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California Is At It Again: A Dozen New Laws Will Significantly Impact the State's Employers

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Each fall for several years before the arrival of Governor Schwarzenegger, California employers came to expect that the legislature and governor would enact a slew of employment-related laws that imposed new obligations on them and created additional legal risks. The last seven legislative sessions have been relatively mild for employers, but the respite is over. Just nine months after taking office, Governor Brown has joined forces with the legislature to produce a dozen new employment-related laws, which, as in the "old days," impose substantial additional responsibilities, burdens and costs on employers. The new laws take effect on January 1, 2012. This Alert summarizes the key changes resulting from the recently concluded legislative session of which employers with operations in California must take note.

Assembly Bill 469 (Wage Theft Prevention Act)

AB 469, to be known as the "Wage Theft Prevention Act of 2011," is modeled on a similar law in New York and is one of the most sweeping legislative acts affecting California employers in recent state history. The new law adds a number of provisions to the California Labor Code and amends others. It creates more rules to which employers must adhere, increases the penalties for violations, and expands administrative and judicial remedies for redressing claimed non-compliance. A detailed analysis of this key piece of legislation will be provided in a separate Paul Hastings Client Alert to follow soon. In brief, the new law:

- adds procedural formalities to Labor Commissioner hearings, and permits the imposition of liquidated damages against an employer who fails to pay minimum wages.
- allows the Division of Labor Standards Enforcement three years (instead of one) to commence an action to collect a civil penalty or fee.
- amends Labor Code section 226 (the pay stub law) to require disclosure of the name and address of the legal entity hiring services of a farm labor contractor on the wage statement, subjecting the employer to hefty penalties if this is not done.
- amends Labor Code sections 240 and 243, permitting the Labor Commissioner to require an employer who has been found guilty of nonpayment of wages to post a two-year bond (instead of a six-month bond) to cover underpaid wages, and to require an accounting of employer assets if a bond is not posted. The law also empowers the Labor Commissioner to bring suit against the employer and seek penalties of up to $10,000 for failure to post a bond and/or give an accounting.
- amends Labor Code section 1174, requiring employers to keep payroll records for three years (instead of two), and prohibiting employers from preventing their employees from maintaining personal records of hours worked or piece-rate units created.

- adds Labor Code section 1194.3, permitting an employee's recovery of fees and costs incurred to enforce a court judgment for unpaid wages.

- amends Labor Code section 1197.1 to expressly provide for restitution of wages in addition to civil penalties for paying less than the minimum wage.

- adds Labor Code section 1197.2, providing that an employer who "willfully fails to pay" a final court judgment or Labor Commissioner order shall be guilty of a misdemeanor and subject to a fine between $10,000 and $20,000, or jail time.

- adds Labor Code section 1206, which in part states: "Notwithstanding any other provision of law, this code establishes minimum penalties for failure to comply with wage-related statutes and regulations."

- adds Labor Code section 2810.5, requiring detailed disclosures to non-exempt employees (except those covered by a collective bargaining agreement that does not incorporate the new requirements) at the time of hiring and throughout employment of the following information: rate of pay; basis of pay; allowances (meal, lodging, etc.) claimed by the employer; paydays; employer "dba"; and telephone number and physical address of the employer's main office and mailing address if different; workers' compensation carrier contact information; and any other information the Labor Commissioner deems material and necessary. And when any of this information changes, the employer must notify its employees within seven days, unless this detail is included on employee wage statements.

Senate Bill 459 (Misclassification of Employees as Independent Contractors)

SB 459 adds two new sections to the Labor Code, sections 226.8 and 2753. These provisions make it unlawful for any employer to willfully misclassify an employee as an independent contractor. The new law defines "willful misclassification" as "avoiding employee status for an individual by ***voluntarily and knowingly*** misclassifying that individual as an independent contractor." SB 459 also makes it unlawful to charge an individual who has been willfully misclassified a fee or take a deduction from compensation for any purpose that would constitute a violation of law if the individual had been classified as an employee, e.g., licensure fees, space rental, and equipment rental or maintenance.

