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California Employment Law Updates

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In his first legislative season, California Governor Jerry Brown has signed into law 22 employment-related bills. All but one go into effect on January 1, 2012. The most significant changes are summarized as follows.

Effective January 1, 2012

Wage Theft Prevention Act – AB 469

AB 469 (the Wage Theft Prevention Act) requires that employers provide each non-exempt employee, at the time of hiring, with a written notice specifying the employee's wage rate and the basis of calculation, whether hourly, salary, commission, or otherwise. If any of this information changes during the course of employment, the employer must notify each affected employee in writing within 7 calendar days of the changes unless such changes are reflected on a timely wage statement. No notice is required for an employee who either is exempt from the payment of overtime or is covered by a collective bargaining agreement containing the specified information. Employers should examine their offer letter forms and payroll practices to assure compliance with these notice requirements, and retain copies of the mandated notice in the subject employee's personnel file.

AB 469 also extends to three years (previously two) the period that employers are required to retain payroll records. It directs that employers may not prohibit employees from keeping personal records of their time worked or piece-rate units earned. The statute provides that employers violating minimum wage may be subject to actions for restitution of wages to the employee. This bill also criminalizes the willful violation of certain wage statutes or orders, or willful failure to pay a final court judgment or final order of the Labor Commissioner for wages due. The bill also extends the period for the Labor Commissioner to commence a collective action for penalties or fees from one year to three years.

Fines for Incorrect Use of the Independent Contractor Classification – SB 459

The California Legislature has significantly increased potential exposure for companies who engage independent contractors to provide services. SB 459 - codified as Section 226.8 in the California Labor Code - levies additional civil fines against employers who are deemed to have “willfully” misclassified any employees as independent contractors. Under Section 226.8, an entity found to have willfully misclassified an employee as an independent contractor will be subject to a minimum civil penalty of $5,000 up to a maximum of $15,000 per violation. An entity found to have engaged in a pattern of willfully misclassifying employees is subject to a minimum fine of $10,000 and not more than $25,000 per violation. These penalties are in addition to back taxes, wages, benefits and other civil penalties. Although Section 226.8 does not create a private right of action, plaintiffs may seek these penalties in a civil action under the California Private Attorney General Act.

The law defines willful misclassification as “avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor.” Non-attorneys who advise an employer to intentionally misclassify employees in exchange for consideration will also be held jointly and severally liable for these penalties.

The addition of this section to the Labor Code could have a significant impact on misclassification lawsuits. First, since independent contractor classification may often depend upon the interplay of several factors, determining the willfulness of an erroneous classification can be unpredictable. Second, the imposition of these additional fines will also make misclassification cases more attractive to counsel representing employees in class actions. While the courts provide guidance as to when an employee will be deemed to have willfully misclassified its employees, employer must tread carefully in entering into independent contractor relationships. Companies should also review their current independent contractor relationships to ensure they are confident that this classification is being used appropriately.

Paid Leave for Organ or Bone Marrow Donation – SB 1304

SB 1304 creates two new forms of paid leave in private employment. The statute requires that private employers with at least 15 employees allow those employees who have exhausted all sick leave to take a leave of absence with pay, not exceeding 30 days for the purpose of organ donation and not exceeding 5 days for bone marrow donation. (These rights already existed for state employees.) During the paid leave, the employer must continue its contributions to health benefits and the leave may not constitute a break of service for purposes of salary adjustments, sick leave, vacation, annual leave or seniority. The employee must provide a written verification of the organ or marrow donation, and that such donation is a medical necessity.

SB 1304 requires that private employers restore an employee returning from such leave for organ or bone marrow donation to the same position held by the employee when the leave began or an equivalent position. The statute prohibits a private employer from interfering with an employee taking organ or bone marrow donation leave, or from retaliating against an employee due to taking that leave or due to opposing an unlawful employment practice related to organ or bone marrow donation leave. The statute creates a private right of action for an aggrieved employee to seek enforcement of these provisions. Employers should amend their leave policies and educate their supervisors to acknowledge these new leave rights.

New Medical Insurance Requirements During Pregnancy Leave – AB 592

California law has already required that employers with five or more employees grant up to four months leave for a disability arising from pregnancy, child birth, or a related medical condition. (This is over and above any California state law right to Family Medical Leave.) AB 592 now requires that these employers maintain their contributions for the subject employee's medical coverage under group health plans during that period of pregnancy disability leave. This requirement fills a gap that previously allowed healthcare coverage to end after the completion of 12 weeks of federal Family Medical Leave where the employee or when the employee was not eligible for FMLA leave. AB 592 also confirms a private right of action for failure to provide pregnancy disability leave. Employers will want to review their leave policies and practices to assure medical benefit payment during pregnancy disability leave.

