SB 666 (Steinberg) – Employment: Retaliation

Introduced February 7, 2013, Enrolled and Presented to the Governor September 18, 2013

This bill provides for a suspension or revocation of an employer's business license for retaliation against employees and others on the basis of citizenship and immigration status, and establishes a civil penalty up to $10,000 per violation.

Assembly Amendments: (1) revise the bill to provide that a business license may be suspended or revoked if the licensee has been determined by the Labor Commissioner or the court to have violated subdivision (b) of Section 244 of the Labor Code and the court or Labor Commissioner has taken into consideration any harm such suspension or revocation would cause to employees of the licensee, as well as the good faith efforts of the licensee to resolve any alleged violations after receiving notice; (2) provide that a licensee who violates Section 244 may be subject to disciplinary action from their respective licensing body; and (3) add double-jointing language with SB 496 (Wright).

Existing state and federal law contains provisions that define unlawful discrimination and lawful employment practices by employers and employment agencies to protect both prospective and current employees against employment discrimination.

Existing law, among other things, provides the following:

- Prohibits an employer from discharging, or in any manner discriminating against, any employee or applicant for employment because he/she has engaged in prescribed protected conduct relating to the enforcement of the employee's or applicant's rights.

- Any employee that is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of his/her employment because the employee engaged in any protected conduct - such as making a bona fide complaint or claim to the Division of Labor Standards Enforcement - is entitled to reinstatement and reimbursement for lost wages and work benefits.

- Any employer who willfully refuses to hire, 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.

Regarding employee sharing of information with government entities, existing law:

- Specifies that an employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or

law enforcement agency, where he/she has reasonable cause to believe that the information discloses a violation or noncompliance with state or federal law.

- Prohibits and employer from retaliating against an employee for disclosing this type of information to a government or law enforcement agency.

- Under existing law, in addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding $10,000 for each violation.

However, these provisions do not apply to rules, regulations, or policies implementing the confidentiality of the lawyer-client privilege, the physician-patient privilege, or trade secret information.

The existing Fair Employment and Housing Act prohibits harassment and discrimination in employment because of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, mental and physical disability, medical condition, age, pregnancy, denial of medical and family care leave, or pregnancy disability leave and/or retaliation for protesting illegal discrimination related to one of these categories.

Under existing state law, all protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or have been employed in the state. In addition, for purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability or in proceedings, where no inquiry is permitted into a person's immigration status except where the person seeking the inquiry has shown, by clear and convincing evidence, that the inquiry is necessary in order to comply with federal immigration law.

Existing law establishes grounds for suspension or revocation of certain business and professional licenses. Under the existing State Bar Act, specific causes are established for the disbarment or suspension of a member of the State Bar.

This bill:

1. Provides that a business license regulated by the Business and Professions Code may be subject to suspension or revocation if the licensee has been determined by the Labor Commissioner or the court to have violated subdivision (b) of Section 244 of the Labor Code and the court or Labor Commissioner has taken into consideration any harm such suspension or revocation would cause to employees of the licensee, as well as the good faith efforts of the licensee to resolve any alleged violations after receiving notice, provided however that a licensee of an agency within the Department of Consumer Affairs who has been found by the Labor Commissioner or the court to have violated subdivision (b) of Section 244 of the Labor Code.

2. Provides that an employer shall not be subject to suspension or revocation for requiring a prospective or current employee to submit, within three business days of the first day of work for pay, an I-9 Employment Eligibility Verification form.

3. Authorizes the suspension, disbarment, or other discipline against a licensed attorney who reports the suspected immigration status, or threatens to report the suspected immigration status, of a witness or party to a civil or administrative action, or his/her family member, to a federal, state, or local agency because the witness or party exercises, or has exercised, a right related to his/her employment. For purposes of this provision, this bill defines "family member" to mean a spouse, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, or grandchild related by blood, adoption, marriage, or domestic partnership.

4. Clarifies that the employee or job applicant is also protected under the above provision from retaliation or adverse actions by the employer. This bill also provides these protections to the employee or job applicant for making a written or oral complaint that he or she is owed unpaid wages.

5. Authorizes, in addition to any other remedies available, a civil penalty, not to exceed $10,000 per employee for each violation, to be imposed against a corporate or limited liability company employer.

6. Provides that reporting or threatening to report an employee's, former employee's, or prospective employee's suspected citizenship or immigration status, or the suspected citizenship or immigration status of his/her family member, to a federal, state, or local agency because the employee, former employee, or prospective employee exercises a right under the provisions of the Labor Code, the Government Code, or the Civil Code constitutes an adverse action for purposes of establishing a violation of an employee's, former employee's, or prospective employee's rights. For purposes of this provision, this bill defines "family member" to mean a spouse, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, or grandchild related by blood, adoption, marriage, or domestic partnership.

7. Prohibits any person acting on behalf of the employer from preventing or retaliating against an employee who makes use of anti-retaliation protections.

