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# 2011 CALIFORNIA LABOR AND EMPLOYMENT LEGISLATIVE UPDATE

In early October, California Governor Jerry Brown signed a variety of important employment and labor-related statutes. Although Gov. Brown vetoed several additional anti-employer measures, this year marks a turning point for employers with workforces in California. We anticipate that the 2012 legislative session will yield additional proposals that will impose new and probably onerous obligations on employers. The following are the most significant of the measures signed by Governor Brown in 2011.

## "WAGE THEFT PREVENTION ACT OF 2011" CREATES NEW WAGE DISCLOSURE REQUIREMENTS AND NEW PENALTIES FOR UNDERPAYMENT OF WAGES (AB 469)

The "Wage Theft Prevention Act of 2011," AB 469, creates new, detailed disclosure requirements that must be provided to all new non-exempt employees commencing January 1, 2012. This statute also creates document retention requirements and imposes several new penalties for violations of wage laws.

Newly added Labor Code Section 2810.5 requires employers to provide written notice upon hire to each non-exempt employee of the employee's rates of pay (including overtime compensation rates), the basis for the pay (hour, shift, day, week, salary, etc.), any allowances claimed as part of the employee's wages (including meal or lodging allowances), the regular payday designated by the employer, the employer's name (including dba names), the physical address of the employer's main office or principal place of business, and a mailing address, if different. The Labor Commissioner will be providing a template for employers to follow. Section 2810.5 also requires employers to notify non-exempt employees of any changes to that information within seven days of change, unless the information is reflected in written wage statements required by Labor Code Section 226 or in some other writing required by law within

the seven-day time period. This provision is similar to one enacted in New York in 2009. The notice requirement does not apply to employees who are exempt for overtime purposes or to employees who are covered by a collective bargaining agreement that provides a regular hourly rate of pay not less than 130 percent of the state minimum wage.

The new law also amends the Labor Code 1197.1 to specify that employers who violate the minimum wage law are liable for restitution of wages paid to the affected employee, in addition to civil penalties. It also makes it a misdemeanor to willfully violate wage statutes or orders or to willfully fail to pay a court judgment or final order of the Labor Commission for wages due.

In addition to these penalties, the Wage Theft Prevention Act extends the period of time in which the DLSE may commence a collection action for a statutory penalty or fee to three years. If the Labor Commissioner requires a convicted employer to maintain a bond, the new law extends the time required for the bond to two years, and it permits the Labor Commissioner to require an employer to provide an accounting of assets if the employer does not timely post the bond. Failure to provide the accounting may result in a penalty of up to $10,000. The new law also authorizes employees to recover attorneys' fees and costs they incur to enforce a judgment for unpaid wages.

Finally, the Wage Theft Prevention Act amends Labor Code Section 1174 to increase the amount of time employers must maintain payroll records from two to three years. It also specifies that employers may not prohibit employees from maintaining a personal record of hours worked or piece-rate units earned.

## LIMITATIONS OF THE USE OF PRE-EMPLOYMENT CONSUMER CREDIT REPORTS (AB 22)

Assembly Bill 22, which becomes effective January 1, 2012, amends Civil Code Section 1785.20.5 and adds Labor Code Section 1024.5 to restrict the use of pre-employment credit reports.

Under the provisions of the new law, pre-employment consumer credit reports are prohibited and can be obtained and used in hiring only if the prospective employee holds one of eight categories of positions:

1. A managerial position (defined as a position that qualifies for the executive exemption from overtime);
2. A position involving access to confidential and proprietary information, including trade secret information;
3. A position involving regular access to $10,000 in cash or more belonging to the company or a client of the company;
4. A position in which the employee would be a named signatory on the company's bank or credit account or would be authorized to transfer money on behalf of the employer or to enter into financial contracts for the employer;
5. A position involving regular access to a single person's bank or credit card information, Social Security numbers, and date of birth (other than routine solicitation and processing of credit card applications);
6. A position for which the law requires such information;
7. A position as a sworn police officer or other law enforcement officer; or
8. A position in the state Department of Justice.

