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Employment & Labor Laws 2013 Legislative Forecast

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It's that time of year when we look ahead at the employment and labor laws that will go in effect in the New Year. We have assembled this forecast of the new laws that employers and human resources professionals in California, Massachusetts, and New York may need to comply with in 2013.

California's 2013 New Employment Laws

A new year always means new California employment laws. And 2013 is no different. In 2012, employers saw the new independent contractor misclassification law go into effect—California Labor Code Section 226.8[1] — which imposes a minimum $5,000 and maximum $25,000 fine for willful misclassification of an individual as an independent contractor. Also in 2012, California employers saw the new Wage Theft Protection Act — California Labor Code Section 2810.5[2] — which requires all employers to provide each nonexempt employee new hire with a written notice that contains specific wage and employer information, and to provide written notice of any changes to this information.

Here are some of the new key employment laws that employers will see starting January 2013 (unless another effective date is indicated below):

Commission Pay Agreements — AB 1396[3]

Any employers (based in or outside of California) with California-based employees who are paid on a commission-basis must have a written agreement with those employees that states how the commissions are calculated and paid. The term "commission" does not include bonus- or profit-sharing plans unless the employer offers the employee a fixed percentage of sales or profits as compensation for work to be performed.

Wage Statement Violation Penalties — SB 1255[4]

California Labor Code Section 226[5] requires employers to provide their employees with wage statements that contain nine categories of specific information. Until now, the employer did not have monetary liability under Section 226 unless the employee showed some sort of injury. Now, the new law gives Section 226 some teeth. The employee will be considered to have suffered an injury if the employer fails to provide a wage statement, if the employer provides inaccurate or incomplete information on the wage statement, and the employee cannot "promptly and easily determine from the wage statement alone" any of the following:

1. The amount of gross or net wages paid during the pay period, total hours worked, number of piece-rate units and applicable piece rate if the employee is paid on a piece-rate basis, all

deductions, inclusive dates for the pay period, and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate.

2. What deductions were made from gross wages to determine net wages.
3. The employer's name and address.
4. The employee's name and last four digits of the employee's social security number.

The penalties remain the same — the greater of all actual damages or $50 for the initial pay period, and $100 for each violation in a subsequent pay period, up to a $4,000 maximum.

Wage Statement & Personnel Records Copies — AB 2674[6]

This new law will amend California Labor Code Sections 226 and 1198.5. First, under Section 226, it will now require employers to maintain either a copy of the actual employee wage statement or a computer-generated record that accurately shows all of the information required to be on the wage statement. If employers are presently not keeping copies of the actual employee wage statements, or computer records of those statements, that accurately reflect all nine categories of information required under California Labor Code Section 226, they will need to start doing so.

Second, this new law expands employee rights and employer obligations regarding the inspection of personnel records. Presently, under California Labor Code Section 1198.5[7], employees have the right to inspect certain personnel records under certain conditions. AB 2674 now:

1. Clarifies that the inspection rights apply to current and former employees.
2. Allows the employee to obtain a copy of the personnel records in addition to inspecting them.
3. Allows employee representatives (e.g. attorneys) to make copy or inspection requests on behalf of current or former employees unless there is an existing lawsuit.
4. And requires compliance with an inspection or copy request within 30 days (unless mutually extended to 35 days).

Employers must also create a form that current and former employees can use to request inspection or copying of their files. If the employer violates these requirements, the employee (current or former) or the Labor Commissioner can recover a $750 penalty from the employer, and obtain injunctive relief and attorneys' fees. Also, under the current law, an employer who fails to permit an inspection of these records is guilty of a misdemeanor. However, the new law changes the misdemeanor to an infraction.

Notice and Wage Statement Requirements for Temporary Services Employers — AB 1744 (Effective July 1, 2013)[8]

Starting July 1, 2013, under California Labor Code Section 226, temporary services employers will now be required to provide itemized wage statements that include the rate of pay and the total hours worked for each assignment.

California Labor Code Section 2810.5 (Wage Theft Protection Act) presently requires an employer to provide each employee, at the time of hiring, with a notice that includes certain information, such as the employee's wage rate and basis, whether hourly, salary, commission, or otherwise, and to notify each employee in writing of any changes to the information in the notice within seven calendar days of the changes unless the applicable changes are reflected on a timely wage statement or another writing. AB 1744 will additionally require a temporary services employer to provide in the notice the name and physical address of the main office, the mailing address if different from the physical address of the main office, and the telephone number of the legal entity for which the employee will perform work, and any other information the Labor Commissioner deems material and necessary.