SB 459 authorizes both the California Labor and Workforce Development Agency ("LWDA") and a court to impose the following penalties for violations of the law:

- a civil penalty of between $5,000 and $15,000 for a single violation; and

- a civil penalty of between $10,000 and $25,000 for "pattern or practice" violations.

In addition, the employer will be required to post a notice on its website (or at the worksite if no website exists) for one year which reports the finding of a violation, states the employer has changed its business practices, provides contact information for the LWDA, and invites individuals who believe they too are misclassified to contact the LWDA. If the violator is a licensed contractor, a certified copy of the determination will be sent to the Contractor's State License Board, which is to initiate disciplinary action against the employer within 30 days.

SB 459 provides no guidance to employers in determining whether an individual is an independent contractor. Yet the new law imposes joint and several liability on any person who advises an employer to treat an individual as an independent contractor, unless the advisor is an attorney who gave the advice in the capacity of legal counsel to the employer or misclassified individual.

Given the increased risks associated with independent contractor relationships, employers should immediately audit all such arrangements in consultation with or under the direction of legal counsel, and should involve legal counsel when entering into independent contractor relationships.

Assembly Bill 22 (Job Applicant and Employee Credit Checks)

AB 22 significantly changes the legal landscape for employers who request and consider credit-related information as part of job applicant and employee background checks. The new law prohibits employers from obtaining credit information about applicants for employment as part of the background check process and deciding whether or not to continue the employment of an existing employee, unless the applicant/employee occupies a position specified in the law. The law also requires employers who obtain credit information as part of a background check to identify the specific basis in the law that authorizes the credit check. A detailed analysis of this new law is provided in a separate Paul Hastings Client Alert found here.

Assembly Bill 1396 (Written Contracts Required For Commission-Paid Employees)

Former Labor Code section 2751 required out-of-state employers to have written contracts with their California employees who are paid on a commission basis, including details regarding method of computing and paying the commissions. The law was held to violate the Commerce Clause of the United States Constitution in *Lett v. Paymentech, Inc.*, 81 F. Supp. 2d 992 (N.D. Cal. 1999), because it treated California-based companies more favorably than employers who had no fixed place of business in California.

AB 1396 corrects this defect in the law by imposing the same onerous requirements on California employers. By **January 1, 2013**, both California and non-California-based employers must have written contracts with employees in California who are paid in whole or in part on a commission basis.

Employers should review all employee commission arrangements to insure compliance with the law.

Senate Bill 272 (Organ/Bone Marrow Donation Leaves)

The Michelle Maykin Memorial Donation Protection Act became law earlier this year and provides up to 30 days of paid leave for an organ donation and up to five days of paid leave for a bone marrow donation. Most employers have interpreted the law to mean **calendar days** of leave. SB 1304 specifies that such leaves are to be counted in **business day** increments and thus increases the amount of time off employees may take for such absences and it adds some new protections:

- Leave for an organ donation may not exceed 30 **business days** in a year, or more than five **business days** for a bone marrow donation in one year. The one-year period consists of 12 consecutive months measured from the date the employee's leave begins.
- Time off on an organ or bone marrow donation leave does not constitute a break in service for employment and benefit calculation purposes, and health insurance coverage must be continued in the same manner as if the employee had been actively at work.
- The employer can require the use of paid time off to cover the leave, up to five business days for a bone marrow donation leave and up to two weeks (10 business days) for an organ donation leave.
- Organ or bone marrow donation leave may be taken in one or more periods, but the combined total may not exceed the maximum amount of leave under the law.

Senate Bill 299 (Paid Medical Coverage for Employees on Pregnancy Leave)

SB 299 amends the California Fair Employment and Housing Act (Government Code section 12945), requiring employers not only to maintain an employee's group medical insurance coverage during pregnancy leave, **but**

also to pay for it. The new law allows the employer the right to recover premium costs from the employee for the continued coverage, but only if the employee fails to return from leave after the expiration of the leave ***and*** the failure to return from leave is not due to: (1) the employee taking a birth bonding or other leave under the California Family Rights Act, or (2) the continuation, recurrence or onset of a health condition that entitles the employee to pregnancy leave or *other circumstances beyond the employee's control*, whatever this means.

