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Employment Law Commentary

California Legislative Update – The Bills are Now Getting Signed

By Colette LeBon

Almost thirty years after his first stint as governor of California, Jerry Brown is back at the helm of California. Predictably, many of the employee-friendly bills which died on former Governor Arnold Schwarzenegger's desk have found new life under Governor Brown.

In addition to the general impact of these bills on all employers with California employees, this year's legislation especially affects employers that: pay employees a commission, classify workers as independent contractors, hire or contract farm workers, or use consumer credit reports in making employment decisions. Below are summaries of the new bills and tips on getting prepared to meet the new requirements going into effect on January 1, 2012.

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Federal Legislative Update

NLRB Under Attack

By Colette LeBon

On a federal level, with the House of Representatives in Republican control and the Senate controlled by Democrats, it is unlikely any significant labor or employment legislation will make it to President Obama. The current fight over the power of the National Labor Relations Board is indicative of this overall split.

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Bills Signed Into Law

Wage Theft Prevention Act (A.B. 469)

Similar to the New York Wage Theft Prevention Act that went into effect earlier this year, California's legislation will require new wage notices to employees, with stiff criminal penalties in addition to existing remedies for wage violations. Beginning January 1, 2012, in addition to existing posting and wage statement requirements, employers must provide a written notice to an employee at the time of hire meeting the following criteria:

- The notice must state: the rate of pay; basis for that rate (hourly, salary, commission, or otherwise); allowances claimed as part of the minimum wage (e.g., meal or lodging allowances); date of pay; name of the employer, including any "dba" names used; telephone number and address (physical and mailing, if different) of the employer; name, address, and telephone number of the employer's workers' compensation carrier; and any other information deemed "material and necessary" by the Labor Commissioner.
- The notice must be provided in the language the employer normally uses to communicate employment-related information to the employee. While not specifically required, best practice will be to provide the notice in both English and the employee's native language.
- The employer must notify the employee within 7 calendar days of any changes to this information, unless it is reflected on a timely wage statement.

And some good news:

- The notice does not have to be provided to exempt employees or those covered by a collective bargaining agreement.
- The Labor Commissioner will provide a template for the notice.

Buried in its myriad other provisions, this bill also increases the time to maintain payroll records from two to three years. Employers should review and update, if necessary, all document retention policies as soon as possible to reflect this change.

Additional Penalties for Independent Contractor Misclassification (S.B. 459)

S.B. 459 creates additional penalties for the "willful misclassification" of employees as independent contractors. Unfortunately, the legislature has supplied no additional guidance regarding the standards for classifying employees as independent contractors. These penalties also apply if a person misclassified as an independent contractor is charged a fee for any cost of doing business (for goods, materials, retail space, etc.) which would have been unlawful to charge to an employee. These penalties include:

- A penalty between $5,000 and $15,000 for each violation in addition to existing penalties and fines;
- A penalty between $10,000 and $25,000 for each violation in addition to existing penalties or fines if the conduct is determined to be a "pattern or practice";
- If the employer is a licensed contractor, notification of the Contractor's State License Board for disciplinary action;
- Mandatory posting for one year, on the employer's website or prominent physical location at its business if the employer has no website, a notice that the employer has willfully misclassified employees as independent contractors and has changed its business practices to avoid committing further violations.

Liability for misclassification will also attach to a non-lawyer outside consultant who advised the employer to treat the individual as an independent contractor.

Employers should carefully review and audit all independent contractor relationships with the advice of counsel before this new law takes effect.

