ALERTS AND UPDATES

Compliance Countdown to 2012 for California Employers: New Laws for the New Year

December 6, 2011

The year 2011 is almost over. For the first time in years, California employers witnessed significant changes to employment laws, most of which will take effect on January 1, 2012.

In addition to the California Genetic Information Nondiscrimination Act ("CalGINA"), which prohibits genetic discrimination in employment (See *Alert* September 23, 2011), six new laws are particularly significant. These laws govern employee credit reports, pay notices, employee gender identity, pregnancy leave, independent contractors and commissioned employees. Failure to adhere to these statutes could expose California employers to significant penalties. Companies that are not already prepared have just a few weeks to understand the new laws, train managers and update policies and procedures. The following summaries of law with practical guidance should be considered by employers as a check list.

Employee Credit Reports Prohibited, Except in Limited Circumstances

A new California Labor Code chapter, commencing with section 1024.5, prohibits an employer or prospective employer, with the exception of certain financial institutions, from obtaining a consumer credit report for employment purposes unless the position of the person for whom the credit report will be obtained falls into one of the following eight categories:

1. a position in the state Department of Justice;
2. a managerial position that is covered by the executive exemption as set forth in California Wage Order 4;
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, for any purpose other than the routine solicitation and processing of credit card applications in a retail establishment, to bank or credit card account information, Social Security number and date of birth for any one person;
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, which includes a formula, pattern, compilation, program, device, method, technique, process or trade secret that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who may obtain economic value from the disclosure or use of the information; and (2) is the subject of an effort that is reasonable under the circumstances to maintain secrecy of the information; or
8. a position that involves regular access to cash totaling $10,000 or more of the employer, a customer or a client during the workday.

Additionally, the Consumer Credit Reporting Agencies Act ("CCRAA"), as amended, requires employers to give written notice to the employee or applicant that a consumer credit report will be used, as well as the specific basis under California Labor Code section 1024.5 that supports the use of the report.

Section 1024.5 does not specify an independent remedy for violations, so it can be posited that the penalties available under the Private Attorney General Act would apply. The CCRAA's remedies include damages, attorneys' fees and costs.

Moreover, an earlier statute, effective January 1, 2012, requires employers that order background reports other than consumer credit reports (*e.g.*, criminal background reports, DMV reports) to notify job applicants and employees of the Internet website address of the consumer reporting agency or, if the agency has no Internet website address, the telephone number of the agency where the individual can find information about the agency's privacy practices.

Steps to Consider in December 2011: Employers should evaluate whether their business is subject to Labor Code section 1024.5. If it is, they should determine which provisions, if any, their business can invoke to justify a credit report for existing employees and job applicants. In addition, they should evaluate whether their disclosure and authorization forms and other paperwork used comply with the new law, and add the mandatory notice now required by section 1024.5. Finally, for employers that order background reports other than consumer credit reports, they should modify forms to notify job applicants and employees of the Internet website where the reporting agency's privacy practices can be found.

Mandatory Notice of Pay to All New Employees

New laws require employers to provide to each employee, at the time of hire, a notice that specifies: (1) the pay rate and the basis, whether hourly, salary, commission or otherwise, as well as any overtime rate; (2) allowances, if any, claimed as part of the minimum wage, including meals or lodging; (3) the regular payday; (4) the name of the employer, including any "doing business as" names used by the employer; (5) the physical address and telephone number of the employer's main office or principal place of business, and a mailing address, if different; and (6) the name, address and telephone number of the employer's workers' compensation carrier. Moreover, employers are required to notify each employee in writing of any changes to the information set forth in the notice within seven days of the changes, unless such changes are elsewhere reflected on a timely wage statement or other writing required by law to be provided.

Steps to Consider in December 2011: Employers should create a template for newly hired employees that complies with the new laws. They also should train staff to give timely notice if an employee's terms of employment or other content in the notice changes.

Gender Identity and Gender Expression Protected Against Workplace Discrimination

California law already contains various provisions that require equal rights and opportunities in education, housing and employment, regardless of gender. These laws also prohibit discrimination based on specified characteristics, including sex and gender. The California State Legislature made technical changes to these laws by including gender, gender identity and gender expression among the enumerated characteristics. Under the amended laws, "sex" includes, but is not limited to, pregnancy, childbirth or medical conditions related to pregnancy or childbirth. "Sex" also includes, but is not limited to, a person's gender. "Gender" means sex and includes a person's gender identity and gender expression. Finally, "gender expression" means a person's gender-related appearance and behavior, whether or not stereotypically associated with the person's assigned sex at birth.

