

Louisiana Employment Law Letter

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WORKPLACE ISSUES

What's cooking in the Louisiana Legislature?

You know what they say about laws and sausages? It's better not to see either of them being made. Although we haven't been in the kitchen to watch exactly what goes into making them (the sausages, that is), we've been following the prefiled bills during the Louisiana Legislature's current session and once again report to you on what's brewing.

The Legislature convened its 2003 regular session on March 31 and will adjourn on June 23, 2003. A number of the proposed laws on the table could affect you if they survive both houses and the governor's scrutiny, subject to an overriding two-thirds vote of both houses. A variety of bills addressing labor and employment issues have already been introduced. As we'll explain, some are treats while others will go down about as easily as something featured on Fear Factor.

This article discusses the pending bills we think will most significantly affect you as employers if they become law, good or bad. Of course, we'll continue to track their progress and that of any other significant bills that may be introduced during the remainder of the session and give you a final report on what our lawmakers will be serving this session.

Mending the law on noncompete agreements

Both the Louisiana Senate and the House of Representatives have introduced bills to address the effects of the Louisiana Supreme Court's *SWAT 24 v. Bond* decision, which took a bite out of noncompetition agreements in 2001. As a result of that controversial decision, only noncompete agreements prohibiting employees from starting their *own* business in competition with their former employers are allowed under Louisiana law, subject to certain temporal and geographic limits. In other words, the court interpreted the current law to prohibit agreements to keep former employees from working for a

competing business. That decision came as a shock to many employers based on the statute's language and the multitude of cases clearly permitting those agreements.

Two new bills attempt to legislatively overrule the supreme court's interpretation. House Bill (HB) 1770 would amend the law to provide that working as an employee for a competing business may be prohibited by a valid noncompetition agreement. Senate Bill (SB) 887 would clarify that a noncompete agreement may prohibit a former employee from working as an employee or agent for a competing business. SB 887 also enumerates certain classes of employees who may enter into noncompete agreements, including persons earning more than \$40,000 annually and certain professionals, such as staffing recruiters, staffing consultants, staffing coordinators, real estate brokers, and real estate agents, in whom the employer has invested significant expenses for education, training, and certifications.

SB 887 (Hoyt), referred to Senate Labor and Industrial Relations Committee; HB 1770 (Smith), referred to House Labor and Industrial Relations Committee.

Thickening the roux for employment discrimination claims

Two Senate bills seek to enlarge the group of individuals protected under Louisiana's employment discrimination law. The current law protects certain applicants or employees from discrimination on the basis of race, color, religion, sex, national origin, age, or disability status. SB 1034 would make it unlawful for covered employers — those with 20 or more employees in the current or preceding calendar year — to discriminate against applicants or employees on the basis of their sexual orientation or gender identity.

The proposed law allows you to demand reasonable workplace appearance, grooming, and dress standards. But it requires you to allow employees to appear and dress consistently with their gender identity (regardless of whether that identity is the same as the individual's sex determined at birth). Likewise, SB 1017 would prohibit the state, state agencies, boards and commissions, and political subdivisions from employment discrimination because of a person's sexual orientation. Unlike SB 1034, gender identity isn't addressed in SB 1017.

Another bill, SB 534, seeks to add a comprehensive wage discrimination section to Louisiana's discrimination law. The bill prohibits an employer from discriminating in the payment of employees' wages on the basis of sex, race, or national origin for work on equivalent jobs. The proposed law permits you to pay different wage rates for work on equivalent jobs — if the differential is based on a bona fide factor other than sex, race, or national origin (such as seniority or merit). The bill further prohibits retaliation against employees who oppose wage discrimination, assist in an investigation of wage discrimination, or attempt to enforce their protection against it.

Other obligations that SB 534 seeks to impose on employers include furnishing employees with written statements informing them of their job titles, wage rates, the method for calculating wages, and recordkeeping requirements regarding the payment of

those wages. Moreover, the provision allowing for civil suits to remedy wage discrimination provides for the award of punitive damages to a prevailing employee. Currently, Louisiana law doesn't permit employees to recover punitive damages for any form of employment discrimination.