Limited Use of Credit Reports in Employment Decisions (A.B. 22)

Effective on January 1, 2012, employers may no longer use a consumer credit report for employment purposes in California, unless the position of the person for whom the report is sought meets any of the following criteria:

- A "managerial" position (i.e., an employee who falls under the executive exemption);
- A position in the state Department of Justice;
- A sworn peace officer or other law enforcement position;
- A position for which the information contained in the report is required by law to be disclosed or obtained;
- A position involving regular access to (1) the bank or credit card account information, (2) the Social Security number, or (3) the date of birth of any one person;
- A position held by (1) a named signatory on the employer's bank or credit card account, (2) someone authorized to transfer money on behalf of the employer, or (3) someone authorized to enter into financial contracts on the behalf of the employer;
- A position that involves access to trade secrets; or
- A position that involves regular access to cash totaling $10,000 or more of the employer, a customer, or a client, during the workday.

By A.B. 22's terms, a consumer credit report is limited to a report which contains credit-related information, such as credit history, credit score, or credit record. Therefore, employers may continue to perform criminal background checks on potential hires in accordance with federal and California law, as long as such a report does not include credit-related information.

Before this bill takes effect, employers should evaluate the positions for which they currently use employment reports and determine which, if any, fit into the exceptions to this bill. For positions which do not fit into the exceptions, employers should begin to transition away from their current use of consumer credit reports in making employment decisions to ensure compliance with this new bill by January 1.

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Written Commission Agreements (A.B. 1396)

A.B. 1396 will require all employers paying their employees a commission as any part of a compensation package to provide the commission plan in writing. There will be plenty of time to adjust to this new law as its requirements do not take effect until January 1, 2013. However, if it is not already usual practice, it is prudent to begin providing all commissioned employees with a written commission plan now to minimize later disputes.

This bill was written to provide the protections originally intended by Labor Code section 2751, which required out of state employers paying California employees on a commission basis to put the commission agreements in writing. This law was held unconstitutional and therefore unenforceable in *Lett v. Paymentech, Inc.*, 81 F. Supp. 2d 992 (N.D. Cal. 1999), because it violated the commerce clause and the equal protection clause of the U.S. Constitution by treating in-state and out-of-state employers differently. A.B. 1396 remedies this disparity by requiring all employers to provide a written contract to California employees paid a commission. Also, A.B. 1396 improves upon Labor Code section 2751 by eliminating the provision allowing an aggrieved employee to sue for treble damages.

Liability for Interference with Pregnancy Leave (A.B. 592)

A recent unpublished California Court of Appeals decision, *Harris v. CashCall, Inc.*, No. G042578, 2011 WL 1085116, highlighted that California's Pregnancy Disability Leave Act is unclear about whether "interfering" with pregnancy leave is unlawful, as it is under federal law. A.B. 592 resolves this issue by amending the California Family Rights Act and Pregnancy Disability Leave Act to extend liability to interference with an employee's right to take leave under the Acts. Although the bill does not take effect until January 1, 2012, the bill states that these provisions are declaratory of existing law. Therefore, plaintiffs may argue that these changes should be applied retroactively in pending cases.

Employer-Provided Health Benefits to Employees on Pregnancy Leave (S.B. 299)

This bill requires an employer with 5 or more employees to pay for and maintain a female employee's health care coverage for 4 months of pregnancy leave at the same level as if the employee were not on leave. If the employee fails to return to work following the leave, the employer can recoup the costs paid for the coverage. Currently, employers with 50 or more employees are required to provide such coverage for 12 weeks of leave. This provision, then, requires employers with 50 or more employees to pay for an extra month of insurance during pregnancy leave, and imposes these same requirements on small employers

Gender Non-Discrimination Act (A.B. 887)

A.B. 887 amends California's non-discrimination statutes to add the terms "gender identity" and "gender expression" where only the term "gender" currently appears as a protected category. Further, the law defines gender expression as "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's sex at birth." Because California law has already defined gender to include these terms, these amendments only clarify existing law and do not create new liabilities for employers. However, the new law will require an employer to allow an employee to appear or dress consistently with the employee's gender expression, in addition to the employee's gender identity, as is currently required under the law.

