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labor and employment alert

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New California Employment Laws That Impact Employers

Several new California employment laws will be going into effect in 2012. Some of these laws require prompt action to ensure compliance. Employers are encouraged to review employee-related materials and as necessary revise their handbooks, modify job applications, analyze existing employment agreements, and evaluate their classification of independent contractors.

Additional Penalties For Willful Misclassification Of Independent Contractors (SB 459)

SB 459 creates new penalties for "willful misclassification" of employees as independent contractors. Willful misclassification means "voluntarily or knowingly" misclassifying a worker as an independent contractor. The new law also makes it unlawful to charge willfully misclassified workers any fee or make any pay deductions as a result of their misclassification.

Penalties range from $5,000 to $15,000 for isolated violations. Where there is a pattern or practice of violations, penalties range from $10,000 to $25,000 per violation. Paid advisors who "knowingly advise" employers to misclassify workers are jointly and severally liable for any penalties that result from the misclassification, excluding attorneys and employees of the company.

Employers who violate the new law are required to post a prominent notice on their public website describing the violation. In light of the new substantial penalties associated with willful misclassification, employers who regularly use or are contemplating the use of independent contractors must ensure that their classification of independent contractors complies with the law. It has always been difficult to classify workers as independent contractors in California; now, the stakes for misclassification have increased considerably.

Commission Agreements Must Be In Writing By 2013 (AB 1396)

As of January 1, 2013, all commission agreements with California employees must be in writing, signed by the employee, and must set forth how commissions are calculated and paid. The employer must also obtain a signed confirmation of receipt of the agreement. Bonus and profit sharing plans are not covered by the new law 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."

Upon expiration of a written commission plan, the terms are presumed to remain in effect until a new written plan is executed.

Employers should review their employment agreements with all employees who are compensated on a commission basis to ensure the required level of detail is included. Additionally, employers must be sure to keep a signed confirmation of all such commission agreements in their employees' personnel files.

New Written Notices Required Under Wage Theft Prevention Act Of 2011 (AB 469)

Employers must provide non-exempt employees with a written disclosure of the terms of their employment. The disclosure must include all of the following information:

- 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.
- Allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances.
- The regular payday designated by the employer in accordance with the requirements of this code.
- The name of the employer, including any "doing business as" names used by the employer.
- The physical address of the employer's main office or principal place of business, and a mailing address, if different.
- The telephone number of the employer.

- The name, address, and telephone number of the employer's workers' compensation insurance carrier.

- Any other information the Labor Commissioner deems material and necessary.

The Labor Commissioner will prepare a template for these disclosure statements which is scheduled to be available by mid-December, 2011. Additional notice is required within seven days of any change in the information on the notice (unless all of the new information is included on the employee's pay stub). AB 469 also makes it a misdemeanor to violate certain wage statutes and orders, or to willfully fail to pay a final court judgment or final order of the Labor Commissioner. Additionally, the statute of limitations for the Division of Labor Standards Enforcement to collect statutory penalties or fees is extended from one year to three years.

Employers are now required to prepare and distribute a form to each new hire that contains a host of very specific disclosures. The impact of this law is immediate, as any new hire on or after January 1, 2012 gives rise to this obligation.

Consumer Credit Reports May Not Be Used In Employment Decisions (With Certain Exceptions) (AB 22)

AB 22 prohibits employers from obtaining credit information about job applicants or employees, except in certain circumstances. Notably, the new law does not apply to applicants/employees in the following types of positions: "(1) a position in the state Department of Justice, (2) a managerial position, as defined, (3) that of 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 to specified personal information for any purpose other than the routine solicitation and processing of credit card applications in a retail establishment, (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, as specified, or (8) a position that involves regular access to $10,000 or more of cash, as specified."

In those situations where an employer may obtain a credit report, written notice must be provided to the employee explaining why it is being requested, from whom, and allowing the employee to request a free copy.

Employers who systematically perform credit checks for all job applicants must stop this practice immediately. Employers who desire to perform credit checks on certain types of job applicants should ensure that the applicants fall within one of the statutory exceptions. Where a credit check is anticipated, employers should revise their job application forms to include the justification for performing the credit check.

