Labor & Employment Law

Looking Forward to 2012

With the stroke of several employee-friendly pens, Governor Brown enacted a number of new laws pertaining to employment in California. Most of these laws, which put increased burdens on employers, will take effect on January 1, 2012. This provides a brief synopsis of the aspects of these new employment laws that are most likely to affect your business.

I. Independent Contractors

Beginning on January 1, 2012, Senate Bill No. 459 ("SB 459") significantly increases the penalties that may be assessed against employers who "willfully misclassify" individuals as independent contractors, and imposes a punitive public notice requirement on employers who are found to have misclassified these types of employees.

SB 459 provides, in pertinent part, as follows:

- It is unlawful for any person or employer to willfully (defined as "voluntarily and knowingly") misclassify an individual as an independent contractor.
- It is unlawful for any person or employer to charge an individual who has been willfully misclassified as an independent contractor a fee, or make any deductions from compensation, for any purpose, including for goods, materials, space rental, services, government licenses, repairs equipment maintenance, or fines arising from the individual's employment, where those acts would have violated the law if the individual had not been misclassified.
- Any person (other than an employee or attorney) who knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for that individual shall be jointly and severally liable if the individual is found not to be an independent contractor.

In addition to any other penalties or fines permitted by law, employers who violate SB 459 may be subject to civil penalties of $5,000.00 – $15,000.00 per violation. This may be increased to $10,000.00 –$25,000.00 per violation if an established pattern or practice of misclassification is found. SB 459 also requires that an employer who is found to have violated the law prominently display a notice on its Internet website, or if the employer does not have a website, in an area accessible to employees and the general public, for a period of one year that states:

- The employer has committed a serious violation of the law by engaging in the willful misclassification of employees;
- The employer has changed its business practices in order to avoid committing further violations;
- Any employee who believes that he or she is being misclassified as an independent contractor may contact the Labor and Workforce Development Agency; and
- The notice is being posted pursuant to a state order.

SB 459 also makes it difficult for employers to take advantage of the Voluntary Classification Settlement Program initiated by the IRS, which allows employers to voluntarily reclassify their independent contractors as employees in exchange for reduced federal payroll tax liability, because participation in this federal program might be seen as an admission of misclassification that could be used against employers in state actions involving SB 459.

In advance of the New Year, employers who treat individuals as independent contractors should review their job classifications and consult with legal counsel to ensure that all independent contractors are properly classified and, if they are not, to determine the best course of action for implementing a reclassification.

II. Wage Theft Prevention Act of 2011

Assembly Bill No. 469, also known as the Wage Theft Prevention Act of 2011, creates a series of notice requirements for employers and additional penalties for non-compliant employers beginning January 1, 2012, including:

- Employers must provide all non-exempt employees at the time of hiring a written notice specifying:
  1. the employee's rate of pay (including overtime rates);
  2. the bases for the pay (salary, hourly, etc.);
  3. allowances that are part of the wages (e.g. meal or lodging allowances);
  4. the employer's regular payday;
  5. the employer's name (including "doing business as" names);
  6. the physical address and telephone number of the employer's main office or principal place of business;
  7. the name, address and telephone number of the employer's workers' compensation insurance carrier; and
  8. Any other information deemed material and necessary by the Labor Commissioner.
- The Labor Commissioner will issue a template for the written notice before the January 1, 2012 effective date. Employers are required to provide written notice to employees of all changes of such information within seven days. This requirement does not apply to exempt employees or to certain employees covered by a collective bargaining agreement.
- The act expands the penalties against employers who fail to pay the minimum wage or who issue payroll drafts that are returned unpaid. Employees may file written complaints with the Labor Commissioner for such failures to pay the minimum wage or for returned payroll drafts.
- The act extends statute of limitations for the Labor Commissioner to bring an action to collect fees and penalties on unpaid wages from one year to three years.

An employer who willfully fails to pay and has the ability to pay a final judgment or order for all wages due within 90 days is guilty of a misdemeanor. The penalties depend on the dollar amount of wages due and include fines and possible imprisonment in county jail.

III. Credit Checks Prohibited In Many Cases
Under AB 22, employers (with the exception of some financial institutions) will be prohibited from obtaining or using consumer credit reports regarding their applicants and employees.

However, consumer credit reports may be obtained for persons in the following limited circumstances:
1. a position in the state Department of Justice;
2. a managerial position, as defined;
3. a sworn peace officer or other law enforcement position;
4. a position for which the information contained in the report is required by law to be disclosed or obtained;
5. a position that involves regular access to specified personal information for any purpose other than the routine solicitation and processing of credit card applications in a retail establishment;
6. a position 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;
7. a position that involves access to confidential or proprietary information, as specified; or
8. a position that involves regular access to $10,000 or more of cash

Note too, that even where credit checks are permitted, federal and state notice requirements still apply.

IV. Insurance Benefits During Pregnancy Disability Leave
Under existing law regarding Pregnancy Disability Leave, employers are not required to continue to maintain and pay for group health coverage for an eligible female employee during that leave (unlike leaves protected under the Family and Medical Leave Act ("FMLA") and the California Family Rights Act ("CFRA")). SB 299 amends the Pregnancy Disability Act ("PDA") to make it an unlawful employment practice "for an employer to refuse to maintain and pay for coverage for an eligible female employee who takes pregnancy disability leave for the duration of the leave, not to exceed four months . . ."

