

New California Laws Increase Penalties for Employee Misclassification and Wage Theft

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California Governor Jerry Brown has signed two employment-related bills into law, raising the stakes for employers doing business in California. The two laws, which increase the penalties for employers that wrongly classify employees as independent contractors or engage in “wage theft,” both go into effect on January 1, 2012.

Misclassification of Workers as Independent Contractors

The first of the new laws, SB 459, directly impacts employers that classify workers as independent contractors. Referred to by critics as the “Job Killer Act,” the legislation adds Sections 226.8 and 2753 to the California Labor Code (“Labor Code”). Section 226.8 prohibits the “willful misclassification” of an individual as an independent contractor, and also prohibits an employer from charging fees to a misclassified individual for items that an employee is not normally required to purchase, such as equipment, space rental, services, or licenses. Section 2753 imposes joint and several liability on any person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor simply to avoid the employee designation. (Attorneys who advise employers are exempted from Section 2753.)

SB 459 imposes steep civil penalties for employer violations. Those penalties can compound substantially and quickly. Labor Code Section 228.6 imposes a penalty of between \$5,000 and \$15,000 for each violation, in addition to other penalties permitted by law. When an employer is found to have engaged in a pattern or practice of violations, the penalty increases to between \$10,000 and \$25,000 per violation.

SB 459 also imposes non-monetary penalties. An employer found to have violated Labor Code Section 228.6 may also be ordered to post on its website (or, if the employer has no website, in a prominent physical location) a notice stating that the employer has committed a “serious violation of the law.” This notice must be posted for a year, and it must invite aggrieved individuals to contact the California Labor and Workforce Development Agency, among other requirements.

Although SB 459 requires the misclassification to be “willful,” it is unclear how California courts will interpret this threshold requirement. SB 459 amends Labor Code Section 226.8(h)(4) to now define “willful misclassification” as “avoiding employee status for an

individual by voluntarily and knowingly misclassifying that individual as an independent contractor.” Until there is guidance from courts as to what constitutes “voluntary and knowing” misclassification, California employers must be more careful than ever in classifying workers as independent contractors – and must be more prepared than ever to justify that designation.

The Wage Theft Prevention Act

The second new law is AB 469, also known as the Wage Theft Prevention Act of 2011 (“WTPA”). For employers with operations in New York, the WTPA may appear familiar, as California based its WTPA on similar legislation passed in New York last December. (See *Act Now Advisory*: [“Governor Paterson Signs Overhaul of New York State Labor Law”](#).) Under the WTPA, Section 2810.5 was added to the Labor Code. As of January 1, 2012, certain employers must provide each new non-exempt employee with a written notice at the time of hiring, in the language that the employer normally uses to communicate employment-related information, which contains the following:

- 1) The employee’s pay rate or pay rates, and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any overtime rates, as applicable;
- 2) Allowances included as part of the minimum wage calculation, including meal or lodging allowances;
- 3) The employer’s regular payday;
- 4) The employer’s name, including any “doing business as” names;
- 5) The employer’s physical address of its main office or principal place of business, and a mailing address, if different;
- 6) The employer’s telephone number;
- 7) The name, address, and telephone number of the employer’s workers’ compensation insurance carrier; and
- 8) Any other information the California Labor Commissioner (“Commissioner”) deems material and necessary.

Unlike New York’s anti-wage theft legislation, which requires that *all* New York employees receive notice of pay rates and paydays, the WTPA explicitly excludes the following individuals from the notice requirements:

- Employees who work for the state or any political subdivision, including any city, county, city and county, or special district;
- Employees exempt from the payment of overtime wages by statute or wage orders of the Industrial Welfare Commission; and

- Employees covered by collective bargaining agreements who earn a regular hourly rate of pay – that is, not less than 30 percent more than California’s minimum wage.

The WTPA also requires that employers notify their employees, in writing, of any changes to the information set forth in the notice within seven calendar days after the time of the changes, unless all the changes are reflected in a timely wage statement as required by Labor Code Section 226 or if the changes are noted in another writing required by law within seven days of the changes.

Additionally, the WTPA requires the Commissioner to create a template for employers to use to comply with the above requirements. According to the California Department of Industrial Relations, the template and related materials should be available in mid-December 2011 on its website.

In addition to the new notice requirements, the WTPA also increases penalties and creates new penalties for employers that violate the Labor Code. New sections of the Labor Code created under the WTPA include:

- Labor Code Section 1197.2, which imposes civil and criminal penalties on employers that, despite their ability to pay, willfully fail to pay a final court judgment or final order issued by the Commissioner for all wages due to an employee whose employment was terminated within 90 days of the date that the judgment was entered. In this case, the violating employer will face civil penalties between \$1,000 and \$20,000 and will be charged with a misdemeanor for each offense.
- Labor Code Section 200.5, which extends the time that the Division of Labor Standards Enforcement may commence a civil action from one year to three years from the date that the penalty or fee becomes final.
- Labor Code Section 1194.3, which allows employees to recover attorneys’ fees and costs incurred relating to enforcement of a court judgment for unpaid wages.

The WTPA also modifies existing sections of the Labor Code. Employers that violate the Labor Code must now pay restitution of wages to the employee and will be subject to civil penalties.

Additionally, prior to the passage of the WTPA, existing law provided that the Commissioner could require an employer convicted of a subsequent wage violation (or that failed to satisfy a judgment) to post bond in order to continue its business operations. The Labor Code, as amended by the WTPA, extends the time that a violating employer would have to maintain a bond from six months to two years and the Commissioner may require that a subsequently convicted employer provide an accounting of its assets.

What Employers Should Do Now

- Be prepared to assess whether workers are properly classified as independent contractors under California law. This must be done with great care to avoid triggering the very lawsuit you are trying to avoid.
- If you perform an audit of the independent contractor designation for your workers, do so in cooperation with legal counsel so that the audit may be protected by attorney-client privilege. If you determine that you need to reclassify workers, do so carefully and, again, in cooperation with counsel.
- Be sure that the template explanation you provide new employees of their non-exempt status is ironclad. If it isn't, you may be handing them an invitation to a lawsuit.
- Prepare notices with the above-referenced requirements to comply with the WTPA for all new hires beginning January 1, 2012.
- Consider providing notice to exempt employees. Although not statutorily required, in the event there is a misclassification dispute of an employee's exempt status, at least there will not also be penalties for failure to comply with the WTPA.

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