Governor Brown Signs Bill to Significantly Alter California Retaliation Law to Benefit Employees

Insights
10.04.17

Senate Bill 306, among other things, allows an employee or the Labor Commissioner to obtain a preliminary injunction (ordering the employee to be reinstated pending their retaliation claim) upon a mere showing of "reasonable cause" that a violation of the law occurred. SB 306 goes into effect on January 1, 2018.

In recent years, California employers have seen an explosion in the number of retaliation claims filed by employees who have been terminated or otherwise disciplined. In the experience of many employers, problematic employees who know they are about to be terminated for attendance issues or poor performance will often attempt to file claims with state and federal agencies in order to "protect" themselves from adverse employment action. Dealing with these situations just got a lot more difficult for California employers.

On October 3, Governor Jerry Brown signed into law Senate Bill 306 (Hertzberg), a bill that dramatically tilts the scales in favor of employees when it comes to retaliation and whistleblower claims. Under this new law, employers may be forced to put an employee back to work pending the two or three years it can take to litigate a claim that the employee was subject to unlawful retaliation.

Lowers the Burden of Proof for Injunctive Relief in Retaliation Cases
First, some basic terminology. "Injunctive relief" is a court-ordered remedy that requires an employer to specifically do something – in this case, presumably put an employee back to work following termination or other disciplinary action.

Under existing law, the Labor Commissioner has the authority to seek any appropriate relief (including injunctive relief) in retaliation cases, ***after*** it has investigated a claim and determined that unlawful retaliation has occurred. SB 306 provides that the Labor Commissioner may petition the court for such relief ***"during the course of an investigation"*** – which means that now the Labor Commissioner can go to court to obtain injunctive relief ***before*** an investigation has been completed and any finding of violation has been made. SB 306 also authorizes an employee to petition the superior court for injunctive relief in whistleblower claims under Labor Code Section 1102.5.

However, perhaps the most concerning aspect of SB 306 is that it dramatically reduces the burden of proof for such injunctive relief.

Currently, the general standard for a temporary restraining order or a permanent injunction requires the individual to establish (1) irreparable harm if the injunctive relief is not granted, (2) likelihood of success on the merits of the claim, and (3) that these interests outweigh the harm that the defendant will suffer from granting the injunctive relief. For example, this is generally the standard of proof for obtaining a restraining order by a victim of harassment, stalking, and workplace violence.

However, SB 306 changes all of that for workplace retaliation claims and greatly reduces the burden of proof in these cases. Under SB 306, relief shall be granted under a mere showing that "reasonable cause" exists to believe the employee has been unlawfully discharged or subjected to adverse action.

This is a much lower burden of proof than that which exists for any other form of injunctive relief. In addition, SB 306 instructs the court to consider "the chilling effect on other employees asserting their rights under those laws in determining if temporary injunctive relief is just and proper." Thus, the new law reduces the standard of proof for obtaining such relief, while at the same time instructing the court to consider an entirely new factor that exclusively favors the employee. However, SB 306 does specify that any temporary injunctive relief shall not prohibit an employer from disciplining or terminating an employee for conduct that is "unrelated to the claim of retaliation."

The bottom line is that it will be much easier for the employee or the Labor Commissioner to obtain injunctive relief in retaliation cases.

Allows Labor Commissioner to Investigate for Retaliation Without an Employee Complaint
SB 306 also authorizes the Labor Commissioner, "with or without receiving a complaint" to commence an investigation into alleged retaliation. Currently, the Labor Commissioner is authorized to conduct such investigations only after an employee complaint. SB 306 states that the Labor Commissioner may proceed without a complaint in cases where suspected retaliation has occurred during adjudication of a wage claim, during a field inspection, or in instances of suspected immigration-related threats.

Employers have expressed concern that this provision could result in the Labor Commissioner's office unilaterally conducting investigations without a complaint or without even notifying the employer as to the reason they are being investigated.

New Retaliation Enforcement Process
SB 306 also establishes a new citation process for the enforcement of claims of retaliation and discrimination.

Currently, the Labor Commissioner enforces retaliation determinations via civil action. In other words, the burden is generally on the Labor Commissioner to enforce the determination by going to court. However, SB 306 authorizes the Labor Commissioner to simply issue a citation directing the

employer to cease the violation and take actions necessary to remedy the violation. The burden would instead fall on the employer to challenge the citation through an administrative and court appeal.

Moreover, under current law, if an employer disagrees with a Labor Commissioner determination, the employer generally may appeal to civil court for a trial *de novo* (meaning the court will consider all of the evidence anew). However, under SB 306, the employer is required to file a writ of mandate with the superior court (and post a bond), instead of trial *de novo*. An employer who willfully refuses to comply with a final order of the court shall be subject to a civil penalty of $100 per day of noncompliance, up to $20,000.

Increased Penalties and Other Provisions

SB 306 provides that if the Labor Commissioner is a prevailing party in an enforcement action, the court shall determine the reasonable attorney's fees incurred by the Labor Commissioner and enforce that amount against the employer.

SB 306 also provides that any employer that willfully refuses to comply with an order of the court to hire, promote, or restore an employee, or refuses to comply with an order to post a specified notice, shall be subject to a civil penalty of $100 per day of noncompliance, up to $20,000. These penalties are paid to the affected employee.

Political Takeaway

This is an issue that has been on labor's wish list for a number of years now, and Governor Brown's signature on SB 306 represents a significant victory for labor. Moreover, it is important to view this bill through the lens of union organizing activity. While much of the discussion around SB 306 this year focused on retaliation in the context of wage theft or workplace safety, the real undercurrent here is that this bill is designed primarily as a tool to assist labor in organizing campaigns. Labor has long complained that union organizing campaigns are cut short when pro-union employees are allegedly fired or otherwise retaliated against. Although such conduct, if true, would constitute an unfair labor practice under federal labor law, labor has long complained that the current remedies and processes for enforcement are inadequate. Labor's hope is that a remedy that puts workers back to work immediately will preserve the union organizing campaign and lead to more unionization. Although collective bargaining is an issue of federal law, SB 306 can largely be seen as an example of labor's efforts (even at the state law level) to indirectly protect or advance union organizing activity. Or as some labor lawyers and advocates have termed it, using California labor and employment laws "offensively."

What's Next?

SB 306 was signed into law on October 3, 2017 and goes into effect on January 1, 2018.

Related People

Benjamin M. Ebbink
Partner
916.210.0400
Email