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LEGAL ALERT LABOR & EMPLOYMENT

New California Employment Laws For 2013

Effective January 1, 2013, an unusually large number of new employment laws will affect private employers with employees working in California. Several of these new laws require immediate attention from most employers. Heading into the end of 2012 is a good time for employers to make sure that their policies and practices are compliant with California's evolving employment laws and regulations.

New Pregnancy Regulations Approved

On Friday, November 30, 2012, 28 pages of new pregnancy regulations were approved by the Office of Administrative Law. They become effective December 30, 2012, and will affect virtually every California employer. While some of the amendments are technical and simply update certain terms in the existing regulations, other changes are significant. (Access the full text of the new regulations here: **FEHC's Pregnancy Regulations**) For example, the written notices that employers are required to post and to give to employees who are affected by pregnancy ("Notice A" for employers with less than 50 employees, and "Notice B" for employers with 50 or more employees) are completely re-worded. Thus, new postings and notices are required as of December 30, 2012. Other substantive changes include the requirement that employers must notify an employee in writing of any medical certification requirement each time a certification is required and provide the employee with a form for the employee's health care provider to complete. The regulations include an approved form for this purpose entitled "Certification of Health Care Provider for Pregnancy Disability Leave, Transfer and/or Reasonable Accommodation." The new regulations also attempt to clarify the term "four months" of leave, which the drafters found ambiguous because calendar months do not have an equal number of days. The new definition of four months now includes various methods of calculation and defines the period as the number of days the employee would normally work within four calendar months (one-third of a year equaling 17-1/3 weeks), if the leave is taken continuously following the date the pregnancy disability leave commences. The definition becomes more involved under the new regulations when intermittent leave is taken.

California employers are encouraged to familiarize themselves with these significant new regulations before year-end and to ensure strict compliance with respect to all employees "affected by pregnancy."

New Requirements For "Commission" Plans To Be In Writing (AB 1396, AB 2675)

Enacted in 2011 but effective January 1, 2013, a new Labor Code provision will require that all in-state and out-of-state employers paying commissions to employees working in California provide them with written "contracts" setting forth both the formula for calculating commissions as well as the method of payment. The employer must give a signed copy of the contract to the employee and must get a signed receipt for the contract from the employee. AB 1396 provides that if the commissions contract expires

and the parties continue to perform without change, its terms will remain in full force and effect.

AB 1396 incorporates the meaning of the term "commissions" from Labor Code section 204.1, which provides that "[c]ommission wages are compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof." Under the new law, "commissions" do not include short-term productivity bonuses or profit-sharing plans "unless there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed."

Although neither AB 1396 nor AB 2675 expressly provides for any statutory liability, employers may still face penalties under California's Private Attorneys General Act (PAGA) in the amount of $100 for each affected employee for an initial violation and $200 per employee for each violation thereafter.

Action Items

Employers should review variable compensation plans to determine if they qualify as commission plans and, if so, begin preparing written commission agreements to be effective no later than January 1, 2013. Employers must provide and retain signed agreements for all employees receiving any kind of proportional performance-based compensation. (Such agreements should also clearly set forth, where applicable, that the employees are "at will.")

Salaries For Nonexempt Employees Do Not Include Overtime (AB 2103)

Some employers have a practice of paying nonexempt employees a fixed or guaranteed salary which includes all overtime hours worked (*e.g.,* a fixed amount for all hours worked up to 50 in a week). AB 2103 amends section 515 of the Labor Code to specifically forbid this practice.

AB 2103 provides that payment of a fixed salary to a nonexempt employee only compensates his or her regular non-overtime hours even if an agreement with the employee provides otherwise. This law overturns a recent California Court of Appeal decision (*Arechiga v. Dolores Press*) that held that a nonexempt employee can agree to a fixed weekly salary that includes payment of both regular hourly wages and overtime. Under the new law, Labor Code section 515(d)(2) is amended to state that payment of a fixed salary to a nonexempt employee will be deemed to be payment only for the employee's regular non-overtime hours, notwithstanding any private agreement or "explicit mutual wage agreement" to the contrary. For purposes of calculating overtime, a nonexempt full-time employee's regular hourly rate is 1/40th of the employee's weekly salary under Labor Code section 515(d).