California Cannot Require Employers To Use E-Verify (AB 1236)

AB 1236 prevents California and all cities and counties in the state from requiring private employers to use E-Verify—the free internet based program created by the federal government for determining whether employees are eligible to work in the United States. The law merely clarifies that E-Verify remains an entirely optional system for private employers to use. The new law makes no changes to employers' obligation to complete I-9 forms.

Employers should review their procedures upon hire to ensure that an individual is permitted to work in the United States. Although E-Verify is entirely optional, employers may still want to consider using E-Verify, as it is a free and relatively simple way to verify the legal status of workers. Additionally, an employer who uses this service and obtains confirmation of an employee's eligibility for employment establishes a rebuttable presumption that it has not violated federal laws prohibiting employment of undocumented workers. Employers should consider the benefits of using both E-Verify and I-9 forms.

Employers Must Continue To Provide Health Plan Coverage During Pregnancy Disability Leave (PDL)(SB 299)

Pregnancy Disability Leave laws already require employers to provide up to four months of leave and reasonable accommodations for employees disabled by pregnancy. The new law also requires employers to maintain group health plan coverage during the leave period under the same terms and conditions that would have been provided if the employee was not on leave. If the employee does not return from leave, the employer may be able to seek reimbursement for premiums it paid during the leave.

Employers should review their internal policies on health insurance and pregnancy disability leave to ensure coverage remains in effect throughout the leave.

Employers Must Provide Health Benefits For Same Sex Domestic Partners On The Same Terms As For Heterosexual Domestic Partners (SB 757)

Existing law merely required employers to allow domestic partners to participate in group plans to the same extent as married couples. The new law prohibits discrimination between same sex and different sex domestic partners.

Employers must now review their policies to ensure that health care coverage extends to domestic partners and must also extend coverage to same sex domestic partners.

Employers May Not Discriminate Based On "Gender Expression" Or "Gender Identity" (AB 887)

FEHA already prohibits discrimination based on "sex," including "gender." The new law expands the definition of sex to explicitly include "gender expression" and "gender identity." Gender expression means a person's gender related appearance and behavior. Gender identity means a person's internal sense of being male or female. Employers are specifically required to allow employees to appear or dress consistently with the employee's gender expression.

Employers should review their handbooks and dress policies to ensure that employees are permitted to dress consistently with their gender expression. Employers should also consider updating their supervisor training and employment rights posters to clarify that gender identity and gender expression are now statutorily protected categories.

Employers Are Prohibited From Interfering With An Employee's Right To Protected Leave Under The California Family Rights Act (CFRA) (AB 592)

AB 592 clarifies that existing law prohibits "interference" with an employee's right to protected CFRA leave. Previously, the law only explicitly prohibited employers from refusing to allow an employee to take leave.
Since this clarifies existing law, employers should treat this as effective immediately. Employers should update their supervisor training to clarify that interference with protected CFRA leave is prohibited.

Employers May Not Discriminate Based On Genetic Information (SB 559)

"Genetic information" has been added to the list of protected characteristics under the Fair Employment and Housing Act. Genetic information means genetic tests of the employee or the employee's family members, and "the manifestation of a disease or disorder" in the employee's family. Any discrimination based on the foregoing is unlawful.

Employers should update their internal policies and supervisor training to reflect that genetic information is now a protected characteristic.

Clarification of Organ and Bone Marrow Leave Law (SB 272)

SB 272 clarifies that employees may takes leaves of up to 30 days for organ donations and 5 days for bone marrow donations. The employer may require the employee to use up to 5 days of unused paid days off for bone marrow donation or up to two weeks of paid days off for organ donation as a condition to granting the leave.

Employers should update their internal policies and supervisor training to reflect these new organ and bone marrow donation leave requirements.

For any questions regarding how these new laws may impact your business, or to learn more about labor and employment compliance, please contact the authors or a member of **Venable's Labor and Employment Practice Group**.