Genetic Information Non-Discrimination Act (S.B. 559)

The federal Genetic Information Non-Discrimination Act, known as GINA, was passed in 2008 to prohibit discrimination in employment and health insurance. Codifying into state law the provisions of its federal counterpart, California's GINA will prohibit discrimination on the basis of genetic information under the Unruh Civil Rights Act and the Fair Employment and Housing Act, as well as in state programs or in programs receiving financial assistance from the state. Although the federal GINA only applies to employers with 15 or more employees, California's GINA will apply to all employers of employees in California.

No Mandatory Use of E-Verify: Employment Acceleration Act of 2011 (A.B. 1236)

In recognition of the inaccuracies in the E-Verify system and the costs its use impose on businesses and workers, this bill prohibits the state and any municipality from mandating the use of the E-Verify system, or any other electronic employment verification system. The bill also prohibits conditioning the receipt of a government contract or business license on an employer's use of E-Verify.

Agricultural Labor Compromise (S.B. 126)

Although Governor Brown vetoed the sweeping changes S.B. 104 sought to make to the secret ballot election process in the Agricultural Labor Relations Act ("ALRA"), he signed S.B. 126. S.B. 126 seeks to remedy the existing secret ballot process rather than scrap it. In addition to other changes to the election and unfair labor practices procedures under the ALRA, the bill provides that if the Agricultural Labor Relations Board sets aside an election due to employer misconduct that would render slight the chances of a new free and fair election, the labor organization shall be certified as the exclusive bargaining representative for the bargaining unit.

New Wage Statement Requirements for Farm Labor Contractors (A.B. 243)

This bill amends Labor Code section 226 to require that farm labor contractors include the name and address of the grower on employee wage statements. This bill may encourage farm workers to seek redress for the unlawful wage

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practices of their employer, the farm labor contractor, from a grower complying with all applicable laws. Make sure any farm labor contractors you contract with are following all applicable wage laws.

Liquidated Damages for Administrative Wage Claims (A.B. 240)

Existing law allows workers alleging they were paid less than the minimum wage to seek liquidated damages in civil suits under Labor Code section 1194.2. Upon the employer's showing of good faith, the court can exercise its discretion in determining whether an award of liquidated damages is appropriate. A.B. 240 extends Labor Code section 1194.2 to permit an award of liquidated damages in an administrative action for unpaid minimum wages before the Labor Commissioner.

Bone Marrow/Organ Donation Leave (S.B. 272)

This bill amends Labor Code section 1510 regarding paid leaves of absence for employees while donating organs or bone marrow. The bill clarifies the existing vague law in several ways, most importantly to clarify the amount of earned vacation time an employee can be required to take as a condition of their leave.

Vetoed Bills

Payroll Card Regulation (S.B. 931)

Under S.B. 931, an employer whose employees opted to receive wages on payroll cards would have been required to ensure the employee received many free account services along with the provision of the card, including at least five free ATM withdrawals per month and two free point-of-sale transactions, along with other services. Governor Brown vetoed the bill because he believed the costly new requirements would likely cause banks and employers to cease offering payroll cards altogether.

However, this legislation is not dead: Brown vowed to work together with legislators and banks to regulate the use of payroll cards.

Mandatory Unpaid Bereavement Leave (A.B. 325)

This bill, viewed as a job killer by the California Chamber of Commerce, would have allowed employees to take up to three days of unpaid bereavement leave upon the death of a spouse, child, parent, sibling, grandparent, grandchild, or domestic partner. It also would have created a private right of action for an employee who faced adverse action after taking such leave. Noting his concern about this bill's far reaching private right to sue over benefits that most employers provide voluntarily, Governor Brown vetoed the bill.

Agricultural Workers Card Check Legislation (S.B. 104)

This bill, vetoed by Governor Brown in June, would have amounted to a significant overhaul of the Agricultural Labor Relations Act in California. It would have limited agricultural workers' ability to vote for unionization in the workplace by secret ballot by implementing a card check system which would require the employer to recognize a union when a majority of the workers have signed authorization cards.