Health Insurers May Not Discriminate Against Registered Domestic Partners – SB 757

SB 757, the Insurance Nondiscrimination Act, clarifies existing law requiring equal health coverage rights for registered domestic partners. SB 757 makes clear that any insurance company selling or issuing policies in California, including out of state insurance companies, is subject to California's laws which require that equal health benefits be offered to same-sex registered domestic partners as are offered to opposite-sex registered domestic partners and spouses. The bill addresses a loophole in the current law by which certain out of state insurance companies had avoided providing the same coverage for registered domestic partners as they provide for spouses.

Gender Identity and Gender Expression Identified As Protected Classes – AB 887

While existing law prohibits harassment or discrimination based on gender or sex, this new law amends California's existing anti-discrimination laws as detailed in the Fair Employment and Housing Act ("FEHA") to identify "gender, gender identity, and gender expression" as protected characteristics. The law defines "gender expression" as meaning a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

While newly amended Government Code Section 12949 specifies that the law does not limit an employer's ability to impose reasonable workplace appearance, grooming, or dress standards, within those set guidelines, an employer must permit employees to appear or dress in a manner consistent with the employee's gender identity or expression. New employee handbooks and trainings must also explicitly mention that California law does not tolerate any type of gender discrimination. Employers should review and amend their personnel handbooks and policies to comply with AB 887 and should consider office policies related to use of restrooms or other facilities.

Discrimination Based on Genetic Information Is Now Prohibited – SB 559

This new law amends California's Unruh Civil Rights Act and the Fair Employment and Housing Act ("FEHA") to prohibit discrimination in employment and other areas based on "genetic information." The law defines "genetic information" as information about an individual's or their family members' genetic testing or the manifestation of a disease in an individual's family.

The impact on employers is minimal, however, because the California law as it applies to employers is consistent with the Genetic Information and Nondiscrimination Act (GINA) passed by the federal government in 2008, which prohibited use of genetic information in the areas of employment and health insurance coverage.

Use of Background Checks Limited for Most Jobs – AB 22

AB 22 prohibits employers from obtaining consumer credit reports before selecting candidates for most jobs, other than verifying past income and employment. California and federal law previously permitted general background checks, referenced under the law as "credit reports," so long as certain disclosures were made to the employee. But this new California law prohibits an employer or prospective employer – with the exception of certain financial institutions – from obtaining credit reports (beyond verification of past income and employment) unless the position of the person for whom the report is sought falls into one of several categories, including:

(1) managerial positions,

(2) positions that involve regular access to specified personal information, or access to confidential or proprietary information,

(3) positions in which the person is or would be a named signatory on the employer's bank or credit card account, or authorized to transfer money or enter into financial contracts on the employer's behalf, or

(4) positions that involves regular access to $10,000 or more of cash, or one of several other employment categories.

Any reports allowed under AB 22 will remain subject to disclosure requirements to the employee or candidate. Employers who violate the terms of AB 22 may be subject to suits for money damages. However, those employers who can show that "reasonable procedures" were maintained to assure compliance with the provisions cannot be held liable under the new law. To assure compliance with AB 22, employers should re-examine their hiring processes and consult with their credit report provider and counsel.

Effective January 1, 2013

All Commissioned Employees Must Have Written Agreements – AB 1396

Beginning January 1, 2013, anytime an employee performing services in California is compensated by commission, there must be a contract, in writing, between the employee and employer stating precisely how such commission will be calculated and paid. Commission wages are defined as compensation paid to any person for services rendered in the sale of an employer's property or services, based proportionately upon the amount or value thereof. Thus, whether the employer routinely pays commissions or does so only on an intermittent or anecdotal basis, the new law requires written contracts. Under the modified statute, however, "commissions" do not include short-term productivity bonuses such as are paid to retail clerks; and do not include bonus and profit-sharing plans, unless there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed.

The law will also require the employer to retain a signed acknowledgment from the employee, and provide the employee with a copy of the contract. Those employers who simply publish annual commission plans will need to incorporate the plans into a contract format and obtain written acknowledgements from each employee. If a commission agreement expires, its terms will continue to govern the relationship until it is superseded or the employee terminates.

Labor Code Section 2751 currently requires an employer who has no permanent and fixed place of business in the state, and who enters into a contract of employment involving commissions as a method of payment for services to be rendered within the state, to put the contract in writing. Under Section 2751, an employer who does not comply with those requirements is liable to the employee in a civil action for triple damages. This statute has been held invalid (see *Lett v. Paymentech, Inc.*, 81 F.Supp.2d 992 (N.D.Cal. 1999)) because it applied only to out of state companies. AB 1396 alters the statute and makes it applicable to all employers doing business in California. AB 1396 also removes the triple damages clause. However, violation of the statute could result in litigation under California's Private Attorney General Act (PAGA) and the Unfair Competition Law (B&P Section 17200).

Under AB 1396, many employers will need to devote greater resources to the development and management of their commission plans. Commission plans can be simple, but should always include provisions regarding when the commission is earned (versus when it is paid out), what conditions have to be met to earn the commission, and what happens to unpaid and/or unearned commissions when the employment is terminated. Failure to consider and include such provisions can lead to costly disputes.