Nonexempt Employee Salaries — AB 2103[9]

Generally, under California law, there is an eight-hour work day and 40-hour work week, and any hours worked in excess of eight in a day or 40 in a week requires the payment of applicable overtime compensation to nonexempt employees. And, generally, for purposes of computing the overtime rate to be paid to a nonexempt full-time salaried employee, the employee's regular hourly rate is normally 1/40th of the employee's weekly salary. This bill

would provide that payment of a fixed salary to a nonexempt employee will be deemed to provide compensation only for the employee's regular, nonovertime hours, even if there is a private agreement between the employer and employee to the contrary.

Employee Social Media Privacy — AB 1844[10]

This law will prohibit employers from requiring or requesting an employee or applicant for employment to disclose a username or password for the purpose of accessing personal social media, to access personal social media in the presence of the employer, or to divulge any personal social media. This law will also prohibit an employer from discharging, disciplining, threatening to discharge or discipline, or otherwise retaliating against an employee or applicant for not complying with a request or demand by the employer that violates this law.

The term "social media" is broadly defined to include any "electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations." However, employers will be allowed to ask employees to divulge their personal social media for the purpose of an investigation into alleged employee misconduct or violations of law provided that the social media is used solely for purposes of that investigation or a related proceeding.

This new California law is not surprising in the recent wake of the National Labor Relations Board's recent guidance and opinions on employer social media policies.[11]

Religious Dress/Grooming Accommodation — AB 1964[12]

The new law protects religious dress practice and religious grooming practice. It specifies that an accommodation of an individual's religious dress practice or religious grooming practice that would require that person to be segregated from the public or other employees is not a reasonable accommodation. However, no accommodation is required if an accommodation would result in the violation of specified laws protecting civil rights. The new law does not affect the employer's obligation to provide a reasonable accommodation absent undue hardship.

"Religious dress practice" will be construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed. "Religious grooming practice" also will be construed broadly to include all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed.

Definition of "Sex" Expanded to Protect Breastfeeding — AB 2386[13]

Under the existing California Fair Employment and Housing Act (FEHA), which protects against discrimination and harassment, the term "sex" includes gender, pregnancy, childbirth, and medical conditions related to pregnancy or childbirth. The new law expands the definition of "sex" to include breastfeeding and medical conditions relating to breastfeeding.

Human Trafficking Posting — SB 1193[14] (Effective April 1, 2013)

No later than April 1, 2013, certain business are required to post an 8.5" x 11" notice (in 16-point font) in a conspicuous place near the entrance (or in other places where these types of notices are normally posted) that contains information about organizations that provide services to eliminate slavery and human trafficking. The identified business required to comply with the new law, include: (1) On-sale general public premises licensees under the Alcoholic Beverage Control Act (Division 9 (commencing with Section 23000) of the Business and Professions Code); (2) Adult or sexually oriented businesses, as defined in subdivision (a) of Section 318.5 of the Penal Code; (3) Primary airports, as defined in Section 47102(16) of Title 49 of the United States Code; (4) Intercity passenger rail or light rail stations; (5) Bus stations; (6) Truck stops ("truck stop" means a privately owned and operated facility that provides food, fuel, shower or other sanitary facilities, and lawful overnight truck parking); (7) Emergency rooms within general acute care hospitals; (8) Urgent care centers; (9) Farm labor contractors, as defined in subdivision (b) of Section 1682 of the Labor Code; (10) Privately operated job recruitment centers; (11) Roadside rest areas; and (12) Businesses or establishments that offer massage or bodywork services for compensation and are not described in paragraph (1) of subdivision (b) of Section 4612 of the Business and Professions Code.

The Department of Justice will prepare and make available a model notice that complies with the SB 1193 requirements.

Again, it's no big surprise that a new year means new California employment laws for employers to consider and administer. So it is time again for employers to review, revise, and update their applicable policies and procedures and seek the advice of their trusted employment counsel to assist in the process.