Interference with Employment Contracts (A.B. 267)

This bill would have prohibited employment contracts that require California employees to agree to the use of legal forums and/or laws of other states. Concerned that such a law might deter out of state employers from hiring Californians, Governor Brown vetoed the bill.

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The Republican-led House of Representatives is attacking the decision-making power of the now 3-member National Labor Relations Board. In September, the House passed H.R. 2587, the "Protecting Jobs From Government Interference Act" as a direct response to the NLRB's action against a single employer, Boeing. The NLRB claims Boeing has transferred work away from its unionized plant in Washington State to a new non-union aircraft assembly facility in South Carolina in retaliation for past strikes. The new bill, which was passed along party lines in the House and has very little chance of success in the Democratic Senate, would prohibit the National Labor Relations Board from ordering any employer to restore, relocate, or transfer employment, or to rescind outsourcing.

In the last two months, the House Education and Workforce Committee announced two additional bills which would also significantly limit the powers of the NLRB. The "Workforce Democracy and Fairness Act," H.R. 3094, is a direct response to two NLRB actions in late August. First, the bill targets the NLRB's proposed regulations to speed up unionization elections. The bill would require 14 days between the employer's receipt of the representative petition and the pre-election hearing, and a total of 35 days before the election can be held. Second, the bill counters the Board's decision in *Specialty Healthcare and Rehabilitation Center of Mobile* by requiring the Board to avoid "fragmentation" of bargaining units. This bill is currently being amended in committee. While it has a minimal chance to pass the Senate, it may have broader appeal than the other anti-NLRB bills, depending on its final form.

The "National Labor Relations Reorganization Act," H.R. 2926, would abolish the NLRB and transfer its oversight of elections to the Office of Labor-Management Standards of the Department of Labor. Further, the NLRB's enforcement authority would be vested in a new Bureau of Labor Relations Enforcement within the

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Department of Justice. Representative Trey Gowdy, the bill's sponsor, declared upon introducing the bill: "The NLRB has lost its usefulness and needs to be dissolved." Senate Democrats, however, are not very likely to be persuaded that this is the case.

Coming to a Bulletin Board Near You

By Timothy Ryan

At a time when union membership continues to decline, the National Labor Relations Board has proposed a Rule that takes aim at the vast majority of American workers who remain non-union.

The Rule is called "Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act" (the "Rule"). The Rule would require most private employers to post a Notice "in conspicuous places" where notices to employees are customarily posted. Employers are required to post the notice in English, unless a significant number of its employees use a language which is not English, in which case notice must additionally be given in the other language.

The requirement to post a Notice applies to most private sector employers, but excludes agricultural, railroad, and airline employees, and some very small employers whose business volume is so slight that they do not affect interstate commerce.

What the Notice Says

The required Notice explains, in part, that employees have the right to select a union to negotiate with their employer on their behalf; to discuss wages and benefits with co-workers or a union; to raise work-related complaints with their employers; to strike and picket; or to choose to do none of those activities.

The Notice explains that it is unlawful for an employer to engage in certain activity, such as restricting employees' ability, on their own time, to discuss wages, hours and working conditions with their fellow co-workers; to threaten employees with discipline for engaging in the protected activities stated above; to question employees about their union sympathies or their communication with other workers about work-related matters; or to engage in other like activity.

Effective Date

The Rule was initially slated to take effect on November 14, 2011. Recently, the Board extended the time for posting until January 31, 2012. In the press release announcing the extension, the NLRB noted that it had received questions from businesses and trade organizations, which indicate uncertainty about which businesses fall under the Board's jurisdiction.

Business groups have filed lawsuits to prevent the new Rule from ever going into effect. The National Association of Manufacturers and the National Right to Work Legal Defense and Education Fund, among others, have asked the federal court in Washington D.C. to prevent the NLRB from implementing the Rule. A hearing on the case is schedule for December 19, 2011. The Chamber of Commerce has filed a similar lawsuit in South Carolina.

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