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LEGAL ALERT

New Year Brings New Laws for California Employers

During Arnold Schwarzenegger's tenure as governor of California few new employment laws were enacted. This has changed under Gov. Jerry Brown. As the first year of his term concludes he has signed into law several bills that will affect California employers on January 1, 2012. From consumer credit reports to health care benefits, leaves of absence, and new wage and hour requirements, every California employer has something to prepare for in 2012.

Consumer Credit Checks

Under the California Consumer Credit Reporting Agencies Act, employers can request a consumer credit report (i.e., a report obtained from a consumer credit-reporting agency concerning an individual's credit worthiness, credit standing, or credit capacity) for purposes of evaluating an applicant or employee for employment, reassignment, or retention.

New legislation (AB 22) will prohibit an employer or prospective employer, with the exception of certain financial institutions, from obtaining consumer credit reports unless the person for whom the report is sought has (or will have) a position that is:

- managerial;
- in the state Department of Justice;
- as a sworn peace officer or other law enforcement position;
- one for which the information contained in the report is required by law to be disclosed or obtained;
- one that involves regular access, for any purpose other than the routine solicitation and processing of credit card applications in a retail establishment, to someone's bank or credit card account information, social security number, and date of birth;
- one in which the person is, or would be, any of the following: (1) a named signatory on the bank or credit card account of the employer; (2) authorized to transfer money on behalf of the employer; or (3) authorized to enter into financial contracts on behalf of the employer;
- one that involves access to certain confidential or proprietary information; or

- a position that involves regular access to cash totaling $10,000 or more of the employer, a customer, or client, during the workday.

The new law still imposes the same notice requirements currently in effect. Specifically, you must give notice to the person for whom the report is sought, stating that a report will be used and the source of the report. This notice must contain a box that the person may check off to receive a copy of the credit report. In addition to these requirements, employers will now have to identify which of the above position categories for which the report is being obtained.

When adverse action is taken based in whole or in part on a consumer credit report, you must give the applicant or employee written notice of the adverse action along with the name and address of the consumer credit reporting agency which provided the consumer credit report.

In the event an employer fails to comply with the new law, applicants or employees may bring individual suits for damages, including court costs, loss of wages, attorneys' fees, and when applicable, pain and suffering. In addition, courts can award additional damages up to $5,000 for each violation and any other relief it deems necessary.

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Wage & Hour Laws

Written Commission Agreements

Effective January 1, 2013, AB 1396 will require that all employment relationships involving the payment of commissions "shall be in writing and shall set forth the method by which the commissions shall be computed and paid." "Commissions" are defined as compensation paid to any person in connection with the sale of the employer's property or services and based proportionately upon the amount or value thereof. "Commissions" do not include short-term productivity bonuses or bonus and profit-sharing plans, unless based on an employer's promise to pay a fixed percentage of sales or profits as compensation.

You must give a signed copy of the contract to every employee, and must obtain a signed receipt for each contract. The contract terms are presumed to remain in full force and effect until the contract is superseded or employment is terminated by either party. Failure to comply will subject an employer to an action for penalties of $100 per pay period per aggrieved employee under the Private Attorneys General Act.

Misclassification of Independent Contractors

SB 459 prohibits the willful misclassification of an employee as an independent contractor by a consultant or an employer, and prohibits charging misclassified individuals a fee, or taking a deduction from their compensation, that would violate the law had the individual been classified as an employee. A "willful misclassification" occurs when an employer "avoids employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor."

A violation may result in the California Labor and Workforce Development Agency (LWDA) or a court: (1) imposing civil penalties between $5,000 and $15,000 for each violation, and $10,000 to $25,000 for a pattern and practice of violations; and (2) notifying the Contractors' State License Board of a violator that is a licensed contractor, and requiring the board to initiate an action against the licensee.

There is also a requirement for public notification of violations. Specifically, the new law requires any person or employer who willfully misclassifies a worker as an independent contractor to prominently display a notice on its website, or if the employer does not have a website, in an area that is accessible to all employees and the general public stating: (1) it has committed a serious violation of the law by engaging in the willful misclassification of employees; (2) it has changed its business practices to avoid further violations; (3) that any employee who believes he or she is being misclassified may contact the LWDA (whose contact information must be included); and (4) that the notice is being posted pursuant to a state order. The notice must be signed by an officer of the company, and remain posted for one year.

