgment or final order from the Labor Commissioner for all wages due to an employee who has been discharged or who has quit within 90 days of the date that the judgment was entered or the order became final. Employers who violate the statute are guilty of a misdemeanor. For awards over $1000, the minimum fine will be $10,000.

Unemployment Insurance: Overpayment and Penalties—AB 1845

- This law provides that the Employment Development Department (EDD) can deny reimbursement to an employer for any overpayments made to its unemployment insurance reserve accounts if the EDD determines that overpayment resulted from an employer's failure to respond to or provide adequate information to the EDD. This law applies to benefit overpayments established on or after October 22, 2013.

Payment of a Salary to Nonexempt Employees – AB 2103

- The payment of a fixed salary to a non-exempt employee provides compensation only for the employees' regular, non-overtime hours, notwithstanding any "explicit mutual wage agreement" or other private agreement to the contrary. This law overrules Arechiga v. Dolores Press, issued last year, which held that employers and non-exempt employees could agree on a salary that includes overtime.

Access to Personnel Files – AB 2674

- Employees' right to inspect and receive copies of personnel records under Labor Code 1198.5 is amended. Former employees now have the same right to copy and inspect their personnel files as current employees. Personnel records must be provided within thirty days following the written request of the employee or the employee's representative. There are several other components to this significant change to the law. The DLSE may assess fines of $750 for each violation.

Written Commission Agreements – AB 1396

- As of January 1, 2013, all commission payment arrangements with employees must be in a written commission agreement. The agreement must include the method for calculating the commissions and employees are required to sign a "receipt" retained by the employer. Commissions do not include short-term productivity bonuses (AB 2675.)

Farm Labor Contractors—AB 1675

- This law changes the penalties for farm labor contractors failing to be licensed. Existing law requires licensing by the Labor Commissioner and compliance with specified employment laws applicable to farm labor contractors. Under existing law farm labor contractors are required to have a license, but there is no civil penalty for operating without a license. Now, they will be subject to a penalty of up to $50,000.

Right to Picket in Front of Retail Stores Upheld by California Supreme Court

- In the Recent case Ralphs v. UFCW Local 8, the California Supreme Court held that a Union's right to picket in the walkway in front of a supermarket is protected by California law.
- The Moscone Act protects a Union's right to picket on "any public street or any place where any person or persons may lawfully be."

Right to Picket in Front of Retail Stores Upheld by California Supreme Court

- Ralphs sought to enjoin picketing by the union in front of one of its grocery stores. Under Section 1138.1, the company seeking the injunction must provide witness testimony establishing that unlawful acts have been threatened and have or will be committed unless restrained, and that substantial or irreparable injury to the company's property will follow.

Right to Picket in Front of Retail Stores Upheld by California Supreme Court

- Ralphs argued that Labor Code Section 1138.1 violated the First Amendment of the U.S. Constitution and the California Constitution's free speech protections, by giving favorable treatment to "union speech."
- The Court disagreed, finding that the state has an interest in promoting collective bargaining to resolve labor disputes. Since labor picketing is an integral part of collective bargaining, the union is justified in enacting procedural safeguards to protect picketing from judicial interference. The Court found that picketing on the private sidewalk in front of the targeted store was protected by these laws.

NLRB Rules Employer May Not Stop Deducting Dues When Contract Terminates

- In the recent case WKYC-TV v. NLRB, the National Labor Relations Board ("NLRB") has overruled the fifty year old decision in Bethlehem Steel Co. Bethlehem that had held for fifty years that union security/dues check-off clauses may be cancelled by employers upon contract expiration.
- Now, the NLRB has held that the employer may not unilaterally cease deducting dues pursuant to a check-off provision at the expiration of the contract without first bargaining with the union.

NLRB Rules Employer May Not Stop Deducting Dues When Contract Terminates

- The Board held that dues check-off "does not involve the contractual surrender of any statutory or non-statutory right. Rather, it is simply a matter of administrative convenience to a union and employees whereby an employer agrees that it will establish a system where employers may, if they choose, pay their dues through automatic payroll deduction."

AB 243: THE FLC PAY STUB RULE

- Assembly Bill 243 was signed into law by Governor Brown and takes effect on January 1, 2012.

- Modifies Labor Code Section 226 by requiring that farm labor contractors list the name and address of the legal entity that secured the services of the farm labor contractor.

LABOR CODE 226(a)

226. (a) Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. The deductions made from payment of wages shall be recorded in ink or other indelible form, properly dated, showing the month, day, and year, and a copy of the statement and the record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California.