The practical effect of this is as follows:
- The FMLA and CFRA apply only to employers having 50 or more employees; the PDA applies to employers with 5 or more employees.
- Only employees who have been employed for one year or more and have worked 1,250 hours in the previous 12 months qualify for FMLA or CFRA leave; there is no such prerequisite for PDA.
- FMLA and CFRA leave extend for up to 12 weeks; PDA leave can extend up to four (4) months.

SB 299 also states that the employer can recover the premium from the employee if: (1) the employee fails to return from leave after four months and (2) the failure to return from leave is for a reason other than (a) the taking of a CFRA leave or (b) the continuation, recurrence or onset of a health condition that entitles the employee to pregnancy disability leave or "other circumstance beyond the control of the employee."

V. Gender Identity and Expression Protected
Effective January 1, 2012, AB 887 amends specific portions of the Fair Employment and Housing Act ("FEHA") and the Unruh Civil Rights Act, expanding the definition of "gender" to include "gender identity" and "gender expression" (defined as "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth"). As with other protected characteristics under the FEHA, employees or applicants may not be discriminated against or harassed due to their gender identity or gender expression, and employers have an affirmative duty to reasonably prevent such discrimination or harassment in their workforce.

This new law additionally requires an employer to allow an employee to appear or dress consistently with the employee's gender identity/gender expression. In other words, this bill now provides protection for transgender employees to dress according to their gender identity/expression.

VI. Genetic Information
Effective January 1, 2012, SB 559 expands the Fair Employment and Housing Act and the Unruh Civil Rights Act to prohibit discrimination on the basis of genetic information. The act defines genetic information to mean 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 is further defined to include 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 an individual. Genetic information does not include information about the sex or age of an individual. SB 559 covers more employers and contains more detailed requirements than the federal Genetic Information Nondiscrimination Act.

VII. California Family Rights Act
The California Family Rights Act (CFRA) did not specifically recognize "interference" with an employee's right to temporary leave as a basis for liability. Effective January 1, 2012, AB 592 will bring California's pregnancy and family medical leave laws in line with the federal standard by clarifying that "interference" is a basis for liability under California law. AB 592 amends Government Code sections 12945 and 12945.2 to make 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 California Family Rights Act. AB 592 is declaratory of existing law.

VIII. Organ and Bone Marrow Transplant Leave Clarified
Labor Code section 1510 currently provides that where an employer employs 15 or more employees, an employee must be granted a leave of absence to make an organ or a bone marrow donation. The current leave of absence for an organ donor is up to 30 days in a one-year period. The current leave of absence for a bone marrow donor is up to five days in a one-year period. Due to employer confusion in implementing the organ and donor transplant leave policy, SB 272 amends Section 1510 to provide that the days of leave are business days rather than calendar days, and that the one-year period is measured from the date the employee's leave begins and consists of 12 consecutive months. The bill also states that the leave of absence is not a break in the employee's continuous service for the purpose of his or her right to paid time off. The bill further states that the employer may condition the initial receipt of leave upon the employee's use of a specified number of earned but unused days of paid time off. SB 272 is declaratory of existing law.

IX. Employees Paid Commissions
California Labor Code Section 2751 formerly required that out-of state employers enter into written commission agreements with California residents, and Section 2752 formerly provided that an employer who did not comply with this requirement could be liable for triple damages. In 1999, however, a Ninth Circuit District Court found that these provisions were unenforceable because they violate the equal protection and commerce clauses of the federal constitution (i.e., they do not apply equally to in-state and out-of-state employers).

To restore the employee protections under Labor Code Sections 2751 and 2752, Governor Jerry Brown approved Assembly Bill No. 1396, which provides:

By January 1, 2013, whenever an employer enters into a contract of employment with an employee for services to be rendered within the state and the contemplated method of payment of the employee involves commission, the contract shall be in writing and shall set forth the method by which the commissions shall be computed and paid. (Emphasis added).

AB 1396 also requires that employers give a signed copy of the commission agreement to every employee who is a party to the agreement, and that employers obtain a signed receipt for the agreement from each employee. Although AB 1396 does not provide a specific penalty for violation of its provisions, violation of this new law may trigger litigation under California's Private Attorneys General Act ("PAGA") and Unfair Competition Law.

As used in AB 1396, the term "commissions" means compensation paid to any person for services rendered in the sale of the employer's property or services and based proportionately upon the amount or value of the property or services. The term "commissions" does not include short-term productivity bonuses (such as those paid to retail clerks) and it does not include bonus and profit-sharing plans, unless there has been an offer by the employers to pay a fixed percentage of sales or profits as compensation for work to be performed.

For California employers, AB 1396 differs from the unconstitutional Labor Code Sections 2751 and 2752 in two fundamental ways:

- It applies with equal force to employers with a fixed place of business in California and to employers who do not have a fixed place of business in California; and
- It repeals the provision of Section 2752 that provided for triple damages for violations of Section 2751.

Consequently, all employers who do business in California and pay their employees by commission must put the terms of the commission arrangement in a writing signed by the employee by January 1, 2013. In view of the fact that the Legislature has provided a grace period for employers to bring their practices in compliance with this law, California employers who pay their employees by commissions should use this time to review the terms of their commission arrangements to make sure that they comply with California law, and to put the terms of these commission arrangements in writing.

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These new laws compel employers to audit their employee classifications, to expand their policies and procedures, and to amend the provisions of their Employee Handbooks. Employers should consult with counsel now to ensure that they are in full compliance with these laws when they take effect.

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