Positions that are exempt under the administrative or professional exemptions will not fall within the "managerial position" exemption to enable the employer to obtain and consider a credit report on an applicant (unless the position would also qualify under the executive exemption). A person employed in an executive/managerial capacity is one whose duties and responsibilities involve managing the business, who customarily and regularly directs the work of at least two other full-time employees (or the equivalent), who customarily and regularly exercises discretion and independent judgment, and who has authority to make employment decisions or whose opinion in such matters holds particular weight. Employees must also meet a minimum monthly salary requirement of no less than twice California's minimum wage for full-time employment to fall within the executive exemption. *See* Cal. Tit. 8, § 11040.

The new law specifically exempts national banks, federal branches, and agencies of foreign banks and their subsidiaries, as well as member banks of the Federal Reserve System, banks insured by the Federal Deposit Insurance Corporation (and their subsidiaries), and savings associations insured by the Federal Deposit Insurance Corporation (and their subsidiaries) from its prohibition on pre-employment credit reports. See 15 U.S.C. § 6805.

Practically speaking, the exemptions in the statute will limit its effect. Nevertheless, employers will be required to abandon the use of pre-employment credit checks for positions that do not meet one of the eight exceptions.

## NEW LIABILITY AND PENALTIES FOR WILLFUL MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS (SB 459)

SB 459 creates civil penalties for "willful misclassification" of employees as independent contractors. This statute responds to widely published claims that employers routinely misclassify workers as independent contractors although they are in fact employees. Not coincidentally, the statute is aimed as well at increasing income and payroll tax revenue by requiring stricter compliance by employers. Responding to the same reports and the same budget issues, President Obama's Department of Labor has also announced a major initiative to identify industries and employers where misclassification is prevalent.

SB 459 amends Section 226.8 of the Labor Code and adds Section 2753. It is effective January 1, 2012.

SB 459 makes it unlawful to willfully misclassify an individual as an independent contractor. It defines "willful misclassification" as "avoiding employee status for an individual by voluntarily and knowingly misclassifying the individual as an independent contractor." The new law also makes it unlawful to charge an individual who has been willfully misclassified as an independent contractor any fee or to make deductions from compensation for any reason, including for goods, materials, or space rental, unless doing so would be permitted were the employee properly classified.

The new law also authorizes the Labor and Workforce Development Agency ("LWDA") to issue a determination that an employer has violated the law, and it creates a penalty range of $5,000 to $15,000 per violation, in addition to any other fines or penalties permitted by law. Similarly, if either the LWDA or court issues a determination that an employer has engaged in a pattern or practice of willful misclassification or other violation of the law, the civil penalties range from $10,000 to $25,000 per violation, in addition to any other fines or penalties permitted by law. Employers found in violation of the law must also display prominently for one year on their web sites or in an area generally accessible to employees or the public a notice stating that the violation has occurred, that the employer has changed its business practice, and that the posting or notice is pursuant to court order. The notice must also provide information about how to contact the LWDA.

Labor Code Section 2753 creates joint and several liability for individuals who advise an employer to treat an individual as an independent contractor to avoid employee status. Employees who provide advice to their employers and attorneys providing counsel and advice are excluded from the new provision.

If an employer found violating this law is a licensed contractor pursuant to the Contractors' State License Law, the LWDA or court shall also transmit a certified copy of the order to the Contractors' State License Board. The Contractors' State License Board must then initiate disciplinary action against a licensee.

## WRITTEN COMMISSION CONTRACTS REQUIRED BY 2013 FOR ALL COMMISSIONED EMPLOYEES (AB 1396)

Labor Code Section 2751 previously required out-of-state employers with no permanent and fixed place of business in California who use commissions as a method of payment for employees to put those contracts in writing. Employers who failed to comply with the statute were liable for treble damages. Case law invalidated the statute because it applied only to out-of-state employers.