DLSE 406 (Rev. 11/11)
FARM LABOR CONTRACTOR LICENSE
Forms and Instructions
WAGE DEDUCTION STATEMENT
(Page 3)

DATE (Month, Day, Year)				GROSS WAGES EARNED	$	
NAME OF EMPLOYEE				DEDUCTIONS: Federal Withholding Tax	$	
SOCIAL SECURITY NUMBER				O.A.S.D.I. (Social Security)	$	
INCLUSIVE DATES OF PAY PERIOD (from-to)				State Withholding Tax	$	
NAME AND ADDRESS OF LEGAL ENTITY SECURING SERVICES OF FARM LABOR CONTRACTOR				Other (list separately)	$	
					$	
Number of Hours:		Hourly Rate:	$		$	
Number of Hours:		Hourly Rate:	$	TOTAL DEDUCTIONS	$	
Number of Hours:		Hourly Rate:	$	NET WAGES EARNED	$	

THE DLSE INCONSISTENCY

- December 21, 2011 Letter from Julie A. Su, California Labor Commissioner: Attached pay stub form has wages/hours/units broken down by the entity using the farm labor contractor.
- DLSE 406 was revised in November 2011 *after* the law was signed and is still posted on the DLSE's website.
- Labor Commissioner then said her "template" need not be followed exactly, but is intended to reflect what she considers to be the "best practices in the industry."

Senate Bill 126

- Modified the Agricultural Labor Relations Act in 2011 to, among other things, allow the ALRB to certify a union as the bargaining representative even if a majority of the employees vote against the union.

- Took effect January 1, 2013.

- It is NOT "card check."

Senate Bill 126
ALRA Modifications

1. If it sets asides a unionization election due to employer misconduct that changed the election's outcome, the Agricultural Labor Relations Board would nonetheless certify the union to represent the employer's agricultural employees if the misconduct "would render slight the chances of a new election reflecting the free and fair choice of employees."

Senate Bill 126
ALRA Modifications cont.

2. The ALRB would normally have to process challenged ballots or election objections with more expedient deadlines.

Senate Bill 126
ALRA Modifications cont.

3. An employer's request for court review of a union's certification would not stop mandatory mediation regarding proposed labor-contract provisions thereby exposing the employer to risk in challenging a union's certification.

Senate Bill 126
ALRA Modifications cont.

4. The ALRB can more readily get a court order to prevent or cure an employer's unlawful conduct. This would include immediate reinstatement of terminated employees.

Senate Bill 126
ALRA Modifications cont.

5. Mandatory mediation regarding proposed labor-contract provisions can occur sooner than under previous law.

- 90 (vs. previous 180) days after an initial request to bargain
- 60 days after certification of a union under paragraph 1 above
- 60 days after a decertification petition was dismissed due to employer misconduct

Senate Bill 126
ALRA Modifications cont.

The ALRB has created new modifications to the Regulations to put SB 126 into effect. Some of the modifications to the Regulations include:

- Taking the Regional Directors and the Executive Secretary out of the decision-making process for Challenges and Election Objections.
- Issuing decisions on whether to hold hearings on the Challenges and/or Objections to a matter of weeks.

SB 25: UFW Seeks Another ALRA Amendment

- On December 3, 2012, Senator Steinberg introduced another amendment to the Agricultural Labor Relations Act (ALRA.) The UFW is now seeking to dramatically amend and repeal provisions of the ALRA to permit the UFW easier access to the collective bargaining process and essentially create a bargaining obligation that "runs with the land".

SB 25 Cont'd.

- SB 25 would permit an agricultural union, after decades of abandonment of a certification, to serve an agricultural employer with a request for mandatory mediation to commence bargaining immediately and forego existing requirements in the law as a prelude to invoking the mandatory mediation process.

SB 25 Cont'd.

- SB 25 would expand the definition of "agricultural employer" to include subsequent purchasers of all or part of an agricultural employer's business where the selling employer had an obligation to bargain under the Mandatory Mediation statute.
- The bill also provides that an action to enforce an order of the Board (with reference to the mandatory mediation decision of the Board) may be filed within 60 days, whether or not the other party is seeking judicial review of the order.

New Hourly Rate for Computer Software Employees

- Effective January 1, 2013, the DLSE published the new hourly rate of $39.90, up from $38.89, to permit these employees to maintain their exemption from daily/weekly overtime rules. However, employees must still satisfy all of the requirements set forth in Labor Code Section 515.5, in addition to the new hourly rate. The new monthly salary rate is $6,927.75 and the yearly salary rate is $83,132.93.

