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California Broadens Immigration-Related Retaliation Protections

By Sean-Patrick Wilson and Adam Y. Siegel on September 5, 2014

California Governor Jerry Brown recently signed into law AB 2751, a "clean up" bill that expands the bases and remedies for immigrant-related retaliation, and clarifies the penalty and employee information provisions of AB 263 and SB 666.

AB 263 and SB 666 were enacted last year to protect immigrant workers against unlawful retaliation. These two bills have since operated in conjunction to prohibit employers from engaging in various "immigration-related practices" against employees who had exercised certain rights protected under state labor and employment laws. These "unfair immigration-related practices" included threatening to file or filing a false police report or threatening to contact or contacting immigration authorities in retaliation for some protected activity engaged in by the employee (e.g., filing a workplace complaint).

The signing of AB 2751 expands the definition of "unfair immigration-related practices" to also include threatening to file or filing complaints filed with any state or federal agency, not just the police or immigration authorities. In addition, AB 2751 authorizes a civil action for equitable relief and damages or penalties by employees or other persons who are the subject of an unfair immigration-related practice. The law also authorizes courts to order the appropriate government agencies to suspend certain business licenses held by the violating party for prescribed periods based on the number of violations.

AB 2751 also amends the law relating to revisions made to employees' personal information. Pre-existing law prohibited an employer from discharging or otherwise retaliating against an employee because the employee updated or attempted to update his or her personal information, "unless [those] changes [were] directly related to the skill set, qualifications, or knowledge required for the job." AB 2751 narrows this provision by limiting the scope of the protection to updates of person information related to work authorization, such as "a lawful change of name, social security number, or federal employment authorization document." By narrowing the types of documents which may be updated by the employee, AB 2751 removes previously-existing protections for employees who corrected misrepresentations relating to their educational qualifications or criminal history. Employers are therefore provided with a greater flexibility to discipline or terminate employees for making false statements about their personal information while still being restricted from retaliating against employees who seek to revise their immigration or work authorization status.

Lastly, AB 2751 clarifies that a $10,000 penalty (per employee) for each violation will be awarded to the employee

or employees who faced the illegal retaliation.

In light of the fact that AB 263 and SB 666 provide the same protections, rights, and remedies to undocumented immigrant workers as they do to authorized immigrant workers, there may have been some concern at the time of AB 2751's signing that the bill – as well as those laws the bill aims to amend – would be preempted by federal immigration law (e.g., the federal Immigration Reform and Control Act of 1986, which prohibits the employment of unauthorized workers and requires their termination when discovered). However, the California Supreme Court recently decided Salas v. Sierra Chemical¸ Case No. S196568 (June 26, 2014), in which the Court held that all employees, regardless of immigration status, are entitled to all of the protections, rights and remedies provided under California employment laws and that California employment discrimination laws are not necessarily trumped by federal immigration law, putting pre-emption concerns — at least temporarily — to rest.

In light of both this recent legislative enactment and Supreme Court's Sierra Chemical decision, California employers are strongly advised to consult with employment counsel before taking any potentially adverse employment actions against employees who are known or reasonably believed to be non-U.S. nationals. It would also behoove employers to review and update any immigration-related employment policies, procedures, and training accordingly, as well as to keep one eye open for any federal court decisions addressing preemption issues calling Sierra Chemical's holdings into question .

AB 2751 becomes effective on January 1, 2015.

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