Assembly Bill 592 (Expanded Enforcement Provisions for Pregnancy Disability and Family Rights Act Leaves)

Unlike the federal Family and Medical Leave Act, the California Pregnancy Disability Leave Act and the California Family Rights Act currently do not contain any express basis for a claim for interference with an employee's right to take a covered leave. AB 592 makes it an unlawful employment practice to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under either of these leave laws. AB 592 also states that these protections are "declaratory of existing law," thus allowing the argument that they should applied retroactively in pending cases.

Senate Bill 559 (Prohibition of Genetic Discrimination)

In 2008, the United States Congress enacted the federal Genetic Information Nondiscrimination Act ("GINA"), prohibiting employers (and others) from discriminating based on genetic information. SB 599 is California's version of GINA, amending the Unruh Civil Rights Act and the Fair Employment and Housing Act to include genetic information as a protected category. While SB 599 effectively provides the same protection as GINA, California employers now have one more state-mandated protected category of which they must be aware, and one more basis for a potential claim of discrimination under California law.

Assembly Bill 887 (Definition of Gender Discrimination Expanded)

AB 887 amends numerous California statutes to expand the definition of "gender," and thus provides more bases for claims of alleged gender discrimination. Under current law gender is defined to include the concepts of "gender identity" and "gender expression." AB 887 broadens the definition to include "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." AB 887 also affirmatively requires an employer to allow an employee to appear or dress consistently with the employee's gender identity.

Assembly Bill 240 (Liquidated Damages for Administrative Wage Claims)

Under current law, an employee who proves in court that he or she was paid less than the minimum wage can be awarded liquidated damages in the amount of two times the unpaid wages. AB 240 amends Labor Code sections 98 and 1194.2, and authorizes the California Labor Commissioner to award "liquidated damages" against an employer for unpaid minimum wages, in addition to the unpaid wages, interest and penalties. Thus, employees may obtain the same relief before the Labor Commissioner which previously was only available in civil court. The new law grants the Labor Commissioner discretion to refuse to award liquidated damages if the employer demonstrates that the failure to pay the minimum wage was based on a good faith belief that it had not violated the minimum wage law.

Senate Bill 117 (Same-Sex Partner Medical Benefits For State Contractor Employees)

State government contractors who cover employees with a same-sex spouse or registered domestic partner dependents under their group medical insurance benefits plans demonstrated to the legislature that they are at a competitive disadvantage compared to contractors who provide these benefits only to employees with opposite-sex spouses. SB 117 is intended to address this concern and requires state contractors with contracts of $100,000 or more who provide medical insurance benefits to employees and their dependents to provide the benefits to employees with same-sex spouses and registered domestic partners as well.

ASSEMBLY BILL 228 (Out-Of-State Workers' Compensation Coverage)

AB 228 amends California Insurance Code section 11780.5 to authorize the State Compensation Insurance Fund ("SCIF") to provide workers' compensation coverage to a California employer whose California employees temporarily work outside the state and whose injuries while on these assignments might trigger workers' compensation liability in some other state. Prior to AB 228, the SCIF could rightfully deny coverage for out-of-state workers' compensation claims, creating the risk of personal injury lawsuits by employees as a result of their employer not having workers' compensation insurance coverage in place for such injury claims.

This expanded coverage is created through partnerships between the SCIF and other qualifying carriers, who insure workers' compensation risks in California and the other states where the California employees are temporarily working. Of course, the SCIF insureds who might consider this statutorily authorized expanded coverage should also expect to see a related increase in premium costs.

WHAT SHOULD EMPLOYERS DO?

California-based employers and out-of-state employers with employees in California should immediately review their policies, procedures and practices to ensure compliance with the new laws. If you have any questions concerning these developing issues, we encourage you to contact the Paul Hastings lawyer with whom you work to discuss these developments or please do not hesitate to contact any of the following lawyers:

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