Finally, the law states that non-lawyers who advise an employer to misclassify a worker may be held jointly and severally liable with an offending employer.

Liquidated Damages Before The Labor Commissioner

Under current California law, an employee may bring a complaint alleging payment of less than the state minimum wage in court or before the Labor Commissioner. While an employee can recover liquidated damages equal to the wages unlawfully unpaid and interest thereon in a civil action, a Labor Commissioner cannot award liquidated damages.

AB 240 allows the Labor Commissioner to award liquidated damages, in addition to unpaid wages, interest, and penalties. An employer may avoid liquidated damages by demonstrating a good faith belief that it had not violated the minimum wage law.

Wage Theft Prevention Act of 2011

AB 469 amends and adds several provisions to the California Labor Code to do the following:

1. Authorize the Labor Commissioner to provide for a hearing to recover wages, penalties, and other demands for compensation, including liquidated damages.
2. Expand the statute of limitations for the Labor Commissioner to collect statutory penalties and fees from one to three years.
3. Require farm labor contractors to disclose in an itemized wage statement the name and address of legal entities securing the contractor's services.
4. Permit the Labor Commissioner to require an employer criminally convicted of a wage violation or who fails to satisfy a judgment for unpaid wages to maintain a bond for up to 2 years. An employer who fails to post such a bond may be required to provide an accounting of its assets to the Labor Commissioner. Failure to provide an accounting may result in penalties up to $10,000, while failure to post bond may result in a court order prohibiting the employer from conducting business within California until the bond is posted.
5. Permit an employee to recover attorneys' fees and costs incurred in enforcing a court judgment for unpaid wages due.
6. Require an employer to pay restitution to an employee, in addition to civil penalties, if the employer pays the employee less than minimum wage.
7. Provide that an employer who willfully fails to pay and has the ability to pay a final court judgment or final order issued by the Labor Commissioner for all wages due is guilty of a misdemeanor, and is subject to fines between $1,000 and $20,000, and possible jail time.
8. Require employers to provide each non-exempt employee at the time of hiring with notice of:
    a) the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission or otherwise, including any rates for overtime;
    b) allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances;
    c) the regular payday;
    d) the name of the employer, including any "doing business as" names;

e) the physical address of the employer's main office or principal place of business, and a mailing address, if different;
f) the telephone number of the employer;
g) the name, address and telephone number of the employer's workers' compensation insurance carrier; and
h) any other information the Labor Commissioner deems material and necessary.

Public employers and employees covered by a collective bargaining agreement are exempt from notice requirements. Written notice of changes in the above information must be provided to each employee within 7 calendar days of the change unless the change is reflected on a timely wage statement or another specified writing.

Anti-Discrimination Laws

Addition of "Gender Expression"

The Fair Employment and Housing Act (FEHA) prohibits discrimination on the basis of an individual's "sex," defined as including "gender." "Gender" includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

AB 887 revises the definition of "gender," making clear that discrimination on the basis of gender identity and "gender expression" is prohibited. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth. This amendment is retroactive because it is a clarification rather than a change in the law.

"Genetic Information" As A Protected Category

In 2008, President George W. Bush signed into law the Genetic Information and Nondiscrimination Act (GINA), which protects individuals against discrimination based on their genetic information in health coverage and in employment.

AB 559 creates a California version of GINA by prohibiting discrimination under the Unruh Civil Rights Act and the FEHA on the basis of genetic information. "Genetic information" means information about an individual's genetic tests, the genetic tests of family members of the individual, or the manifestation of a disease or disorder in family members of the individual. "Genetic information" also includes "any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual."

Maternity Leave Laws

Under the current law it is an unlawful employment practice, unless based upon a bona fide occupational qualification, to refuse to allow a female employee disabled by pregnancy, childbirth, or related medical conditions to take leave on account of pregnancy for a reasonable period of time, not to exceed four months, and thereafter return to work. It is also unlawful to refuse to provide reasonable accommodation for an employee for conditions related to pregnancy, childbirth, or a related medical condition, if she so requests, with the advice of her health care provider. Continued health care coverage during pregnancy disability leave is generally not required by the FEHA.

