Legislative and other Developments Affecting California Employers in 2012

In the first year of Governor Brown's term, he has lost no time signing into law several bills that significantly add to the already burdensome regulations imposed on California employers. This Bulletin summarizes these and other important developments in employment law. In addition to becoming aware of these laws, California employers must also proactively prepare for many of them, in most cases before the New Year. Unless otherwise noted, all of these laws become effective on January 1, 2012.

Health Insurance Benefits for Employees on Pregnancy Disability Leave

Employers with five or more employees will now be required to maintain and pay for health insurance coverage for the entire duration of an employee's Pregnancy Disability Leave, up to a maximum of four months in a 12-month period, at the same level and under the same conditions as if the employee had continued working during the leave period. However, if the employee normally pays a portion of the premium, the employer may require the employee to make these employee contributions during the leave. If, at the conclusion of the Pregnancy Disability Leave (or the immediately following qualifying leave pursuant to the California Family Rights Act), the employee does not return to work for a reason unrelated to the health condition that prompted the leave, the employer may recover the insurance premiums that were paid on the employee's behalf during the leave. Employers are reminded to revise their Pregnancy Disability Leave policies to ensure they are compliant with this new law.

NLRB Posting Requirement

Beginning on January 31, 2012, all employers covered by the National Labor Relations Act (the "Act") will be required to post a notice informing employees of their rights under the Act. This new requirement applies to covered employers (which includes the vast majority of private sector employers engaged in interstate commerce) regardless of whether they currently employ any unionized workers.

The required notice must be 11-by-17 inches in size and can be downloaded on the National Labor Relations Board's ("NLRB") website at www.nlrb.gov or by clicking http://www.nlrb.gov/sites/default/files/documents/1562/employee_rights_nlra.pdf. It must be placed in a conspicuous location where employee notices are typically posted. In addition, if the employer has a practice of notifying employees of personnel rules via an internet or intranet website, the notice must also be disseminated in that manner. Finally, if more than 20 percent of employees speak a language other than English, the notice must also be posted in the translated form. Translated versions will be available on the NLRB's website prior to the January 31, 2012 posting date. If a

posting in the language you require is not available on the NLRB's website, you will not be required to post it.

Although a number of trade groups have filed lawsuits challenging the NLRB's authority to mandate this posting, the requirement currently stands, and the NLRB has stated that failure to post this notice will be treated as an unfair labor practice. As such, it should be taken very seriously.

NLRB Regulation of Social Media Policies

With social media use steadily on the rise, many companies are implementing policies that regulate their employees' use of social media with respect to the times during which such websites can be accessed and the types of information about the employer which can be publicized through their employees' posts or tweets.

These policies have recently caught the attention of the NLRB, which has begun to analyze them carefully to determine whether the restrictions interfere with employees' protected rights under the Act. Many policies – particularly those that are drafted broadly – have been found by the NLRB to be in violation of the Act, even for employers who employ only non-union workers. In those cases, the terminations of employees who had violated the overbroad social media policies were found to have been wrongful.

Although these NLRB cases have been decided on very fact-specific bases, in general, any prohibition of online comments that could be perceived as restricting employees' rights to collectively discuss their employers' labor policies, treatment of employees, or the terms and conditions of their employment, are considered a violation of the Act. Any policy that utilizes such broad or vague language will likely be struck down by the NLRB as unlawful.

If you have implemented or are considering implementing a social media policy, you should ensure that it protects your company while still remaining in compliance with all relevant laws.

Misclassification of Independent Contractors

It has always been unlawful to misclassify employees as independent contractors. Until now, employers could be subject to tax withholding amounts, overtime pay, and liability for failing to provide workers' compensation benefits, among other things.

The California Legislature has now created specific additional penalties for such violations. Now, if a court or California's Labor and Workforce Development Agency ("LWDA") determines that an employee has been willfully misclassified, that employer will be subject to a civil penalty of $5,000-$15,000 for each violation. If the LWDA determines that the misclassification has been part of a pattern or practice, the penalty increases to $10,000-$25,000 for each violation. Offending employers will also be required to post on their website that they have committed a "serious violation of the law by engaging in willful misclassification of employees" and will have to provide the contact information to the LWDA for reporting purposes. The law also imposes joint liability on non-attorney outside

consultants who knowingly advise an employer to treat an individual as an independent contractor to avoid employee status.