Action Items

Employers must ensure that all nonexempt employees, salaried or hourly, keep accurate time records of

hours worked and meal periods taken and receive hourly overtime pay for any overtime hours. Additionally, employers should consider converting nonexempt salaried employees to an hourly wage rate to reduce potential liability.

Required Information for Employee Pay Statements -- A Mistake Here Can Cost Employers $4,000 Per Employee (SB 1255)

Employers are required to provide at least nine categories of specified information to employees on every wage statement each time wages are paid to an employee. An employee who "suffers an injury" as a result of an employer knowingly or intentionally failing to comply with the statute is entitled to recover damages against the employer.

SB 1255 amends Labor Code section 226 to define an "injury" for purposes of violating the itemized wage statement statute. Under prior case law, an employee did not definitively suffer an "injury" if only one of the nine itemized requirements in Labor Code section 226 was not included on the pay statement. However, now an employee showing that any of the nine categories of information was omitted from a pay statement will be entitled to recover $50 for the initial pay period in which a violation occurs and $100 for each subsequent pay period, up to $4,000 plus costs and attorneys' fees.

Action Items

Ensure that pay statements include all of the following information as required by Labor Code section 226:

- Gross wages earned
- Total hours worked (except for exempt employees)
- Applicable piece rate units and piece rates
- All deductions (which may be aggregated)
- Net wages earned
- Inclusive pay period
- Employee name and last four digits of social security number or employee ID
- Name and address of the legal entity serving as employer
- All applicable hourly rates in effect during the pay period and corresponding number of hours worked
- For temporary service employers: the name, address, and telephone number of the entity (client company) where the employee will provide services.

Employers May Not Require or Request Applicants/Employees To Divulge "Social Media" (AB 1844)

Employees' increasing use of electronic communication and social media (Facebook, MySpace, Twitter, Instagram, etc.) has created new challenges for employers and, effective January 1, 2013, a new California law, AB 1844, adds provisions to the California Labor Code which prohibit California employers from

requiring or requesting current employees or job applicants to: (i) disclose their username or password so the employer can access their personal "social media;" (ii) access their personal "social media" in front of the employer; or (iii) divulge their personal "social media" to the employer. The definition of "social media" under the new law is broad, and covers more than typical social media sites such as an employee's or applicant's Facebook page. Indeed, the new law considers an employee's or applicant's personal e-mail and text messages as "social media."

Despite this law's wide reach, the new law does not prohibit employers from requesting an employee 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." In addition, employers are not prohibited from requesting an employee to provide a username or password so that the employer can access an employer-issued electronic device.

NLRB Also Limits Use of Social Media By Employers

Employers should also be mindful that the National Labor Relations Board ("NLRB") has issued several rulings invalidating social media policies that might be read to impermissibly interfere with employees' rights to engage in protected concerted activity under the National Labor Relations Act ("NLRA"). In fact, the NLRB's General Counsel has issued a report illustrating the types of social media policies that are unlawful. Problematic policies include those that prohibit employees from posting confidential information, inaccurate information, personal information about co-workers, offensive or abusive remarks, information on legal matters, and the employer's logo.

The NLRB also found in a case involving *Costco Wholesale Corp*. that the employer's prohibition of the electronic posting of statements "that damage the Company, defame any individual or damage any person's reputation" violates the NLRA. The NLRB's recent actions in this area demonstrate that employers should carefully reevaluate existing social media polices.

New Requirements for Wage Statement "Copies" and Inspection of Personnel Files (AB 2674)

Current law (Labor Code section 226) requires that every employer provide semimonthly, or at the time of each payment of wages to each employee, an accurate itemized statement showing certain specified information. Employers are required to retain a copy of the statement and the record of deductions on file for three years. AB 2674 provides that "copy" includes a duplicate of the statement provided to the employee or computer-generated record that accurately shows all of the information that existing law requires be included in the itemized statement.

