Fenwick Employment Brief

November 10, 2011
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NEW CALIFORNIA STATUTES ADD TO EMPLOYER OBLIGATIONS

Following up on new California statutes covered in last month's FEB Update [http://www.fenwick.com/publications/6.5.4.asp?mid=77], Governor Brown approved several additional laws that take effect January 1, 2012 and add to employer obligations:

AB 469 requires employers to provide non-exempt employees at the time of hire with a notice specifying among other things (1) the rate and basis of pay of the employee's wages (e.g., hourly, salary, commission or other method, including rates of overtime pay); (2) the employer's regular paydays; (3) the name, address, and telephone number of the employer; and (4) the name, address and telephone number of the employer's worker's compensation carrier. Employers must also notify employees of any change in the rate or basis of pay in writing within 7 calendar days of the change, unless changes are reflected on a timely wage statement (i.e., a pay stub issued within 7 days of the change) or other timely written notice.

AB 469 also creates a new statutory remedy for restitution of unpaid wages when an employer fails to pay wages fixed by a wage order, and makes it a *misdemeanor* for an employer to willfully violate wage statutes or orders. Finally, the statute extends the statute of limitations from the current one year to three years in which to commence an action to collect statutory penalties or fees.

SB 459 imposes new penalties for misclassification of employees as independent contractors. This new statute:

- Makes it unlawful to willfully (i.e., voluntarily and knowingly) misclassify an individual as an independent contractor
- Prohibits charging a misclassified contractor a fee or making any deductions from compensation for, among other things, materials, services, equipment maintenance, or imposing fines that would have been impermissible had the individual been properly classified as an employee
- Imposes a civil penalty of between $5,000 and $10,000 for each violation, or $10,000 to $25,000 per violation for engaging in a pattern or practice of violations, in addition to other existing penalties or fines permitted by law
    - Civil penalties may be enforced against any successor corporation, owner, or business entity if the penalties are not paid by the employer
- Imposes joint and several liability on any person who knowingly advises an employer to misclassify an employee as an independent contractor except for:
    - A person advising his or her own employer
    - An attorney providing legal advice in the course of his or her practice of law

AB 22 prohibits employers from obtaining credit reports as part of a background check for applicants or employees. The law provides for several exceptions, allowing credit checks for:

- Managerial positions covered by the executive exemption
- Positions that involve regular access to personal information, including:
    - Bank account or credit card account information
    - Social security number and date of birth
    - Exception to exception: Credit checks are prohibited for positions that involve routine solicitation and processing of credit card applications for retail establishments

- Positions that involve handling employer financial accounts, including:
  - Named signatory on employer bank or credit card account
  - Authority to transfer funds on employer's behalf
  - Authority to enter into financial contracts for employer
- Positions that involve regular access to $10,000 or more of the employer's cash or cash of customers
- Positions that involve access to employer's confidential and proprietary information
- Additional exceptions for law enforcement positions, and where credit checks are required by law

AB 22 also requires that the employer provide written notice to the applicant or employee of the specific reason that the employer is obtaining the credit report.

AB 887 makes explicit for purposes of employment discrimination law that prohibited "gender" discrimination includes discrimination on the basis of gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth. The new law requires employers to allow employees to appear or dress consistently with the employee's gender expression.

SB 657 was enacted in 2010 as the California Transparency in Supply Chains Act, and takes effect on January 1, 2012. The Act requires retail sellers and manufacturers doing business in California to disclose efforts to eradicate slavery and human trafficking from their direct supply chains for tangible goods offered for sale. The law only applies to retail sellers or manufacturers with more than $100,000,000 in annual worldwide gross receipts. Covered companies must post the required disclosure of their efforts on their website with a conspicuous and easily understood link on the homepage.

The disclosure must state to what extent, if any, the company:

- Verifies product supply chains to evaluate and address risks of human trafficking and slavery
- Conducts audits of suppliers
- Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business
- Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking
- Provides company employees and management, who have direct responsibility for supply chain management, with training on human trafficking and slavery.

NEWS BITES

Employee fails to establish sexual harassment based on isolated events

In *Brennan v. Townsend & O'Leary Enterprises, Inc.*, a California court of appeal affirmed a judgment notwithstanding the verdict for the employer that overturned a $250,000 jury verdict in employee's favor for sexual harassment. Plaintiff's principal evidence was an August 2004 email that described the size of plaintiff's breasts and suggested that she operated in a "mindless" state. The court described the email as "rude, insulting, and unprofessional" but discounted the legal significance of the email as an isolated event that was written by a manager who was not plaintiff's supervisor. Other evidence included three alleged incidents of sexual conduct over a three-year period before the August 2004 email: (1) a supervisor wearing a sexual device on his head for about five minutes at a staff meeting in 2000; (2) a manager dressed as Santa who asked female employees to

sit on his lap at an offsite Christmas party in 2000 or 2001; and (3) another manager wearing a hat with a sexual expletive at another offsite Christmas party in 2002 or 2003. Plaintiff further alleged that a supervisor asked her about her personal life, but admitted that the questions were asked out of concern for her in light of a difficult time she was having in her personal life. The court observed that "conspicuously absent" was any evidence that the supervisor's conduct was offensive. Ultimately, the court held that plaintiff failed to show the sort of severe or pervasive conduct needed to establish a hostile work environment.

Federal Court, Not California PUC, Must Decide Whether SuperShuttle Drivers Are Employees Or Independent Contractors

In *Kairy v. SuperShuttle International*, shuttle van drivers for SuperShuttle's airport transportation service commenced a class action alleging that they were improperly classified as independent contractors rather than employees under California law. In California, the company previously classified its drivers as employees; however, commencing in 2001, the company converted its drivers to independent contractor "franchisees." SuperShuttle successfully convinced the lower court to dismiss the lawsuit on the ground that the issue was within the exclusive jurisdiction of the California Public Utilities Commission. On appeal, the federal Ninth Circuit Court of Appeals held that the matter was appropriately before the court and remanded to the trial court for determination.

Frequently Absent Employee Fails To Establish Disability Discrimination

In *Colon-Fontanez v. Municipality of San Juan*, the federal First Circuit Court of Appeals upheld summary judgment in the employer's favor on the employee's claims of disability discrimination. Plaintiff, an auction officer for San Juan, Puerto Rico, was responsible for administering auctions for the city. It was undisputed that regular attendance at the office was an essential function of the job, and that the functions could not be performed from home. In 2005, plaintiff was diagnosed with fibromyalgia and during that year she was absent 30% of her scheduled work time. Her lawsuit claimed that her employer discriminated against her on account of her fibromyalgia by, among other actions, denying her a closer parking spot. In rejecting her claim, the court cited the employer's evidence that plaintiff had a lengthy history of absenteeism: 1993 – absent 20% of the time; 1994 – absent 59% of the time; 1995 – three month unpaid leave; 1996 – three month leave for a foot injury unrelated to her claimed disability; 1997 – three month unpaid leave; 2000 – absent 23% of time; and so on. The court ruled that plaintiff was therefore not a qualified individual covered by the federal Americans with Disabilities Act on account of her failure to meet the essential job requirement of regular attendance.

California Supreme Court To Issue Ruling In Brinker Within 90 Days

On November 8, 2011, the California Supreme Court heard oral argument in *Brinker v. Superior Court (Hohnbaum)*, to decide among other issues whether employers must ensure that employees take meal periods or simply make them available to employees. The court normally issues a ruling within 90 days of hearing.

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