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Employment Practices

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Employment Practices

Employment Practices; California Occupational Safety and Health Act of 1973

Government Code §§11200.4, 11553.4, 11554.1, 12804.1 (new); Health and Safety Code §§12081, 13108 (amended); Labor Code Chapter 2 (commencing with §6400), Chapter 3 (commencing with §6500), Chapter 4 (commencing with §6600), §§144, 145, 146, 147, 6300, 6301, 6302, 6303, 6305, 6306, 6307, 6308, 6309, 6310, 6311, 6312, 6313, 6314, 6315, 6316, 6317, 6318, 6319, 6320, 6321 (repealed); Chapter 6.5 (commencing with §148), Chapter 2 (commencing with §6350), Chapter 3 (commencing with §6400), Chapter 4 (commencing with §6423), Chapter 5 (commencing with §6450), Chapter 6 (commencing with §6500), Chapter 7 (commencing with §6600), Chapter 8, (commencing with §6650), Chapter 9 (commencing with §6700), §§57.1, 142.1, 142.2, 142.3, 142.4, 142.5, 143, 143.1, 143.2, 144, 144.5, 144.6, 145, 145.1, 146, 147, 147.1, 155, 156, 2626.5, 6300, 6301, 6302, 6303, 6304.1, 6305, 6306, 6307, 6308, 6309, 6310, 6311, 6312, 6313, 6313.5, 6314, 6315, 6315.5, 6316, 6317, 6318, 6319, 6319.5, 6320, 6321, 6322, 6323, 6324, 6325, 6326, 6327, 6327.5, 6328, 6329, 6330 (new); §§53, 55, 57, 140, 141, 142 (amended).

AB 150 (Fenton); STATS 1973, Ch 993

Support: California Labor Federation

Opposition: California Conference of Employers; California Manufacturers Association; National AFL-CIO
(Effective October 1, 1973)

Vests in the Division of Industrial Safety the authority to enforce industrial safety laws; creates the Occupational Safety and Health Standards Board, the Occupational Safety and Health Appeals Board, and the Bureau of Investigations and defines the powers thereof; defines the duties and responsibilities of employers and employees with respect to industrial safety; specifies the criminal and civil penalties which may be imposed for safety regulation violations; requires a permit for extrahazardous employments; specifies the conditions upon which a temporary variance from a safety regulation may be granted; provides for educational and

research programs for the promotion of industrial safety; and provides miscellaneous safety provisions.

Chapter 993 has enacted the California Occupational Safety and Health Act of 1973 [CAL. LABOR CODE pt. 1 (commencing with §6300)] for the purpose of assuring safe and healthful working conditions for California working men and women by authorizing the enforcement of effective standards, by assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for research, information, education, training, and enforcement in the field of occupational health and safety. This Act has substantially revised the laws regulating industrial safety. The administration and enforcement of this Act has primarily been assigned to the Division of Industrial Safety. Three subdivisions have been created within the Division of Industrial Safety, namely: (1) the Occupational Safety and Health Standards Board; (2) the Occupational Safety and Health Appeals Board; and (3) the Bureau of Investigations. These agencies are respectively responsible for the promulgation of occupational safety and health standards, hearings on the division's decisions, and the investigation of specified industrial accidents involving the violation of occupational safety and health standards, orders, or special orders.

The jurisdiction, duties, and powers of the Division of Industrial Safety are delineated in Chapter 6 (commencing with §140) and Chapter 1 (commencing with §6300) of the Labor Code. Section 2626.5 provides that the enforcement of occupational safety and health standards established pursuant to Chapter 6 (commencing with §140) is specifically and entirely reserved to the Division of Industrial Safety. However, the division may delegate its authority to administer and enforce occupational safety and health standards to other political subdivisions pursuant to a written agreement [CAL. LABOR CODE §144(a)]. The authority of any other state or local agency is not limited by Section 144 as to any matter other than the enforcement of occupational safety and health standards. Moreover, local authorities are not restricted from adopting and enforcing higher standards relating to occupational safety and health for their own employees. Section 6307 vests the division with such power, jurisdiction, and supervision over every employment and place of employment as is necessary to adequately enforce all lawful standards, orders, and special orders pertaining to industrial safety. "Occupational safety and health standards and orders" are the standards and orders adopted by the Occupational Safety and Health Standards Board pursuant to Chapter

6 (commencing with §140). A "special order" is an order promulgated by the division to correct an unsafe condition, device, or place of employment which poses a threat to the health or safety of an employee and which cannot be made safe under existing standards or orders of the standards board [CAL. LABOR CODE §6305]. Section 6308 grants the division the authority to prescribe safety devices for industry, to enforce standards and orders adopted by the standards board, and to require the performance of any other act necessary for the protection of the life and safety of employees.