President Obama's NLRB Recess Appointments In Doubt:

Here we go again.

On January 25, 2013, the U.S. Court of Appeals for the District of Columbia ruled in *Noel Canning v. NLRB* that President Obama's appointments to the NLRB in early January 2012 were unlawful. President Obama believed that he had the power to fill three vacancies on the five member NLRB during a holiday break in Congress under the Constitution's Recess Appointments Clause, which provides that the President may make appointments when Congress is in recess to avoid delays in confirmation. The Court of Appeals ruled that a "recess" means that Congress is not in session, not merely a short break.

President Obama's NLRB Recess Appointments In Doubt: *Here we go again. Cont.*

The case will undoubtedly end up before the Supreme court, but if it is upheld, the NLRB will be back in exactly the same situation that it found itself in back in 2010 when over 600 decisions became invalid when the NLRB attempted to conduct business with only two members, which does not constitute a quorum.

President Obama's NLRB Recess Appointments In Doubt: *Here we go again. Cont.*

The three NLRB Members whose appointments are in doubt include Richard Griffin, former General counsel of the Operating Engineers union; Sharon Brock, former staff member for Sen. Edward Kennedy and former Deputy Assistant Secretary of Labor under Sec. Hilda Solis; and Terrence Flynn, former Chief Counsel to NLRB Chairman Peter Schaumber.

The question now is whether the NLRB will continue to make rulings until the Supreme Court decides the case.

Bipartisan Framework for Comprehensive Immigration Reform

On January 28, 2013, several U.S. Senators announced that they were going to submit legislation to reform the current immigration system. Senators McCain, Schumer, Durbin, Menendez, Rubio, Bennet and Flake have joined together in an effort to comprehensively reform the system rather than approach it in individual piecemeal efforts, such as AgJOBS, in the past.

Bipartisan Framework for Comprehensive Immigration Reform Cont.

The Senators are basing their legislative efforts on four basic pillars:

"1. Create a tough but fair path to citizenship for unauthorized immigrants currently living in the United States that is contingent upon securing our borders and tracking whether illegal immigrants have left the country when required;"

Bipartisan Framework for Comprehensive Immigration Reform Cont.

"2. Reform our legal immigration system to better recognize the importance of characteristics that will help build the American economy and strengthen American families;

3. Create an effective employment verification system that will prevent identity theft and end hiring of future unauthorized workers; and

4. Establish an improved process for admitting future workers to serve our nation's workforce needs, while simultaneously protecting all workers."

Bipartisan Framework for Comprehensive Immigration Reform

- Recognition that agricultural workers without legal status will be treated differently than the rest of the undocumented population.
- Agricultural workers will earn a path to citizenship through a different process under the new agricultural worker program.
- Creation of a workable program to meet the needs of America's agricultural industry, including dairies, to find Ag workers when domestic American workers are not available to fill open positions.

NLRB Putting Handbooks Under Scrutiny

During the past year, labor unions and employee attorneys have been filing unfair labor practice charges alleging provisions of employers' handbooks violate the law in different ways. One of the most common allegations is that employer rules concerning the posting of notices or which regulate solicitation by employees illegally restrict concerted protective activity.

Specifically, allegations include handbook provisions which require management permission before an employee may post anything on a bulletin board, or which otherwise provide management with final discretion as to what may be posted. While most unfair labor practices have thus far dealt with bulletin board, the NLRB's General Counsel has aggressively made it clear that company online bulletin boards are also be scrutinized.

First, how far behind can the ALRB's General counsel be on this subject?

Second, the easiest thing to do is to prohibit all use of the company's bulletin board for anything other than posters or company notices concerning work.

New Approaches in Wage and Hour Class Action Suits

Some new or different allegations are showing up in wage and hour lawsuits against agriculture:

Are employees truly being fully release for meal breaks and rest periods for the required amount of time if they must walk to the edge of the field to use the restroom, obtain drinking water or eat lunch? Specific allegations involve food safety protocols where employees are not allowed to eat in the fields and must wash their hands before entering the fields. If, in reality, crew forepersons are providing additional time for meal breaks (40 minutes v. 30 minutes), then it should be noted on the primary timesheets.

Another common allegation recently has to do with the wage rate being paid to employees for training, exercise, movement between fields and any other non-productive work time. Unless the employer sets a non-productive wage rate which applies to such time periods, the allegation will be that the employees should be paid the regular rate of pay, including the average hourly rate if the employee is working under a piece-rate. While not a new allegation , the arguments are being renewed given the additional non-productive work periods that employers have had to implement due to laws and regulations (training, food safety).

THANK YOU.