Given this new law, it is now more important than ever to conduct an internal audit to ensure that all of your independent contractors are properly classified.

Wage Notice Requirement

Employers will now be required to provide each non-exempt employee, at the time of hire, a written notice that sets forth the following information regarding the payment of his or her wages: (1) the rate of pay and the basis for payment (i.e., hourly, salary, piece, commission, etc.) including any overtime rates; (2) any allowances claimed as part of the minimum wage; (3) the regular payday; (4) the legal name of the employer; (5) the physical address of the employer's main office or principal place of business; (6) the employer's telephone number; and (7) the name, address and telephone number of the employer's workers' compensation carrier. Any changes in compensation must be reflected in new notices within seven (7) days of the change unless the change results in the reclassification of the employees as exempt from overtime.

Credit Report Restrictions

A new California law significantly restricts employers' use of consumer credit reports for most employees and job applicants. As a result, the information that employers will be able to obtain in the background check process will be much narrower unless one of the exceptions to the law applies to a particular employee or applicant. The exceptions are: (1) for law enforcement positions and positions for which the information is required by law; (2) for positions that qualify for the executive exemption from overtime; (ii) for positions that involve regular (other than routine solicitation and processing of credit card applications in retail establishments) access to bank or credit card information, social security numbers and dates of birth; (iii) for positions where the employee would have regular access to cash totaling $10,000 or more of either the employer or the employer's customers or clients during the workday; (iv) for positions where the employee would have access to confidential, proprietary information; or (v) for positions where the employee would be a named signatory on the employer's bank or credit card accounts and/or would be authorized to transfer money on the employer's behalf.

Employers are cautioned to avoid running a credit check on an employee or applicant as a matter of course, and instead to conduct a fact-specific inquiry to determine whether one of the relevant exceptions applies. Employers whose employment applications contain such authorization requests are advised to have their applicant and employee background check authorization forms revised before January of 2012 to address this new law.

No Discrimination for Genetic Information and Gender Expression

Two new protected categories have been added to the California Fair Employment and Housing Act ("FEHA"). The first category, genetic information, provides that an individual cannot be discriminated against based on an individual's genetic tests, the genetic tests of family members, or the

manifestation of disease or disorder in a family member. The second category, gender expression, provides that an individual cannot be discriminated against based upon a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth. Your non-discrimination policies should be updated to ensure compliance with these new requirements.

Clarification to Organ and Bone Marrow Donor Law

Last year we notified you of a new leave of absence in California for employees who are donating organs or bone marrow (employees can take 30 days off in a one-year period for organ donation and five days off in a one-year period for bone marrow donation). This year, the Legislature has further clarified that law in the following ways: (1) the one-year time period is a rolling time period; (2) the number of days of the leave is to be measured in business days, not calendar days; (3) the leave should not be considered a break in service for benefits or seniority purposes; and (4) employers may require employees to use some paid time off in connection with this leave (five days for bone marrow donation and two weeks for organ donation). Your policies should be updated to reflect these clarifications.

Liquidated Damages Available for Minimum Wage Claims

Employees who are paid less than the minimum wage have always been eligible to receive liquidated damages (currently the amount of unpaid wages plus interest) in a civil court action. They are now also eligible to receive liquidated damages from an action brought before the Labor Commissioner.

Commission Agreements

Effective January 1, 2013, employers who compensate their employees, in whole or in part, with commission pay must put their commission pay arrangements in a written contract, signed by both the employer and the employee, setting forth the method the commissions will be computed and paid. The good news with this particular law is that employers will have all of 2012 to bring their commission arrangements into compliance.

Meal and Rest Breaks

After waiting over three years, California employers are much closer to knowing whether they are required to merely provide meal and rest periods or whether they must ensure that employees take meal and rest periods. On November 8, 2011, the California Supreme Court heard oral argument in a case commonly known as *Brinker*. The court has 90 days (until February 6, 2012) to file its written opinion. We will notify you as soon as this important opinion is issued.

Questions?

If you have any questions about your obligations pursuant to these significant legislative developments, or if we can assist you in bringing your personnel policies into compliance, please contact Nancy Bertrando, Chair of Greenberg Glusker's Employment Law Group