The investigative powers of the division are primarily embodied in Sections 6309, 6313, 6313.5, 6314, and 6315. Section 6309 provides that whenever the division learns or has reason to believe that any employment or place of employment is not safe, it *may* summarily investigate the same, with or without notice or hearings. However, if the division receives a complaint from an employee, his family, or personal representative to the effect that an employment or place of employment is not safe, the division *must* summarily investigate the same as soon as possible, and no later than three days after receipt of the complaint. Complaints of a serious hazard will take priority over other complaints made earlier in time. The division does not have to respond to any complaint within the specified three-day period if, in its opinion, the complaint was intended to willfully harass the employer or is without a reasonable basis in fact. The division is required under Section 6313 to make an investigation of any employment accident which is fatal to one or more employees or which results in a serious injury to five or more employees. The division may investigate the cause of other industrial accidents or occupational illnesses which result in a serious injury and shall issue any order necessary to eliminate such causes. Section 6314 provides that any person authorized by the chief of the division shall have free access to any place of employment upon presenting the appropriate credentials for the purpose of making an investigation. Any person who hampers or obstructs such an investigation is guilty of a misdemeanor. The chief or his representative has the authority to demand that an employer furnish any statistics, information, or other physical materials under his control which are directly related to the purpose of the investigation. An intentional or negligent refusal by the employer to furnish such materials is punishable as a misdemeanor. The chief or his representative also has the authority to issue subpoenas, administer oaths, examine witnesses under oath, and take depositions and affidavits for the purpose of carrying out the duties of the division. It should be

noted that an employer or his representative and a representative of the employees have the right to accompany the chief or his representative during the course of an investigation. Section 6322 provides that all information obtained in an investigation which contains or might reveal a trade secret (referred to in 18 U.S.C. §1905 (1970)) or other confidential information (pursuant to CAL. Gov't CODE §6250 *et seq.*) shall be confidential except for disclosure to officers concerned with carrying out the provisions of this Act. A violation is a misdemeanor.

Section 6321 generally prohibits giving an advance warning of an inspection to an employer. Only the chief, or his representative in case of his absence, can give advance warnings, and the Director of Industrial Safety is authorized to specify the instances in which such advance warnings may be given. Any person who gives an advance warning in violation of this section has committed a misdemeanor which is punishable by a fine of not more than \$1,000 or by imprisonment for not more than six months, or both.

Sections 6317 through 6320 specify the procedures by which an individual may be cited for a violation of an occupational safety and health standard, order, or special order. If after inspection the division believes that an employer has violated a standard, order, or special order established pursuant to this Act or by the standards board, a citation will be issued with reasonable promptness. A citation need not be issued if the violation does not have a direct relationship with the health or safety of an employee. In such a case a notice may be issued in lieu of a citation. No citations or notices may be issued for any given violation after six months have lapsed since its occurrence. The division must notify an employer within a reasonable time of all citations issued, and the employer has 15 working days after receipt of the notice to notify the Occupational Safety and Health Appeals Board of his desire to contest the citation. Section 6317 authorizes the division to, among other things, impose a civil penalty, as specified in Chapter 4 (commencing with §6423), against an employer. Section 6319(c) authorizes the director to promulgate regulations concerning the assessment of civil penalties and defines the criteria to be used in determining the amount of the penalty. An employer served with notice of a civil penalty may contest the amount of the proposed penalty by appealing to the appeals board within 15 working days from the receipt of the notice. Section 6318 provides that the employer must post at or near the place of violation a copy

of the citation for a period of three days or until the unsafe condition is abated, whichever is longer.