8. Provides protection to a person for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry.

9. Specifies that its provisions are severable, and if any of its provisions are held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

Senate Bill No. 666

Passed the Senate September 10, 2013

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Secretary of the Senate

Passed the Assembly September 9, 2013

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Chief Clerk of the Assembly

This bill was received by the Governor this _____ day

of _____, 2013, at _____ o'clock ____M.

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Private Secretary of the Governor

CHAPTER _____

An act to add Sections 494.6 and 6103.7 to the Business and Professions Code, and to amend Sections 98.6 and 1102.5 of, and to add Section 244 to, the Labor Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

SB 666, Steinberg. Employment: retaliation.

Existing law establishes grounds for suspension or revocation of certain business and professional licenses.

This bill would subject those business licenses to suspension or revocation, with a specified exception, if the licensee has been determined by the Labor Commissioner or the court to have violated specified law and the court or Labor Commissioner has taken into consideration any harm such a suspension or revocation would cause to employees of the licensee, as well as the good faith efforts of the licensee to resolve any alleged violations after receiving notice. The bill would subject a licensee of an agency within the Department of Consumer Affairs who has been found by the Labor Commissioner or the court to have violated specified law to disciplinary action by his or her respective licensing agency.

The State Bar Act establishes specific causes for the disbarment or suspension of a member of the State Bar.

This bill would make it a cause for suspension, disbarment, or other discipline for any member of the State Bar to report suspected immigration status or threaten to report suspected immigration status of a witness or party to a civil or administrative action or his or her family member, as defined, to a federal, state, or local agency because the witness or party exercises or has exercised a right related to his or her employment.

Existing law establishes various rights and protections relating to employment and civil rights that may be enforced by civil action.

This bill would provide that it is not necessary to exhaust administrative remedies or procedures in order to bring a civil action enforcing designated rights. Under the bill, reporting or threatening to report an employee's, former employee's, or prospective employee's suspected citizenship or immigration status, or the suspected citizenship or immigration status of the employee's

or former employee's family member, as defined, to a federal, state, or local agency because the employee, former employee, or prospective employee exercises a designated right would constitute an adverse action for purposes of establishing a violation of the designated right. Because a violation of certain of those designated rights is a misdemeanor, this bill would impose a state-mandated local program by changing the definition of a crime.

Existing law prohibits an employer from discharging an employee or in any manner discriminating against any employee or applicant for employment because the employee or applicant has engaged in prescribed protected conduct relating to the enforcement of the employee's or applicant's rights. Existing law makes it a misdemeanor for an employer to take adverse employment action against employees who file bona fide complaints.

This bill would also prohibit an employer from retaliating or taking any adverse action against any employee or applicant for employment because the employee or applicant has engaged in protected conduct. The bill would expand the protected conduct to include a written or oral complaint by an employee that he or she is owed unpaid wages. The bill would subject an employer to a civil penalty of up to $10,000 per violation of these provisions.

Existing law entitles an employee to reinstatement and reimbursement for lost wages and benefits if the employee has been discharged, demoted, suspended, or in any way discriminated against because the employee engaged in protected conduct or because the employee made a bona fide complaint or claim or initiated any action or notice, as prescribed.

This bill would similarly grant these entitlements to an employee who is retaliated against or subjected to an adverse action.

Existing law prohibits an employer from making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. Existing law further prohibits an employer from retaliating against an employee for such a disclosure. Under existing law, a violation of these provisions by an employer is a crime.

This bill would additionally prohibit any person acting on behalf of the employer from making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, as provided, and would extend those prohibitions to preventing an employee from, or retaliating against an employee for, providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry. Because a violation of these provisions by an employer would be a crime, this bill would impose a state-mandated local program.

This bill would incorporate additional changes to Section 1102.5 of the Labor Code proposed by SB 496 that would become operative if this bill and SB 496 are enacted and this bill is enacted last.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 494.6 is added to the Business and Professions Code, to read:

494.6. (a) A business license regulated by this code may be subject to suspension or revocation if the licensee has been determined by the Labor Commissioner or the court to have violated subdivision (b) of Section 244 of the Labor Code and the court or Labor Commissioner has taken into consideration any harm such suspension or revocation would cause to employees of the licensee, as well as the good faith efforts of the licensee to resolve any alleged violations after receiving notice.

(b) Notwithstanding subdivision (a), a licensee of an agency within the Department of Consumer Affairs who has been found by the Labor Commissioner or the court to have violated subdivision (b) of Section 244 of the Labor Code may be subject to disciplinary action by his or her respective licensing agency.

(c) An employer shall not be subject to suspension or revocation under this section for requiring a prospective or current employee

to submit, within three business days of the first day of work for pay, an I-9 Employment Eligibility Verification form.

SEC. 2. Section 6103.7 is added to the Business and Professions Code, to read:

6103.7. It is cause for suspension, disbarment, or other discipline for any member of the State Bar to report suspected immigration status or threaten to report suspected immigration status of a witness or party to a civil or administrative action or his or her family member to a federal, state, or local agency because the witness or party exercises or has exercised a right related to his or her employment, broadly interpreted. As used in this section, "family member" means a spouse, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, or grandchild related by blood, adoption, marriage, or domestic partnership.