In addition to defining a refusal to allow employees to take pregnancy disability leave or family medical leave as discrimination, AB 592 clarifies that "interference" is also a basis for liability in California, making it an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under the Pregnancy Disability Leave law and the California Family Rights Act.

SB 299 requires an employer to maintain and pay for coverage under a group health plan for an employee on maternity leave.

SB 222 and AB 210 (which go into effect on July 1, 2012), ensure access to comprehensive maternity health coverage by requiring group health care policies and individualized health insurance plans to provide maternity coverage.

Organ Donor And Bone Marrow Donor Leave Laws

AB 272 requires employers to grant a leave of absence of up to 30 business days in a one-year period to an employee who is an organ donor, and up to five business days for a bone marrow donor. The one-year period is measured from the date the employee's leave begins and consists of twelve consecutive months. The leave of absence for either donor is not a break in continuous service for the purpose of salary adjustments, sick leave, vacation, annual leave, or seniority. As a condition of an employee's initial receipt of the leave of absence, you may require a bone marrow donor to use up to five days of accrued paid time off, and an organ donor up to two weeks of accrued paid time off.

Equal Benefits Laws

Same Health Benefits Regardless of Sex

Under existing California law, a health care service plan and a health insurance policy must provide group coverage to the registered domestic partner of an employee, subscriber, insured, or policyholder that is equal to the coverage it provides to the spouse of those persons. A policy or certificate of health insurance marketed, issued, or delivered to a California resident is generally subject to California insurance law, except for a policy issued outside of California to an employer whose principal place of business and majority of employees are located outside of California.

AB 757 provides that a health care service plan or a health insurance policy may not discriminate in coverage between spouses or domestic partners of a different sex and spouses or domestic partners of the same sex. Moreover, it states that all group health care service plans that are marketed, issued, or delivered in California must comply with California's non-discrimination requirements.

SB 117 bars the state of California from entering into contracts in excess of $100,000 with businesses and other entities that deny equal benefits to the same-sex spouses or registered domestic partners of their employees.

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Miscellaneous Employment Laws

Out-of-State Workers' Compensation Coverage

Currently, California employers must obtain a separate workers' compensation policy to cover employees who work out of state. But as of January 1, 2012, under AB 228, the State Compensation Insurance Fund will provide workers' compensation coverage to California employers whose California employees sustain injury while temporarily working on a out-of-state assignment triggering workers' compensation liability in another state.

Electronic Employment Verification

The E-Verify Program of the United States Department of Homeland Security, in partnership with the United States Social Security Administration, enables participating employers to use the program, on a voluntary basis, to verify that the employees they hire are authorized to work in the United States.

AB 1236 prohibits the state, or a city, county, or special district, from *requiring* private employers to use to use E-Verify or any other electronic employment verification system, unless it is required by federal law or as a condition of receiving federal funds.

ALRB and Unionization

Employers are prohibited from engaging in unfair labor practices, including interfering in the election by agricultural employees of labor representatives to engage in collective bargaining for the designated bargaining units.

SB 126 allows the Agricultural Labor Relations Board (ALRB) to certify a union as the bargaining agent for employees if it finds employer misconduct during an union election that would affect the results of the election and render a slight chance for a new and fair election. The new law imposes time limits for challenging election results, and establishes shorter timeframes for mandatory mediation when a agricultural employer and a certified labor organization representing agricultural employees fail to reach a collective bargaining agreement.

The law also specifies that, when ruling on a petition by the ALRB for appropriate temporary relief or a restraining order concerning an alleged unfair labor practice, a court must consider whether the alleged unfair labor practice, by its nature, would interfere with employees' free choice to choose an exclusive bargaining representative, and whether reasonable cause exists to believe that the unfair labor practice has occurred. If so, the court shall issue appropriate temporary relief or a restraining order. The order will remain in effect until an election has been held or for 30 days, whichever occurs first, and the temporary relief or restraining order will not be stayed pending an appeal.

For more information about these new laws, and how they will affect your business, contact any attorney in one of our California offices, or visit our website at www.laborlawyers.com.

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