In response, the California legislature passed AB 1396, which amends Labor Code Section 2751. The new statute requires that, by January 1, 2013, any employer who enters into a contract of employment involving commissions as a method of payment must put the contract in writing. The written agreement must set forth the method by which commissions are computed and paid. The law excludes from the definition of "commissions" short-term productivity bonuses and bonus and profit-sharing plans unless the employer offers to pay a fixed percentage of sales or profits as compensation for work performed. It also eliminates the treble damages penalty for violations.

The new law applies to all employers with commissioned employees in California, whether or not the employer is located in California.

Labor Code 2751 also requires the employer to provide a signed copy of the employment agreement to each employee who is a party to it. It specifies that if the contract expires but the parties continue to perform under its terms, the contract's terms are presumed to remain in full force until a new contract superseding its terms is executed or either party terminates the employment relationship.

## FEHA PROTECTIONS NOW INCLUDE GENDER IDENTITY AND GENDER EXPRESSION (AB 887)

Existing state law prohibits discrimination or harassment based on an individual's gender or sex. AB 887 makes technical changes to a variety of laws, including the Fair Employment and Housing Act, to explicitly identify "gender, gender identity and gender expression" as protected characteristics.

The new law also requires employers to allow an employee to appear or dress in a manner consistent with the employee's gender expression, in addition to appearing or dressing in a manner consistent with the employee's gender identity. Under the new law, "gender expression" is defined as "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." Amended Government Code Section 12949 specifies that the law does not limit an employer's ability to impose reasonable workplace appearance, grooming, or dress standards. However, within dress guidelines, an employer must permit employees to appear or dress in a manner consistent with their gender identity or gender expression.

Similarly, for purposes of workers' compensation coverage, the law prohibits a finding of a personal relationship or personal connection between an employee who is injured or killed by a third party in the course of employment and the third party based on third party's perception of the employee's protected characteristics. AB 887 adds "gender, gender identity and gender expression" to that list of protected characteristics.

## HEALTH CARE FACILITIES MUST ADOPT SAFE PATIENT HANDLING POLICY FOR HEALTH FACILITIES (AB 1136)

AB 1136, the Hospital Patient and Health Care Worker Injury Protection Act, adds Labor Code Section 6403.5, which requires health care employers to adopt a patient protection and health care worker back and musculoskeletal injury prevention plan. The plan must provide trained lift teams in each general acute care hospital. Employers must also provide training, including appropriate use of lifting devices and equipment, for health care workers.

The new law also mandates adoption of a safe patient handling policy, which requires health facilities to replace manual lifting and transferring of patients with powered patient transfer devices, lifting devices, and lift teams. Finally, the new law prohibits disciplinary action by a hospital if a health care worker refuses to lift, reposition, or transfer a patient due to concerns about patient or worker safety or the lack of trained lift team personnel.

## NEW LAW PROHIBITS INTERFERENCE IN CFRA OR PDL LEAVE (AB 592)

The California Family Rights Act ("CFRA") and Pregnancy Disability Leave statute ("PDL") prohibit employers from refusing to permit eligible employees to take leave for specified reasons, including to care for a family member who has

a serious health condition or to take pregnancy disability leave. Existing California law also prohibits retaliation against an employee who exercises rights under the CFRA or PDL laws. AB 592 amends the CFRA and PDL statutes to make it illegal for an employer to interfere with, restrain, or deny the exercise of or attempt to exercise any right provided by California's Pregnancy Disability Leave law or Family Rights Act.

The effect of this new law is to align the CFRA and PDL statutes more closely with the federal Family Medical Leave Act ("FMLA") rights, which include a prohibition on employer interference with exercise of FMLA rights.