Effective January 1, 2013, AB 2674 also amends Labor Code section 1198.5, which allows employees to inspect certain of their personnel records. AB 2674 places the following requirements on employers:

- Employers must maintain personnel records for at least three years after termination of employment.
- Employers are required to provide a current or former employee, or his or her authorized representative, the opportunity to inspect and receive a copy (upon request) of these personnel records within 30 days of making a request, except during the pendency of a lawsuit filed by the current or former employee relating to a personnel matter. For purposes of this section, "representative" means a person authorized in writing by the employee to inspect, or receive a copy of, his or her personnel records. The employee or representative must make the inspection request in writing and may use an employer-provided form if requested.
- The employer is only required to comply with one request per year by a former employee and is not required to comply with more than 50 requests in one calendar month by representative(s) of employees.
- The employer may redact the name of any nonsupervisory employees referenced in the records prior to making them available for inspection.
- The employer may charge the employee the actual cost of reproduction if copies are requested.

If an employer fails to comply with inspection and copying requests under Section 1198.5, either the current/former employee or Labor Commissioner may collect a penalty of $750. A current/former employee also may seek injunctive relief and attorneys' fees.

NLRB Invalidates Certain "At-Will" Provisions Standard in Employee Handbooks

In the past year, the NLRB has taken a position on "at-will" provisions in employee handbooks, finding that some standard provisions violate the NLRA. The issue was first addressed in *American Red Cross, Arizona Region and Lois Hampton,* where the administrative law judge found that a handbook requiring the employee to "agree that the at-will employment relationship cannot be amended, modified or altered in any way" violated Section (8)(a)(1) of the NLRA, which prohibits employers from implementing rules or policies that would "reasonably tend to chill employees" in the exercise of their rights to organize under Section 7 of the NLRA. The administrative law judge explained that employees might interpret the phrase as meaning they were agreeing to not change the "at-will" status of their employment by seeking union representation.

The NLRB further addressed the issue in connection with *Rocha Transportation* and *SWH Corp. d/b/a Mimi's Café.* In those cases, the employee handbooks contained provisions stating that company representatives do not have the authority to enter into employment agreements other than "at-will" agreements. In Advice Memoranda, NLRB's Associate General Counsel explained that these provisions were valid because they did not require employees to personally acknowledge that their at-will status cannot be changed in any way, distinguishing *American Red Cross.*

Action Items

Due to the NLRB's increased scrutiny in this area, employers should update the at-will provisions in their

employment documents (applications, offer letters, employee handbooks, and employment contracts).

FEHA Transformed by Elimination of FEHC and Transfer of Duties to DFEH (SB 1038)

SB 1038 eliminates the Fair Employment and Housing Commission ("FEHC") effective January 1, 2013, and transfers its authorities to the Department of Fair Employment and Housing ("DFEH"). This law creates a new Fair Employment and Housing Council within the California DFEH consisting of seven members appointed by the Governor and confirmed by the Senate to promulgate regulations under the Fair Employment and Housing Act.

SB 1038 also allows the DFEH to file cases directly in court, and parties to all cases will be required to undergo free-of-charge mandatory dispute resolution prior to filing a civil action. The DFEH will also be awarded reasonable attorneys' fees and costs, including expert fees, if successful in its litigation.

These changes apply to any matter pending before the former FEHC on or after January 1, 2013, meaning the DFEH will have the option to remove the matter to court where feasible. With consent, the DFEH can also withdraw certain claims and instead file them directly with the court. The bill also transfers the FEHC's rulemaking duties to a new, to-be-formed Council within the DFEH known as the Fair Employment and Housing Council.

It is too early to predict the full impact of these changes. In order to best protect their legal position, employers are advised to submit thorough position statements to the DFEH during the investigation stage of an employment discrimination complaint, as this will maximize the chances of an outright dismissal of an administrative claim.