SB 1034 (Dean), SB 1017 (Dean), and SB 534 (Fields), all referred to Senate Labor and Industrial Relations Committee.

Making the minimum wage soufflé?

Several bills propose to increase the minimum wage that must be paid to Louisiana employees. HB 245 and SB 533 would raise the state's minimum wage to \$6.15 per hour. The bills also provide that if the federal minimum wage increases, the state's minimum wage will concurrently increase to \$1 more than the new federal minimum wage. The next-highest bid comes from SB 564, which seeks to raise the state's minimum wage to \$6. The bill prohibits an employer from applying tips or gratuities as a credit toward payment of the minimum hourly wage.

Finally, HB 1723 would increase Louisiana's minimum wage to \$5.50 per hour and also provide for a concurrent increase in the state's minimum wage to \$1 more than the federal minimum wage when the latter increases.

HB 245 (Lucas) and HB 1723 (Hunter), referred to House Labor and Industrial Relations Committee; SB 564 (Jones) and SB 533 (Fields), referred to Senate Labor and Industrial Relations Committee.

Overcooking the final wage payment law?

Yet again, a bill has been introduced seeking to change the time within which an employee's final wages must be paid when his employment ends. Current law provides for payment on the earlier of the next regular payday or 15 days after the separation from employment, voluntarily or involuntarily. That rule, added in the 2001 regular session, was a much welcomed simplification of the previous rule in Louisiana, which required final wage payment within different time frames depending on whether the separation was voluntary.

Just when you're getting accustomed to the new simplified rule, the Legislature wants to heat things up again. SB 1014 proposes that if an employee is discharged, he'll be paid in full no later than the sixth day after his discharge. If he resigns, however, he must be paid no later than the next regularly scheduled payday.

SB 1014 also proposes a new scheme to regulate wage payments, charging the Louisiana Department of Labor with the responsibility of monitoring employers' pay policies and practices and creating criminal liability for employers for certain violations. The proposed new law provides that employers must pay employees who are exempt from the overtime provisions of the Fair Labor Standards Act at least once a month.

Requirements regarding the form and method of wage payments are also set out in the bill, which restricts the employer's ability to withhold any part of an employee's wages unless a court order or a law authorizes it to do so or the employer has written authorization from the employee to deduct wages for a lawful purpose. The proposed law also provides that an employer commits a *criminal felony* if it intends to avoid the payment of wages owed to the employee at the time of hiring or fails to pay wages owed after a demand is made by the employee.

Finally, the bill allows employees to file a wage claim with the Department of Labor, which may assess an administrative penalty of up to \$1,000 against the employer in addition to the amount owed. Because the current remedies and penalties for late wage payments aren't addressed, it appears that the proposed administrative system for redress is meant to be in addition to the available civil remedies.

SB 1014 (Holden), referred to Senate Labor and Industrial Relations Committee.

Getting stuck with the bill?

Current law generally allows you to seek reimbursement from employees for the cost of their preemployment medical or drug tests if they quit before the expiration of 90 working days or never report to work. Before you can seek reimbursement, current law requires that the employees sign a contract allowing the costs to be withheld, work full-time, and be paid \$1 more than the federal minimum wage.

HB 1642 would allow you to withhold the costs of the preemployment medical exam, drug test, or both from employees' wages if (1) the requirements set forth above are met and (2) the employees sign a contract fully explaining the terms and conditions under which the right of reimbursement is established and authorizing you to withhold the costs if they resign within 90 working days.

The change proposed in HB 1642 is that the contract must fully explain the terms and conditions under which the right of reimbursement is established. If it becomes law, more than a simple authorization form will be needed to allow you to withhold the costs of a preemployment medical exam or drug test under approved circumstances.

HB 1642 (Guillory), referred to House Labor and Industrial Relations Committee.