Section 6325 authorizes the division to prohibit the use of any equipment or entry into any place of employment which, in the opinion of the division, presents an imminent hazard to employees. A notice of this prohibition in the form prescribed under Section 6328 must be attached to any such equipment or place of employment. This notice cannot be removed except by an authorized representative of the division and not until the place or equipment is made safe. This section does not prohibit the use of the equipment or entry onto the premises for the sole purpose of eliminating the dangerous equipment, so long as such entry or use is with the division's permission. Section 6327(d) provides that an employer may request and shall be granted an immediate hearing to review the validity of an order prohibiting the use of a place or equipment within 24 hours after the prohibition. Entry into a place of employment, or the use of equipment, which has been proscribed pursuant to Section 6325 is a misdemeanor punishable by a fine of up to \$1,000 or imprisonment up to one year in the county jail, or both. A similar penalty is provided for one who destroys, removes, or defaces the notice of prohibition without the permission of the division [CAL. LABOR CODE §6326].

Section 6327.5 provides that if the division arbitrarily or capriciously refuses to take action, and the danger presented by the particular employment practice or condition is such that there is an imminent threat of death or serious bodily injury which cannot be corrected by other available means, then an endangered employee may bring an action against the chief to compel the division to take corrective measures.

Section 6323 provides that the division may apply to the superior court for an injunction restraining the use of any equipment or place of employment which presents a serious menace to the lives or safety of the persons about it. Section 6324 provides that application accompanied by affidavit may also be made for the granting of a temporary restraining order, and no bond shall be required from the division as a prerequisite.

Sections 6309 through 6312 were enacted to discourage retaliation by employers against employees who are actively concerned with industrial safety. Section 6309 provides that any employee who is discharged or in any other manner discriminated against by his employer as a result of making a bona fide complaint to the division about

unsafe working conditions is entitled to reinstatement and reimbursement for lost wages and work benefits. Any employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law is guilty of a misdemeanor. Section 6310 provides that no person shall discharge or in any manner discriminate against any employee because he has made a complaint, caused proceedings to be instituted, or has testified in any proceedings in the exercise of his rights or on the behalf of others. Section 6311 authorizes an employee to refuse to perform work where the performance would be in violation of a provision of this code and the violation creates a real and apparent hazard. If an employee is laid off or discharged for the exercise of his rights under this section, he has a cause of action for wages for the time he was out of work provided that: (1) he notifies his employer within ten days after the termination of his employment of his intention to file a claim; and (2) he files a claim with the Labor Commissioner within 30 days after the termination of his employment. Section 6312 provides that any employee who believes that he has been discharged or otherwise discriminated against in violation of Sections 6310 and 6311 may, within 30 days after the occurrence of the violation, file a complaint with the Labor Commissioner alleging the discrimination. Upon receipt of the complaint, the Division of Labor Law Enforcement must conduct an investigation in the manner it deems appropriate. If it is determined that the provisions of Sections 6310 or 6311 have been violated, the Division of Labor Law Enforcement shall bring an action against the person who committed the violation. The court shall have jurisdiction to restrain any violation of Sections 6310 and 6311 and may order all appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay.

The responsibility for the enforcement of industrial safety rules was previously vested in the Industrial Safety Board [See CAL. LABOR CODE ch. 6 (commencing with §140)]. Section 140 of the Labor Code has been amended to abolish the Industrial Safety Board and create the Occupational Safety and Health Standards Board. The powers of the standards board are delineated in Chapter 6 (commencing with §140). The standards board has the authority to adopt, repeal, and amend occupational safety and health standards. It must adopt standards which are at least as restrictive as the federal standards promulgated under Section 6 of the Occupational Safety and Health

Act of 1970 [29 U.S.C. §651 *et seq.* (1970)] within six months after the effective date of the federal standards. Any standard or order promulgated by the board must prescribe, among other things, the use of labels or other appropriate forms of warnings which are necessary to apprise employees of the dangers to which they are exposed [CAL. LABOR CODE §142.3(b)]. An employer may apply to the board for a permanent variance from any occupational safety and health standard. The variance must be granted if the employer has demonstrated by a preponderance of the evidence that the safety practices he proposes will give rise to as safe and healthful working conditions as those which would prevail if he had complied with the standard. The board must conduct hearings on applications for permanent variances after the employees have been given notice and an opportunity to appear. The board is not bound by statutory or common law rules in conducting such hearings, and its decisions are final except for any rehearing on judicial review provided by law.