SEC. 3. Section 98.6 of the Labor Code is amended to read:

98.6. (a) A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights that are under the jurisdiction of the Labor Commissioner, made a written or oral complaint that he or she is owed unpaid wages, or because the employee has initiated any action or notice pursuant to Section 2699, or has testified or is about to testify in a proceeding pursuant to that section, or because of the exercise by the employee or applicant for employment on behalf of himself, herself, or others of any rights afforded him or her.

(b) (1) Any employee who is discharged, threatened with discharge, demoted, suspended, retaliated against, subjected to an adverse action, or in any other manner discriminated against in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the employee has made a bona fide complaint or claim to the division pursuant to this part, or because

the employee has initiated any action or notice pursuant to Section 2699 shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by those acts of the employer.

(2) Any employer who willfully refuses to hire, 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.

(3) In addition to any other remedies available, an employer who violates this section is liable for a civil penalty not exceeding ten thousand dollars ($10,000) per employee for each violation of this section.

(c) (1) Any applicant for employment who is refused employment, who is not selected for a training program leading to employment, or who in any other manner is discriminated against in the terms and conditions of any offer of employment because the applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the applicant has made a bona fide complaint or claim to the division pursuant to this part, or because the employee has initiated any action or notice pursuant to Section 2699 shall be entitled to employment and reimbursement for lost wages and work benefits caused by the acts of the prospective employer.

(2) This subdivision shall not be construed to invalidate any collective bargaining agreement that requires an applicant for a position that is subject to the collective bargaining agreement to sign a contract that protects either or both of the following as specified in subparagraphs (A) and (B), nor shall this subdivision be construed to invalidate any employer requirement of an applicant for a position that is not subject to a collective bargaining agreement to sign an employment contract that protects either or both of the following:

(A) An employer against any conduct that is actually in direct conflict with the essential enterprise-related interests of the employer and where breach of that contract would actually constitute a material and substantial disruption of the employer's operation.

(B) A firefighter against any disease that is presumed to arise in the course and scope of employment, by limiting his or her consumption of tobacco products on and off the job.

(d) The provisions of this section creating new actions or remedies that are effective on January 1, 2002, to employees or applicants for employment do not apply to any state or local law enforcement agency, any religious association or corporation specified in subdivision (d) of Section 12926 of the Government Code, except as provided in Section 12926.2 of the Government Code, or any person described in Section 1070 of the Evidence Code.

SEC. 4. Section 244 is added to the Labor Code, to read:

244. (a) An individual is not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision of this code, unless that section under which the action is brought expressly requires exhaustion of an administrative remedy. This subdivision shall not be construed to affect the requirements of Section 2699.3.

(b) Reporting or threatening to report an employee's, former employee's, or prospective employee's suspected citizenship or immigration status, or the suspected citizenship or immigration status of a family member of the employee, former employee, or prospective employee, to a federal, state, or local agency because the employee, former employee, or prospective employee exercises a right under the provisions of this code, the Government Code, or the Civil Code constitutes an adverse action for purposes of establishing a violation of an employee's, former employee's, or prospective employee's rights. As used in this subdivision, "family member" means a spouse, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, or grandchild related by blood, adoption, marriage, or domestic partnership.

SEC. 5. Section 1102.5 of the Labor Code is amended to read:

1102.5. (a) An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, where the employee has reasonable cause to believe that the information discloses a

violation of state or federal statute, or a violation of or noncompliance with a state or federal rule or regulation.

(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information to a government or law enforcement agency, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a state or federal rule or regulation.

(c) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a state or federal rule or regulation.

(d) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment.

(e) A report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b).

(f) In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars ($10,000) for each violation of this section.

(g) This section does not apply to rules, regulations, or policies that implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege of Article 3 (commencing with Section 950) of, or the physician-patient privilege of Article 6 (commencing with Section 990) of, Chapter 4 of Division 8 of the Evidence Code, or trade secret information.

SEC. 5.5. Section 1102.5 of the Labor Code is amended to read:

1102.5. (a) An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, or to a person with authority over the employee or to another employee who has authority to investigate, discover, or correct the violation or

noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, or to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(c) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.

(d) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment.

(e) A report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b).

(f) In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars ($10,000) for each violation of this section.

(g) This section does not apply to rules, regulations, or policies that implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege of Article 3 (commencing with Section 950) of, the physician-patient

privilege of Article 6 (commencing with Section 990) of, Chapter 4 of Division 8 of the Evidence Code, or trade secret information.

SEC. 6. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 7. Section 5.5 of this bill incorporates amendments to Section 1102.5 of the Labor Code proposed by both this bill and Senate Bill 496. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2014, (2) each bill amends Section 1102.5 of the Labor Code, and (3) this bill is enacted after Senate Bill 496, in which case Section 5 of this bill shall not become operative.

SEC. 8. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

Approved _____, 2013

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Governor