Steps to Consider in December 2011: Employers should revise policies and procedures to include gender identity and gender expression as two prohibited bases for discrimination, harassment and retaliation. They also should train managers and supervisors on the revised policies.

Employers Required to Provide Group Health Benefits Coverage During Pregnancy Disability Leave

California employers with five or more employees are already required to permit employees disabled by pregnancy to take a leave of absence for the period of disability up to four months. This pregnancy disability leave ("PDL") is in addition to the 12 workweeks of leave for baby bonding under the California Family Rights Act ("CFRA"). Beginning January 1, 2012, California employees taking PDL are entitled to continuation of their group health benefits on the same basis as when they were actively working. Thus, benefits continuation may extend up to four months if the employee is disabled by pregnancy for the maximum period of PDL.

As a practical matter, many employees using PDL are also eligible for leave under the federal Family and Medical Leave Act ("FMLA"), which runs concurrently with PDL. FMLA already requires group health benefits to be continued for the 12 workweeks of FMLA. This new law is meant to bridge the gap in coverage where an employee's pregnancy disability leave exceeds the time available under FMLA or where the employee is not otherwise eligible for FMLA. Therefore, if an employee disabled by pregnancy exhausts her FMLA but is still using PDL, she would be entitled to benefits continuation for the remainder of PDL up to the four-month maximum.

Similar to FMLA, if the employee fails to return from pregnancy disability leave, the employer may recoup from the employee the premiums the employer paid to continue the employee's coverage during the leave, unless the reason the employee did not return is because of a continuing disability or because the employee is taking the separate baby-bonding leave provided under CFRA.

Steps to Consider in December 2011: Employers should review policies and procedures relating to pregnancy disability leaves to ensure compliance with this new law.

Fine for Willful Misclassification of Employees as Independent Contractors

Effective January 1, 2012, employers could be fined between $5,000 and $25,000 for "willfully" misclassifying someone as an independent contractor. Under the new law, "willful misclassification" is defined as avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor. A non-attorney consultant who willfully advises an employer to misclassify an employee may be held jointly liable. Additionally, an employer in violation may be ordered to display prominently on its Internet website (or other area accessible to employees and the general public) a notice that explains that the employer has been found guilty of committing a serious violation of the law by willfully misclassifying employees, along with other prescribed information. Employers who incorrectly classify employees as independent contractors or non-employees are responsible for paying the taxes that were not previously withheld, and penalties for unpaid taxes may be imposed.

Steps to Consider in December 2011: Employers should ensure employees and independent contractors are properly classified as such. They also may want to seek legal counsel when in doubt.

Employment Contracts Required Beginning Next Year for All Commissioned Employees

Currently, an employer who has no permanent and fixed place of business in California, and who enters into a contract of employment involving commissions as a method of payment with an employee for services to be rendered within California, is required to put the contract in writing and describe the method by which the commissions will be computed and paid. An employer who does not comply with those requirements is liable to the employee in a civil action for triple damages.

As of January 1, 2013, this contract requirement is expanded to apply to all employers entering into a contract of employment with a commissioned employee for services to be rendered in California. In addition, the provision making an employer who violates this requirement liable in a civil action for triple damages is repealed. Thus, all employers who pay employees via commission must (1) have a written contract with the employee regarding commissions; (2) include the method for calculating the commissions; and (3) require the employee to sign a "receipt" retained by the employer. Also, the contract remains in effect until a new commission plan has superseded it or employment terminates, even if the old plan expires. Finally, the law attempts to define commission and excludes bonuses, but then includes bonuses that are a percentage of sales or profits.

Steps to Consider in December 2011: Employers should consider early compliance with this law by ensuring all California employees who are paid on a commission basis have written employment contracts, as specified by law.

For Further Information

If you have any questions about this *Alert*, please contact any of the attorneys in our Employment, Labor, Benefits and Immigration Practice Group or the attorney in the firm with whom you are regularly in contact.