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CLIENT BULLETIN

Client Bulletin #453

CALIFORNIA BUSINESSES CANNOT LET GUARD DOWN

By Michael S. Lavenant and Brian E. Ewing
Ventura County and Los Angeles County Offices

A lot is going on here in the Golden State. Governor Jerry Brown was reelected to a third term (after a hiatus of almost 30 years since the end of his second term), and since that time, California employers have been on edge wondering what type of anti-business measures he would sign into law. Although several bills that businesses feared either did not pass or were vetoed, the governor has signed into law a number of measures that should give employers concern.

The following is a summary of the more significant recently-enacted legislation:

Limits on Pre-Employment Credit Checks
Health Insurance Must Be Provided for Pregnancy Disability Leaves
Better Not Misclassify Those Independent Contractors . . . er, Employees!
Leaves of Absence for Organ Donations
Wage Theft Prevention Act
Commission Agreements Must Be in Writing
BONUS: Schwarzenegger's Anti-Trafficking Certification Law Takes Effect January 1

AB 22 – Mendoza (D - Artesia) – Credit Checks
California has followed the growing trend in other states by barring employers from obtaining credit reports during the application process for many job positions. Currently, California employers are required to inform applicants that a credit check might be performed, and get written consent. But starting January 1, thanks to AB 22, employers cannot obtain or use the credit reports of prospective employees for many positions.

The new law has exceptions for certain types of jobs. The positions for which a credit report can be obtained during the hiring process include the following:

- a managerial position
- a position for which credit information is required by law
- a position that requires regular access to bank or credit card account information, social security numbers, and date of birth
- a position in which the employee would be a signatory on the employer's bank account, or authorized to transfer money on behalf of the employer, or authorized to enter into financial contracts on behalf of the employer
- a position that involves access to confidential or proprietary information, including trade secrets

- a position that involves regular access to cash totaling $10,000 or more of the employer, a customer, or client, during the workday, or
- any position with certain financial institutions.

When an employer does intend to obtain a credit report during the hiring process, the employer must inform the applicant of the specific reason the employer is obtaining the report, meaning the exception that applies to the position. This new requirement is in addition to the other requirements already imposed on employers under the federal Fair Credit Reporting Act and other similar laws.

SB 299 – Evans (D - Santa Rosa) – Health Insurance Coverage for Pregnancy Disability Leaves
Currently, employers with 50 or more employees are subject to the federal Family and Medical Leave Act as well as California's Family Rights Act. Both laws require that a covered employer provide health insurance coverage to an eligible employee who must take a leave of absence for a qualifying reason on the same basis as if the employee was continuing to work.

The right to have continued health insurance coverage applied only to employees who had worked for 1,250 hours in the 12-month period preceding the leave, and at least 12 months of service with the employer.

Employers who were not covered by the FMLA or CFRA, but who had California employees who needed to take pregnancy disability leaves, were required to provide up to four months of leave. However, they were not required to continue health insurance coverage because the costs to smaller employers were considered too burdensome. SB 299 requires that companies with five or more employees (no tenure requirement) provide continued health insurance for up to four months for pregnancy disability leaves – more than what is required by either the FMLA or the CFRA. This may cause some smaller employers to reconsider whether they want to provide health insurance at all.

SB 299 will take effect January 1, 2012.

SB 459 – Corbett (D - San Leandro) – Independent Contractor Misclassification
This bill has now created an entire administrative scheme and additional causes of action for companies that engage the services of individual independent contractors. If the individual is found to have been improperly classified as an independent contractor, the contracting entity may be fined anywhere from $5,000 to $25,000 for each violation.

This new law is going to be difficult to comply with as the various state agencies use different criteria for determining who is an independent contractor. We have not seen clear guidance yet, but it would be our recommendation to comply with all of the tests, and in particular, the 11-point test used by the California Labor Commissioner. When in doubt, treat the worker as employee rather than an independent contractor. By all means, seek legal advice if you have any individuals who are currently performing work for your company and are being paid on a "1099" basis.

SB 272 – DeSaulnier (D - Concord) Organ Donor/Bone Marrow Leave of Absence
Last year SB 1304 was enacted with relatively little fanfare. This law added sections 1508-1513 to the California Labor Code. SB 1304 created an additional leave of absence for employees of private organizations which entitled employees to up to 30 days of paid leave to donate an organ, and up to 5 days of paid leave to donate bone marrow. SB 272 brings renewed attention to SB 1304 and clarifies that the 30 days are business days and not

calendar days. SB 272 also clarifies that the time off cannot be seen as a break in service for pay increases or the accrual of benefits, including vacation and seniority.