Chapter 6.5 (commencing with §148) has been added to the Labor Code to establish the Occupational Safety and Health Appeals Board within the Division of Industrial Safety. All decisions of the appeals board must be made by a simple majority, unless otherwise expressly provided, and must be in writing. A decision by the appeals board is final, except for any rehearing or judicial review permitted by Chapter 7 (commencing with §6600), and is binding on the director and the Division of Industrial Safety with respect to the parties involved in the particular appeal. However, the director has the right to seek judicial review irrespective of whether or not he appeared or participated in the appeal.

Chapter 7 (commencing with §6600) specifies the procedures by which an employer may appeal the decision of the division, and the powers of the appeals board. In general, this chapter provides for hearings by either the appeals board or a duly appointed hearing officer on all final decisions by the division. A party adversely affected by the initial decision of the appeals board may petition for reconsideration. Additionally, a party affected by an order or decision of the appeals board may apply to the superior court of the county in which he resides for a writ of mandate for the purpose of inquiring into and determining the lawfulness of the original order or decision or of the order or decision following reconsideration. No new or additional evidence may be introduced into court; the case must be heard on the record of the appeals board. The review by the court is limited to a determination based on the entire record as to whether:

(1) the appeals board acted without or in excess of its powers; (2) the order or decision was procured by fraud; (3) the order or decision was unreasonable; (4) the order or decision was not supported by substantial evidence; and (5) whether the findings of fact support the decision or order under review. After hearing the case, the court must enter a judgment either affirming or annulling the order or decision, or the court may remand the case for further proceedings before the appeals board.

The Bureau of Investigations has been created through the enactment of the Occupational Safety and Health Act of 1973 (§6315). The bureau is responsible for directing accident investigations involving violations of standards, orders, or special orders in which there is a serious injury, death, or request for prosecution by a division representative. The bureau is also responsible for preparing cases for prosecution, including evidence, findings, and recommendations for appropriate action. In any case where the bureau is required to conduct an investigation, and in which there is a serious injury or death, the results of the investigation must be referred to the city or district attorney having jurisdiction for appropriate action.

In addition to the administrative procedures discussed above, this Act also provides for: (1) the duties and responsibilities owed by employers and employees; (2) the criminal and civil penalties which may be imposed for the violation of safety regulations; (3) the requirement of a permit for extrahazardous employment; (4) the granting of temporary variances from existing safety regulations; (5) education and research concerning employment safety; and (6) miscellaneous safety provisions. The general thrust of Chapter 3 (commencing with §6400), which specifies the responsibilities and duties of employers and employees, is that employers and employees must do everything which could reasonably be expected to promote safety in employment, including the use of proper safety devices and safeguards and the maintenance of safe and healthful working conditions. This chapter also provides certain procedures by which employers, insurers, physicians, and law enforcement officials must report industrial accidents (See §§6409-6412).

Chapter 4 (commencing with §6423) designates the acts or omissions which may be punished by specified criminal or civil penalties. Section 6432 provides that a "serious violation" shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which

exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. In general, an employer, or any person acting in a similar capacity, has committed a misdemeanor if he: (1) knowingly or negligently violates an industrial safety regulation which is deemed to be a serious violation; (2) repeatedly violates an industrial safety regulation which creates a real and apparent danger to employees; (3) fails or refuses to comply with a safety regulation after notification by the division when such failure or refusal creates a real and apparent hazard to employees; and (4) directly or indirectly knowingly induces another to do any of the above (§6424). Where an employer, or a person acting in a similar capacity, willfully violates a safety regulation and the violation causes the death of or permanent or prolonged injury to an employee, the employer may be subject to a fine of not more than \$10,000, or imprisonment for not more than six months, or both (§6425). A second or subsequent conviction under this section is punishable by a fine of not more than \$20,000 or imprisonment for not more than one year, or both. Nothing in this section shall prohibit a prosecution under Section 192 of the Penal Code. However, a person may not be prosecuted under both sections for the same act or omission. Sections 6427 through 6431 designate the instances in which a civil penalty will be imposed for the violation of safety regulations. A civil penalty of \$1,000 *may* be imposed for a violation of a safety regulation which is of a non-serious nature and must be imposed when the violation is specifically determined to be a serious violation. A civil penalty of \$1,000 may be imposed for each day that a violation continues after the period permitted for its correction has expired. Willful or repeated violations of safety regulations may be punished by a civil penalty of up to \$10,000. Also, any employer who violates any of the posting requirements of Section 6408 shall be assessed a civil penalty of up to \$1,000 for each violation. A civil penalty may not be assessed against employers that are governmental entities. The procedures by which a civil penalty is transformed into a civil judgment are specified in Chapter 8 (commencing with §6650).