Religious Dress and Grooming Now Expressly Protected (AB 1964)

The passage of AB 1964 adds to and amends California's Fair Employment and Housing Act ("FEHA") by prohibiting discrimination on the basis of an employee's or job applicant's religious dress or grooming practices. Currently, the FEHA prohibits employers from discriminating against employees or applicants based on certain protected characteristics, including their "religious creed." As of January 1, 2013, FEHA's definition of "religious creed" will be expanded to include the "religious dress practice" and the "religious grooming practice" of employees and applicants.

Under the new law, "religious dress practice" includes the wearing or carrying of religious clothing, head or face coverings, jewelry and artifacts. "Religious grooming practice" includes all forms of head, facial, and body hair that are part of an employee's or job applicant's observance of his/her religion. With limited exceptions, employers will be required to accommodate the religious dress and grooming practices of employees and applicants. On this front, the new law specifically provides that segregation of an

employee from other employees or the public is not a reasonable accommodation of an employee's religious dress or grooming practice.

Action Items

In anticipation of the new law, employers should review dress codes and uniform policies to ensure that there are sufficient accommodations for religious dress and grooming. Employers should also update handbooks and manager and sensitivity training materials accordingly.

FEHA's Definition of Sex is Clarified to Protect Breastfeeding (AB 2386)

AB 2386 changes the FEHA's definition of "sex" to expressly include breastfeeding and related medical conditions. Prior to AB 2386, the FEHA prohibited discrimination on the basis of sex which was defined to include gender, gender identity and expression, pregnancy, childbirth and medical conditions related to pregnancy and childbirth. As a result of AB 2386, discrimination on the basis of breastfeeding (or related medical conditions) is expressly a violation of the FEHA.

Action Items

Although AB 2386's amendment to Government Code section 12926 is effective January 1, 2013, AB 2386 states that it does not constitute a change in, but is declaratory of, existing law. Employers should not delay in revising their notices, postings, policies, and training related to preventing discrimination and harassment.

Intellectual Disabilities and the Shriver R-Word Act (AB 2370, SB 1381)

The recently enacted "Shriver R-Word Act" -- named after Dr. Timothy Shriver, a longtime advocate for the intellectually disabled community -- also known as AB 2370, revises the language in several California statutes.

Under existing law, California statutes refer to mentally retarded persons. The bill replaces the term "mentally retarded" with "intellectually disabled" and "mental retardation" with "intellectual disability." The statues affected are: Business & Professions Code, Education Code, Government Code, Health and Safety Code, Insurance Code, Penal Code, Probate Code, Vehicle Code, and Welfare and Institutions Code.

The bill also states that the intent of the Legislature is not to be construed to change the coverage, eligibility, rights, responsibilities, or substantive definitions referred to in the amended provisions of the bill. Thus, the bill should not change an employer's statutory obligations or rights.

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New FCRA Forms and Notice Requirements

The newly created Consumer Financial Protection Bureau ("CFPB") recently issued regulations modifying the notices required under the Fair Credit Reporting Act ("FCRA"). These regulations include a revision to the standard notice employers provide to applicants and employees when they are obtaining criminal background reports, credit history reports, and other background checks. The changes affect three forms: the Summary of Consumer Rights under FCRA; the Notice to Users of Consumer Reports of Their Obligations under the FCRA; and the Notice to Furnishers of Information of Their Obligations under the FCRA.

The new notices direct consumers to the CFPB to obtain information about their FCRA rights, rather than to the Federal Trade Commission ("FTC") (which is where they were directed under the old notice). The Dodd-Frank Wall Street Reform and Consumer Protection Act transferred rulemaking authority over the FCRA to the CFPB instead of the FTC. Employers must use the new forms beginning January 1, 2013.

New Notice Required When Taking Adverse Actions Against Applicants or Employees Based on DOJ Criminal History Reports (AB 2343)

AB 2343 now requires agencies, organizations and individuals, such as certain health care institutions, that received criminal history information from the California Department of Justice to give notice to an applicant or employee who is the subject of an adverse employment, licensing or certification decision. This new reporting requirement models those already found in the Fair Credit Reporting Act and the California Investigative Consumer Reporting Agencies Act.

The content of this article is intended to provide a general guide to the subject matter, and is not a substitute for legal advice in specific circumstances.

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