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Attention California Employers: New Employment Laws Affecting Your Business Take Effect On January 1, 2013

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With the stroke of several employee-friendly pens, Governor Brown enacted a number of new laws in California that take effect on January 1, 2013. These laws further expand the rights of employees in California, and further increase the burdens on employers. This is a brief synopsis of the new employment laws that are most likely to affect your business, and that require changes to your policies and practices.

Commission Agreements Must Be in Written Contracts Signed by the Employee

If you are an employer who pays commissions to employees, it is no longer enough to have an oral agreement to pay commissions or to include a description of a commission plan in an employee handbook or other form of mass communication to employees. Effective January 1, 2013, Labor Code section 2751 requires all employers who pay commissions to employees performing services in California to put the commission agreement in a written contract that describes the method by which the commissions are computed and paid. The employer must give a copy of the signed contract to the employee and retain a written, signed acknowledgement from the employee that she or he received a copy of the contract. In addition, if the written commission contract expires, and the parties continue to work under the terms of the expired contract, its terms are presumed to remain in full force and effect until the written contract is expressly superseded by a new written contract or the employment is terminated by either party.

The term "commissions" under the new law means 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. The new law expressly excludes short-term productivity bonuses (such as those paid to retail clerks), temporary and variable incentive payments that increase but do not decrease payment under the written contract, and bonus and profit-sharing plans, unless they are based on the employer's offer to pay a fixed percentage of sales or profits as compensation for work to be performed.

The new law does not contain specific penalties for non-compliance, but as with other California employment laws, non-compliance may subject an employer to penalties under the California Labor Code and Section 17200 of the California Business & Professions Code.

Consequently, employers who pay commissions to employees as any part of their compensation package should review their commission arrangements to ensure that they fully comply with the new law by January 1, 2013.

Expanded Duties to Provide Copies of Personnel Files & Clarification of Duty to Provide Copies of Itemized Wage Statements

AB 2674 amends Labor Code section 1198.5 to expand an employer's existing duties with respect to the maintenance and inspection of employee personnel files. Under AB 2674, employers must now:

- Maintain employee personnel records for at least three years after the employee's separation;
- Provide current and former employees (or their representatives) with copies of personnel records. The employer may redact the names of any nonsupervisory employees before making the records available to the employee;
- Provide a copy of the employee's personnel records within 30 days of a request, or 35 days if the parties agree to a written extension; and
- Develop a written form that employees may use to request records in their personnel file and provide it to the employee (or employee representative) upon verbal request.

AB 2674 limits employees to one request to inspect or copy their personnel records per year. Additionally, an employer is not required to comply with more than 50 requests for copies of personnel records by employee representatives in one calendar month.

An employee's right to inspect and copy ceases if a lawsuit is filed. Note, however, that this does not appear to affect an employer's obligation under Labor Code section 432 to provide copies of all documents signed by the employee upon written request.

The requirements of this new law do not apply to:

1. Records relating to the investigation of a possible criminal offense;
2. Letters of reference;
3. Ratings, reports or records that were obtained prior to the employee's employment, or prepared by identifiable examination committee members, or obtained in connection with a promotional examination.

Noncompliance can result in a $750 penalty per violation, injunctive relief, and attorneys' fees in a civil action.

AB2674 also amends Labor Code section 226, which requires California employers to provide a copy of an employee's itemized wage statements (paystubs) going back three years within 21 calendar days of the request. AB 2674 clarifies that the employer need not provide actual photocopies of the paystubs. A "copy" of the pay records may include a duplicate or computer-generated record, as long as it accurately shows all of the information that existing law requires in the itemized statements.

No Fixed Salary Agreements Covering Overtime

Notwithstanding the Labor Code's strict overtime requirements, in *Arechiga v. Dolores Press* (2011) 192 Cal.App.4th 567, a California Court of Appeals held that California Labor Code section 515 permits an employer and a non-exempt salaried employee to enter into a fixed wage agreement covering both regular, non-overtime hours worked and overtime hours the employee was expected to work.