Chapter 6 (commencing with §6500) requires, prior to the commencement of work, a permit for those employments or places of employment which by their nature involve a substantial risk of injury. The employments or places of employment which are required to ob-

tain a permit are: (1) the construction of trenches or excavations which are five feet or deeper and into which a person is required to descend; and (2) the construction or demolition of any building, structure, falsework, or scaffolding more than three-stories high. The division may issue a permit based on a determination that the employer has demonstrated that the conditions, practices, and other operations or processes used to accomplish the job will provide a safe and healthful place of employment. Prior to the commencement of actual work, the division may conduct an investigation or hearing and may require the employer to hold a safety conference.

Chapter 5 (commencing with §6450) provides that an employer may apply to the division for a temporary order granting a variance from an occupational safety or health standard. The temporary variance must be granted if the employer files an appropriate application and demonstrates that: (1) he is unable to comply with a standard by its effective date because of unavailability of professional personnel, materials, or equipment needed to comply with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date; (2) he is taking all available steps to safeguard against the hazards covered by the standard; and (3) he has an effective program for coming into compliance with the standard as quickly as practicable. This chapter also specifies the content of the order granting the variance and certain procedures concerning temporary variances. Chapter 2 (commencing with § 6350) and Chapter 9 (commencing with §6700), respectively, provide for educational and research programs involving industrial safety and miscellaneous safety regulations.

See Generally:

- 1) 29 U.S.C. §651 *et seq.* (1970) (Federal Occupational Safety and Health Act of 1970).
- 2) Span, *The New Occupational Safety and Health Act*, 58 A.B.A.J. 255 (1972) (federal law).
- 3) Burton, *The Occupational Safety and Health Act*, 23 LABOR L.J. 501 (1972) (federal law).

**Employment Practices; disability benefits
for pregnant women**

Unemployment Insurance Code §2626 (amended).
AB 809 (Deddeh); STATS 1973, Ch 1026

Section 2626 of the Unemployment Insurance Code defines the term "disabled" for the purpose of determining an individual's eligibility for disability compensation under Part 2 (commencing with §2601).

This section has been amended to include within this definition the confinement of a woman in a hospital as the result of pregnancy complications to the extent specified in Section 2626.2. Prior to amendment, the term "disabled" did not include any injury or illness caused by pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter. Section 2626.2 has been added to provide for the payment of disability benefits relating to pregnancy upon a doctor's certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, or that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy. The section enumerates examples of such complications.

See Generally:

- 1) *Clark v. California Employment Stabilization Commission*, 166 Cal. App. 2d 326, 332 P.2d 716 (1958) (constitutionality of §2626).
- 2) *Connecticut G.L. Ins. Co. v. California Unemployment Board*, 138 Cal. App. 2d 878, 292 P.2d 642 (1956) (primary liability of voluntary insurer).
- 3) *Annot.*, 95 A.L.R.2d 1382, 1400 (1964) (benefit provisions of statutory non-occupational disability plans).

**Employment Practices; discrimination against
the physically handicapped**

Labor Code §1432.5 (new); §§1411, 1412, 1413, 1419, 1419.9, 1420, 1432 (amended).

AB 1126 (Dunlap); STATS 1973, Ch 1189

Support: National Rehabilitation Association; Rehabilitation Counseling Association of California

Opposition: Department of Industrial Relations

In 1959 the California Fair Employment Practices Act [CAL. LABOR CODE §1410 *et seq.*] was added to the Labor Code to prohibit employment discrimination on the basis of race, religious creed, color, national origin, ancestry, or sex [CAL. LABOR CODE §1411]. The administration and enforcement of the provisions of the Act are vested in the State Fair Employment Practice Commission. The commission has the authority to adopt necessary rules to investigate violations of the provisions of this Act and to conduct hearings regarding such violations. Chapter 1189 has been enacted to extend the protection offered by this Act to the physically handicapped.