AB 469 – Swanson (D - Oakland) California Wage Theft Prevention Act

The Wage Theft Prevention Act of 2011 imposes new requirements on California employers. One significant provision now requires employers to provide non-exempt employees with a written notice, at the time they are hired, of various compensation information and information about the company.

In particular, Labor Code Section 2810.5 (as of January 1, 2012) will require that at the time of hiring, an employer shall provide each employee a written notice, in the language the employer normally uses to communicate employment-related information to the employee, containing the following information:

1. The rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, as applicable.
2. Allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances.
3. The regular payday designated by the employer in accordance with the requirements of this code.
4. The name of the employer, including any "doing business as" names used by the employer.
5. The physical address of the employer's main office or principal place of business, and a mailing address, if different.
6. The telephone number of the employer.
7. The name, address, and telephone number of the employer's workers' compensation insurance carrier.
8. Any other information the Labor Commissioner deems material and necessary.

The Labor Commissioner is in the process of preparing a template that complies with the above requirements and estimates that the template will be made available to employers any day now.

If an employer changes any terms or conditions of employment related to the eight items, it is required to notify the affected employees in writing of any changes within seven calendar days, unless all changes are reflected on a timely wage statement furnished in accordance with Section 226; or unless notice of all changes is provided in another writing required by law within seven days of the changes.

This "New Hire Statement" applies to private, non-exempt employees but does not apply to public employees, exempt employees, or employees who are covered by a valid collective bargaining agreement.

The Act also requires employers to maintain records of itemized wage statements and records of deductions for three years. The Act also dramatically strengthens certain penalties and the enforcement powers of the California Labor Commissioner. One particular provision now allows the Labor Commissioner to collect penalties and fees for up to three years. The prior limit was one year.

AB 1369 – Assembly Committee on Labor & Employment – Written Commission Agreement

This new law requires all employers doing business in California to draft written contracts for any agreements with employees that involve commissions as a method of payment for services. Commission wages are defined

as "compensation paid to any person for services rendered in the sale of an employer's property or services and based proportionately upon the amount or value thereof."

The deadline for employers to reduce all commission agreements to writing is January 1, 2013. In addition to outlining the commission plan in writing, employers must provide a signed copy of the contract to every employee covered by the commission agreement and obtain a signed receipt for the contract from each employee. There are no penalties associated with a violation of the new statute, but presumably a violation could be a basis for suit under California's Private Attorneys General Act (PAGA) and Unfair Competition Law. Accordingly, we recommend that employers comply as soon as possible.

In at least one respect, this law may work to the advantage of employers. Frequently, when employers are sued for failing to pay promised commissions, there is no evidence of exactly what the commission arrangement was. Disputes frequently arise over at what stage in the sale is the commission considered "earned" by the employee, as well as how commissions are handled in the event of a termination. By requiring these terms to be put in writing, AB 1369 may have the effect of reducing employers' risk of litigation over unpaid commissions.

California Transparency in Supply Chains Act of 2010

Finally, a statute enacted in 2009 under former Governor Arnold Schwarzenegger will take effect on January 1, 2012.

The California Transparency in Supply Chains Act of 2010 requires every retail seller and manufacturer doing business in the State of California and having annual worldwide gross receipts that exceed $100MM to disclose its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale.

The disclosure must be posted on the company's website with a conspicuous and easily understood link to the required information placed on the business's home page. If the company does not have a website, it must provide the written disclosure to a consumer within 30 days of receiving a written request for the disclosure.

The Act does not require covered companies to eliminate slavery or human trafficking. It does, however, require them to, at a minimum, disclose whether and to what extent they do each of the following:

1. Verify product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure must specify if the verification was not conducted by a third party.
2. Audit suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure must specify if the verification was not an independent, unannounced audit.
3. Require 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.
4. Maintain internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.
5. Provide training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products, to company employees and management who have direct responsibility for supply chain management.

December 16, 2011

The exclusive remedy for a violation of the Act is an action brought by the Attorney General for injunctive relief.

Other laws have gone into effect, and we will provide more guidance as the impact on businesses becomes clearer. California employers should be diligent in keeping up with developments, and should work with their Chambers of Commerce and industry associations to protect their interests.

If you have any questions about these changes, please contact any member of Constangy's **Los Angeles County Office** or **Ventura County Office**, or the Constangy attorney of your choice.

About Constangy, Brooks & Smith, LLP

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