Cooking up criminal background checks

While current Louisiana law doesn't prohibit an employer from obtaining an applicant's criminal records and even requires certain employers to conduct inquiries in certain situations, a proposed law would clearly recognize employers' right to do so generally. SB 801 authorizes employers or their representatives to obtain criminal records on applicants for jobs that prohibit the hiring of persons with past criminal records, including but not limited to security positions and jobs at nuclear facilities.

Along those lines, HB 429 exonerates employers from civil liability arising from the disclosure or dissemination of background information obtained from a lawful background check. To benefit from the protection, the employer must have received written consent from the employee or prospective employee to conduct the background check.

SB 801 (Marionneaux), referred to Senate Labor and Industrial Relations Committee; HB 429 (Pitre), referred to House Civil Law and Procedure Committee.

Serving workers' compensation goulash

Several bills address workers' comp procedures and assess penalties to employers or insurers that fail to comply. HB 1097 provides that an employer requesting records of a workers' comp claimant's wages from the Department of Labor must have the written authorization or consent from the employee to obtain the records. The bill also provides that the party requesting the earnings records must agree to keep them confidential and use them only in connection with the workers' comp claim.

SB 270 and SB 269 would require an employer or its insurer or representative to simultaneously mail any written communication sent to a health care provider about the employee to the employee or his representative. Currently, an employer isn't obligated to do so.

Unfortunately, several bills seek to institute or increase the penalties against employers and insurers for violations of the workers' comp law or procedures. For instance, HB 295 would permit penalties against employers and insurers that discontinue paying benefits if the discontinuance is determined to be arbitrary, capricious, or without probable cause.

Current law requires the employer or insurer to pay the employee's attorneys' fees for an arbitrary discontinuance, but HB 295 also subjects the employer or insurer to an extra penalty in the amount of 12 percent of any unpaid compensation or medical benefits or \$50 for each calendar day they remain unpaid, whichever is greater. HB 300 seeks to impose the same penalty, not to exceed \$2,000, if an employer or insurer fails to authorize medical treatment for the employee making the claim. Finally, HB 298 imposes a penalty of \$50 a day, not to exceed \$2,000, for each day an employer arbitrarily and capriciously fails to consent to an employee's request to select or change a physician.

HB 1097 (Pitre) and HB 295, 298, and 300 (Murray), all referred to House Labor and Industrial Relations Committee; SB 270 (Fields), pending Senate final passage; SB 269 (Fields), referred to Senate Labor and Industrial Relations Committee.

Just desserts — protected absences for volunteer firefighters

SB 80 would offer similar protections to volunteer firefighters that current law provides to employees who need leave for military service or training. For employers with 10 or more employees, the proposed law provides unpaid leave to an employee who's a

certified volunteer firefighter for up to 14 calendar days per year for fire or law enforcement training. An employer with 30 or more employees would face liability for reinstatement and reimbursement for lost wages and benefits if it fires, threatens to fire, demotes, suspends, or otherwise discriminates against an employee for taking time off to participate in fire or law enforcement training.

Furthermore, under the proposed law, a volunteer firefighter may not be fired for an absence or tardiness because of an emergency for which he must provide volunteer firefighter or emergency medical services. Any employer violating the proposed law may be sued for reinstatement and reimbursement of back pay or benefits.

SB 80 (Hoyt), referred to Senate Labor and Industrial Relations Committee.

If you don't like what the Legislature's serving, send it back!

You may direct comments or questions about any of the bills summarized above by contacting your legislators:

- Members of the House of Representatives may be reached by calling (225) 342-6945, e-mailing webreps@legis.state.la.us, or writing in care of the Louisiana State House of Representatives, P.O. Box 94062, Baton Rouge, LA 70804-9062.
- Members of the Senate may be reached by calling (225) 342-2040, e-mailing websen@legis.state.la.us, or writing in care of the Louisiana State Senate, P.O. Box 94062, Baton Rouge, LA 70804-9062.

We'll continue to monitor the status of these and any other bills of interest to employers. In the meantime, you can check the status of any bill by calling the PULS line at (225) 342-2456 or (800) 256-3793.

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