AB 2103 legislatively overturns *Arechiga* and amends California Labor Code 515 by specifically providing that fixed salary agreements with non-exempt employees may only cover compensation for regular, non-overtime hours, and not overtime. Notwithstanding any private agreements to the contrary, an employer must compensate non-exempt salaried employees for overtime hours worked at the rate required by law (not less than 1.5 times the hourly rate of 1/40th of the employee's weekly salary).

While *Arechiga* did not necessarily reflect the prevailing law in California, AB 2103 makes clear that employers must pay overtime compensation to non-exempt, salaried full-time employees in accordance with the law.

Expansion of California Discrimination Law—Religious Accommodation and Breastfeeding

A. Religious Accommodation

Under current California law, employers must reasonably accommodate religious beliefs, observances, and practices of employees, unless doing so would cause an undue hardship. AB 1964 expands current law to require accommodation of "religious dress practices" and "religious grooming practices," broadly defined to include head or face coverings, jewelry, the wearing or carrying of religious clothing, and the wearing of all forms of head, facial and body hair in the observance of the employee's religion. The law provides two narrow exceptions to accommodation: (1) when accommodation would require segregating the employee from the public or other employees, or (2) when accommodation constitutes a violation of some other law prohibiting discrimination or protecting civil rights.

B. Breastfeeding

While California courts and the Department of Fair Employment & Housing have long recognized breastfeeding as protected by the discrimination provisions of the California Fair Employment & Housing Act, AB 2386 amends the Act to explicitly include breastfeeding and related medical conditions under the statutory definition of "sex" as a protected class.

Employers Prohibited from Requesting Social Media Information from Employees and Applicants

AB 1844 is a new law that attempts to address the increasing presence of social media in the workplace and related concerns over employee privacy. Under the new law, employers are prohibited from requiring or requesting that employees or applicants:

- Divulge any personal social media to the employer;
- Disclose their user names or password information for the purpose of accessing any personal social media; and
- Access their personal social media in the presence of the employer.

A limited exception to the new law permits employers to request (but not require) employees to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding. An employer may request and require an employee to disclose a user name or password or other method to access an employer-issued electronic device.

"Social media" is broadly defined in the new law 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."

AB 1844 prohibits an employer from disciplining, discharging, retaliating, or threatening to discipline or discharge an employee for not complying with a request in violation of the law.

Clarification of Requirement to Provide Wage Statements

Under current law, an employer who "knowingly and intentionally" fails to provide a wage statement (pay stub) that complies with the nine requirements in Labor Code section 226(a), is subject to an award of actual damages or statutory penalties up to $4,000 in connection with any "injury" to the employee. SB 1255 clarifies the existing law by providing that an employee is deemed to suffer an injury for the purpose of awarding the penalty if the employer fails to provide a wage statement at all, or if the employer fails to provide accurate and complete information as required by 226(a) **and** the employee

cannot "promptly and easily determine" from the wage statement alone any of the following:
(i) the amount of and manner in which the employer calculated the gross wages and net wages paid to the employee during the pay period;
(ii) which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period;
(iii) the name and address of the employer; and
(iv) the name of the employee and the last four digits of his or her social security number or an employee identification number.

The new law defines "promptly and easily determine" as being able to readily ascertain without reference to other documents or information. Under the new law, a "knowing and intentional failure" does not include an isolated and unintentional payroll error due to a clerical or inadvertent mistake. In reviewing for compliance with this section, a court may consider whether the employer, prior to an alleged violation, has adopted and is in compliance with policies, procedures, and practices that fully comply with the Act as a relevant factor.

Expansion of California False Claims Act—Whistleblower Claims

The California False Claims Act authorizes current and former employees with direct and independent knowledge of fraud to oppose or report false claims made by employers in connection with goods or services provided to state or local governments. AB 2492 amends and expands the Act in several respects by, among other things, authorizing contractors and agents (not just employees) to oppose or report false claims, permitting recovery of attorneys' fees from employers in more cases, and increasing civil penalties by 10 percent, from $5,500 to $11,000 per violation.

Employers should audit their current policies and practices and make any necessary changes to ensure they are in full compliance with these new laws by January 1, 2013.

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