Endnotes

1 http://law.onecle.com/california/labor/226.8.html

2 http://law.onecle.com/california/labor/2810.5.html

3 http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1351-1400/ab_1396_bill_20111007_chaptered.pdf

4 http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1251-1300/sb_1255_bill_20120930_chaptered.pdf

5 http://law.onecle.com/california/labor/226.html

6 http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_2651-2700/ab_2674_bill_20120930_chaptered.pdf

7 http://law.onecle.com/california/labor/1198.5.html

8 http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1701-1750/ab_1744_bill_20120930_chaptered.pdf

9 http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_2101-2150/ab_2103_bill_20120930_chaptered.pdf

10 http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1801-1850/ab_1844_bill_20120927_chaptered.pdf

11 http://www.employmentmattersblog.com/2012/09/nlrb-mandates-wholesale-changes-to-costcos-social-media-policy/

12 http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1951-2000/ab_1964_bill_20120908_chaptered.pdf

13 http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_2351-2400/ab_2386_bill_20120928_chaptered.pdf

14 http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1151-1200/sb_1193_bill_20120924_chaptered.pdf

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New Massachusetts Laws in 2013

On the Massachusetts legislative front, several employment-related laws take effect in 2013:

Fair Share Employer Contribution for Health Insurance

The major health legislation, An Act Improving the Quality of Health Care and Reducing Costs through increased Transparency, Efficiency and Innovation, changes the fair share employer contribution measurement in a small but significant manner. It raises the fair share contribution threshold, the point at which employers become subject to fair share assessment laws, from 11 to 21 full-time employees. Additionally, it no longer counts employees who have health care coverage through a spouse, government program, or elsewhere towards an employer's fair share contribution. The rules go into effect on July 1, 2013.

Additional changes to the fair share law were made in the 2012 Economic Development bill, which will take some pressure off of employers who are found out of compliance with the fair share contribution requirements. Under the new law, the Massachusetts Department of Unemployment Assistance (DUA) must allow an employer 60 days, rather than 10, to appeal a finding of noncompliance. The DUA cannot remove funds from an employer's bank account while an appeal is pending. Under prior law, an employer would accrue 12% interest on what it owed to the fair share contribution from the day it was issued a finding by the DUA. The new law forbids this practice while the appeal is pending, but may impose the interest if the appeal fails. Finally, the DUA must issue a written decision on the amount an employer must pay within 90 days of its final decision for companies with more than 50 employees and within 30 days for those with 50 or fewer.

Tax Incentives to Employers for Creating Wellness Programs

The legislation An Act Improving the Quality of Health Care and Reducing Costs through increased Transparency, Efficiency and Innovation also includes a provision that will provide employers an annual tax credit of up to $10,000 for instituting wellness programs for their employees. The tax incentives provided in the new law will take effect on January 1, 2013. The Massachusetts Department of Public Health is expected to issue regulations with details on how employers can ensure that their wellness program qualifies for the tax credit.

Temporary Workers Right to Know Act

The Temporary Workers Right to Know Act amends existing Massachusetts laws governing the temporary staffing

industry in three specific ways by: (1) requiring staffing agencies to provide much greater detail about new assignments to its employees, including the applicable wages, the duration of the assignment, and any risk to personal safety; (2) prohibiting staffing agencies and worksite employers from charging certain fees to temporary employees; and (3) requiring staffing agencies to reimburse their employees' transportation on days where no employment actually existed. Certain professional employees are exempt. The new law will take effect on January 31, 2013.

Potential Legislative Activity

Several noteworthy employment-related bills are likely to be reintroduced in the coming legislative session, including: (1) efforts to mandate paid sick leave; (2) bills that would curtail or negate entirely the protections of noncompete agreements; (3) an attempt to amend the current definition of "independent contractor" that has been problematic for employers; (4) increasing the minimum wage; and (5) clarifying amendments to the provision of the Massachusetts Personnel Records Law mandating that employees be notified promptly of adverse entries in their personnel records. In addition, legislation providing protection to victims of domestic violence and their immediate family members by guaranteeing up to 15 days of leave from their jobs in any 12-month period, which already passed the Senate, is expected to be enacted into law in the 2013 session.

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New York Legislative Update for 2013

While amendments to New York's wage deduction and social security number protection laws become effective at the end of 2012, no new major employment laws are scheduled to become effective in the New Year. The election also failed to shed some much needed light on the New York employment law legislative scene for 2013. While both legislative chambers fell into the hands of Democrats, a recent power-sharing deal between the Senate Republican and Independent caucuses may stall the implementation of any progressive agenda. However, we do expect that both chambers will make a strong push to increase the state minimum wage from $7.25 per hour to possibly $8.50 per hour and to any future minimum wage increases to inflation. Governor Cuomo currently supports a wage hike. We also expect several legislators to reintroduce bills aimed at outlawing discrimination based on gender expression, eliminating workplace bullying, and enhancing social media privacy. Separately, the New York City Council, New York City's local governing body, has introduced bills prohibiting employees from waiving their rights under the New York City Human Rights Law unless the waivers are entered into knowingly and voluntarily, and prohibiting employers from discriminating based on pregnancy, childbirth or a related condition. The New York City Council also continues to explore the possibility of a passing a paid sick leave law.

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