Section 1413 has been amended to define a "physical handicap" as any impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination,

or any other health impairment which requires special education or related services. This section has also been amended to exclude an individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility from the definition of employee [See CAL. LABOR CODE §§1191, 1191.5]. The purpose of this exclusion is apparently to prevent any conflict between the provisions of Section 1191, which allow the employment of a handicapped individual at less than the minimum wage, and Section 1420, which prohibit discrimination against the handicapped with respect to compensation. Section 1420 has been amended to prohibit, among other things, discrimination against an individual with respect to hiring, training, compensation, terms, conditions, or privileges of employment solely because he is physically handicapped. However, an employer is not prohibited from discharging or refusing to hire a physically handicapped person, nor can he be subjected to any legal liability for such acts, if the employee is unable to perform his duties because of his physical handicap, or cannot perform them in a manner which would not endanger his health or safety or the health or safety of others. This section also provides that any law enforcement agency may inquire into the *physical fitness* of applicants for peace officer positions. Since lack of fitness is not a disability as defined by this chapter, other professions requiring an equivalent degree of physical well-being should also be able to inquire into this characteristic without fear of violating a person's rights.

Section 1432.5 has been added to the Labor Code to provide that an employer is not required to alter his premises beyond the safety requirements applicable to other employees in order to accommodate employees who have a physical handicap. Section 1419.9, which instructs the commission to seek and utilize the cooperation of other state agencies, has been amended to specifically authorize the use of the efforts and experience of the Department of Rehabilitation. However, none of the functions, powers, or duties of the Fair Employment Practices Commission are to be transferred to that department.

See Generally:

- 1) CAL. CIV. CODE §54 *et seq.* (discrimination against the handicapped other than employment discrimination).
- 2) CAL. LABOR CODE §1412 (the opportunity to seek, obtain, and hold employment without discrimination is a civil right).
- 3) CAL. LABOR CODE §§1429, 1430 (penalty for violation of CEPA).
- 4) 3 WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §157 *et seq.* (7th ed. 1960), (Supp. 1969).
- 5) Colley, *Civil Actions for Damages Out of Violations of Civil Rights*, 17 HAST. L.J. 189 (1965).

**Employment Practices; employer's negligence
causing death of an employee**

Labor Code §6416 (repealed).

AB 275 (Fenton); STATS 1973, Ch 267

Section 6416 of the Labor Code has been repealed. This section provided a misdemeanor penalty for employers convicted of gross negligence in failing to provide a safe employment or place of employment when such negligence resulted in the death of an employee.

COMMENT

Under Penal Code Section 192(2), a person may be prosecuted for involuntary manslaughter if death of another results from his acts which: (1) are intentional violations of law punishable as a misdemeanor; or (2) amount to gross negligence. A violation of this section is punishable as a felony. After Section 6416 of the Labor Code was enacted, it was questionable whether a district attorney had authority to bring a felony action under Section 192(2) against a grossly negligent employer who caused the death of an employee. According to Assemblyman Jack R. Fenton, such authority did not exist [Assemblyman Jack R. Fenton, Press Release, Feb. 6, 1973], and only a misdemeanor action could be brought against a grossly negligent employer. Now that Section 6416 has been repealed, a district attorney clearly has such authority.

See Generally:

- 1) CAL. BUS. & PROF. CODE §7109.5 (disciplinary action for violations of Division 5 of Labor Code).
- 2) CAL. PEN. CODE §§192-193 (manslaughter provisions).
- 3) 1 WITKIN, CALIFORNIA CRIMES, *Crimes Against the Person* §§327, 341-344 (1963).

**Employment Practices; Industrial Welfare Commission—
authority to all employees**

Labor Code §1172 (repealed); §§1173, 1178, 1182, 1185, 1191.5, 1193.5, 1193.6, 1194, 1198, 1199 (amended).

AB 478 (Brown); STATS 1973, Ch 1007

Support: California AFL-CIO

Chapter 1007 has been enacted to amend the Labor Code to give the Industrial Welfare Commission authority to investigate and regulate the hours, conditions of labor and employment, and the health, safety, and welfare of all *employees* except those employed as outside salesmen [CAL. LABOR CODE §1171]. Prior to this amendment, the commission had the power to set the *wages* of all employees but could

only concern itself with the hours or working conditions of employees who were women or minors.

Chapter 1007 has amended Section 1173 to require the Industrial Welfare Commission to undertake a full review of all rules, regulations, and policies made under its jurisdiction. This review is to be accompanied by hearings on the subjects; and no rules, regulations, or policies existing on the effective date of this chapter may be extended or changed before such hearings are undertaken. Section 1173 has also been amended to provide that the commission and the Industrial Safety Board should determine the areas where their jurisdictions overlap and in those areas of conflict the board shall have exclusive jurisdiction and the rules, regulations, and policies of the commission shall have no force or effect. This chapter also repealed Section 1172, which defined minor, as this section is no longer required.

The legislature indicated in Chapter 1007 that it was their intent in enacting this chapter that the commission interpret the provisions so as to cause no undue hardship or loss of employment opportunities [A.B., 478, CAL. STATS. 1973, c. 1007, §11].

COMMENT

Prior to the 1972 amendment [A.B. 256, CAL. STATS. 1972, c. 1122, at 2152], California minimum wage law applied only to women and minors, though men were covered under federal legislation as embodied in the Fair Labor Standards Act [29 U.S.C. §201 *et seq.* (1970)]. The 1972 amendment replaced the terms "women" and "minors" with the term "employees," thus including men in many of the sections of the Labor Code. This amendment will have the effect of completing the extension of the commission's power.

See Generally:

- 1) 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 482 (1973).

Employment Practices; refusal to participate in abortion

Health and Safety Code §25955 (amended).

SB 575 (Roberti); STATS 1973, Ch 935

AB 1597 (Murphy); STATS 1973, Ch 820

Section 25955 of the Health and Safety Code as originally enacted three years ago [CAL. STATS. 1971, c. 1159, at 2180] made it a misdemeanor, except in a medical emergency, for any employer to: (1)

require a nurse, or any other person employed to furnish direct personal health service to a patient, to directly participate in the induction or performance of an abortion, if such employee has filed a written statement with the employer indicating a moral, ethical, or religious basis for refusal to participate in an abortion; and (2) penalize or discipline any of the above-noted employees for declining to directly participate in an abortion.

Chapter 820 has amended Section 25955 of the Health and Safety Code to provide that a nonprofit medical facility or clinic which is organized or operated by a religious association, or any administrative officer, employee, agent, or member of the governing board thereof, is not required by the Therapeutic Abortion Act [CAL. HEALTH & SAFETY CODE §§25950-25955.5] to perform, permit, or provide abortion services. Such refusal or failure to provide abortion services shall not impose any liability upon the organizations or individuals, nor shall such refusal or failure be a basis for any disciplinary action or other recriminatory action. Any such hospital, facility, or clinic which does not permit the performance of abortions on its premises shall post notice of such proscription in an area of such hospital, facility, or clinic which is open to patients and prospective admittees.

Section 25955 has been amended by Chapter 935 to provide that no employer or other person shall require a physician, a registered nurse, a licensed vocational nurse, or any other person employed *or with staff privileges at a hospital* to directly participate in the induction or performance of an abortion, if such employee or other person has filed a written statement with the employer or the hospital indicating a moral, ethical, or religious basis for refusal to participate in the abortion. No such employee or person with staff privileges in a hospital shall be subject to any penalty or discipline by reason of his refusal to participate in an abortion. No such employee of a hospital which does not permit the performance of abortions, or person with staff privileges therein, shall be subject to any penalty or discipline on account of such person's participation in the performance of an abortion in other than such hospital.

Section 25955 has also been amended to prohibit any employer from refusing to employ any person because of such person's refusal for moral, ethical, or religious reasons to participate in an abortion, *unless* such person would be assigned in the normal course of business of any hospital to work in those parts of the hospital where abortion patients are cared for. Furthermore, no provision of the Therapeutic

Abortion Act [CAL. HEALTH & SAFETY CODE §§25950-25955.5] prohibits any hospital which permits the performance of abortions from inquiring whether an employee or prospective employee would advance a moral, ethical, or religious basis for refusal to participate in an abortion before hiring or assigning such a person to that part of a hospital where abortion patients are cared for. This refusal of a physician, nurse, or any other person to participate or aid in the induction or performance of an abortion pursuant to these provisions shall not form the basis of any claim for damages.

Chapter 935 also amends Section 25955 to provide that no medical school or other facility for the education or training of physicians, nurses, or other medical personnel shall refuse admission to a person or penalize such person in any way because of such person's unwillingness to participate in the performance of an abortion for moral, ethical, or religious reasons. Nor may any hospital, facility, or clinic refuse staff privileges to a physician because of such physician's refusal to participate in the performance of abortion for moral, ethical, or religious reasons.

The provisions of Section 25955 do not apply to medical emergencies and *spontaneous* abortions.

See Generally:

- 1) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 425 (1972).
- 2) Comment, *The Landmark Abortion Decisions: Justifiable Termination Or Mis-carriage Of Justice?—Proposals For Legislative Response*, 4 PAC. L.J. 821 (1973).

Employment Practices; tips or gratuities

Labor Code §352 (repealed); §351 (amended).

AB 10 (Greene); STATS 1973, Ch 879

Section 351 of the Labor Code provides that no employer shall collect, take, or receive any gratuity given to an employee by a patron, or deduct any amount from wages due an employee on account of such a gratuity, unless the employer posts a conspicuous sign at his business location stating that such a practice is being followed. Section 351, as amended, simplifies the statement that must be printed on the sign, to require that it state the extent to which the employees are required to accept gratuities in lieu of wages, or the extent to which the employees are required to accept gratuities and credit them against wages. An exception to the above is established to the extent that may be permitted by a valid regulation of the California Division of Industrial Welfare [See CAL. ADMIN. CODE tit. 8, ch. 5 (commenc-

ing with §11000) (setting tips off against minimum wage)]. The amended version also declares that every gratuity is the sole property of the employee to whom it was given or left for. As amended, however, Section 351 does not apply to employment in which no charge is made for the services rendered to a patron if both of the following conditions are met: (1) the employee is receiving a wage or salary not less than the higher of the state or federal minimum wage, regardless of whether the employee is subject to either minimum wage law; and (2) the employee's wage or salary is guaranteed and paid in full irrespective of the amount of tips received by the employee. A violation of Section 351 is a misdemeanor punishable by a fine not exceeding \$500 or imprisonment not exceeding 60 days, or both [CAL. LABOR CODE §354].

See Generally:

- 1) CAL. LABOR CODE §353 (requiring an employer to keep records of gratuities deducted from employees' wages).
- 2) 29 U.S.C. §§203(m), 206(b) (1970) (credits against federal minimum wage).
- 3) *In re Farb*, 178 Cal. 592, 174 P. 320 (1918) (unconstitutionality of statute proscribing the taking, crediting, or deducting of tips).
- 4) *Anders v. State Board of Equalization*, 82 Cal. App. 2d 88, 97, 185 P.2d 883, 888-89 (1947) (discussing validity of agreement made in violation of Section 351 prior to amendment).

**Employment Practices; unemployment insurance
and welfare benefits—refusal to work**

Unemployment Insurance Code §1258.5 (new); §1259 (amended); Welfare and Institutions Code §11308.6 (amended).

AB 343 (McCarthy); STATS 1973, Ch 1000

SB 586 (Marks); STATS 1973, Ch 1210

Support: California Labor Federation AFL-CIO

Section 1258.5 has been added to the Unemployment Insurance Code, and Section 1259 amended, to provide grounds upon which an unemployed individual may refuse otherwise suitable employment without foregoing unemployment benefits. These grounds are: (1) the employer does not possess the appropriate state license for the particular business, trade, or profession; (2) the employer fails to withhold disability contributions required by Part 2 (commencing with §2601) and does not transmit such contributions to the Department of Employment Development as required by Section 986; or (3) the employer does not carry either workmen's compensation insurance or possess a certificate of self-insurance as required by Division 4 (commencing with §3201) of the Labor Code. Section 11308.6 of the

Welfare and Institutions Code has been correspondingly amended to prohibit the denial of welfare benefits for a refusal to accept employment under any of the circumstances stated above.

See Generally:

- 1) CAL. UNEMP. INS. CODE §1257 (withdrawal of benefits for refusal to accept suitable employment), §1258 (defines suitable employment).
- 2) CAL. WELF. & INST. CODE §§11308, 11308.5 (withdrawal of welfare benefits for refusing employment).