## EMPLOYERS MUST MAINTAIN INSURANCE COVERAGE DURING PDL LEAVES OF ABSENCE (SB 299)

SB 299 amends Government Code Section 12945 to require employers to maintain and pay for group insurance coverage for eligible female employees throughout the duration of PDL, under the same conditions as if she had been employed continuously. The statute does not appear to require employer-provided coverage for a period of longer than 12 weeks in a 12-month period for female employees who qualify for both PDL and CFRA leave.

The new law also permits employers to recover the premium expenses paid if the employee fails to return to work and the reason she does not return is not because the employee has taken CFRA leave or because of a health condition that prompted the initial leave.

## HEALTH INSURANCE PLANS MUST PROVIDE EQUAL COVERAGE FOR SAME SEX DOMESTIC PARTNERS AND SPOUSES (SB 757)

Existing law requires health care plans and policies to include coverage for registered domestic partners of an employee equal to the coverage of a spouse of an employee. SB 757 makes changes to the Health and Safety and Insurance Codes to specify that every group health care service plan contract or policy issued to a California resident must provide equal coverage to same-sex domestic partners or spouses as is provided to opposite-sex spouses or registered domestic partners.

## NEW LAW AUTHORIZES DIVISION OF LABOR STANDARDS ENFORCEMENT TO AWARD LIQUIDATED DAMAGES (AB 240)

The Labor Commissioner is authorized to investigate complaints filed by employees, but until now, employees could recover liquidated damages only in a court action. AB 240 amends Sections 98 and 1194.2 of the Labor Code to permit an employee to recover liquidated damages pursuant to a complaint before the Labor Commissioner alleging payment of less than the minimum wage fixed by a Wage Order or statute.

## NEW LAW PROHIBITS MANDATORY USE OF E-VERIFY BY STATE OR GOVERNMENT CONTRACTORS (AB 1236)

The federal E-Verify program allows employers to use an electronic system to verify that newly hired employees are authorized to work in the United States. AB 1236 prohibits any state, city, county, or special district from requiring an employer (other than one of those government entities) to use an electronic employment verification system, unless mandated by federal law or required for receipt of federal funds.

## GENETIC DISCRIMINATION PROHIBITED IN EMPLOYMENT (SB 559)

Effective January 1, 2012, SB 559 amends California's Unruh Civil Rights Act (Civil Code Section 51 *et seq.*) and the FEHA, among other laws, to prohibit discrimination based on "genetic information." The law defines "genetic information" as information about an individual's genetic tests, genetic tests of an individual's family members, and the manifestation of a disease in an individual's family members. The new law is consistent with the philosophy of the federal Genetic Information Non-Discrimination Act of 2008.

## PREVAILING WAGE LAWS EXPAND IN SCOPE AND INCREASE PENALTIES (SB 136, AB 514, AB 551)

Several new laws expand the definition of "public works" and thereby expand application of state prevailing wage laws to state-funded construction. Prevailing wage laws increase the cost of publicly funded construction. SB 136 modifies Section 1720.6 of the Labor Code to define "public work" as including work done under private contract if it is "performed in connection with the construction or maintenance of renewable energy generating capacity or energy efficiency improvements," performed on state property, and more than half the energy generated will be purchased by a government entity or the improvements are primarily intended to reduce costs that would otherwise be incurred by the state or a political subdivision of the state.

AB 514 modifies the Labor Code Section 1720.3 to add a definition of "hauling of refuse" from a public works site to an outside disposal location to include hauling of soil, sand, gravel, rocks, concrete, asphalt, excavation, materials, and construction debris. It specifically excludes hauling recyclable metals from the definition.

AB 551 increases the penalties for violations of prevailing wage laws and for failing to retain proper payroll records. The law increases the maximum penalty to $200 per calendar day and increases the minimum penalty to $40 per calendar day for good faith mistakes. Under the new law, contractors and subcontractors with prior violations can be assessed $80 (up from $20) for violations and $120 (up from $30) for willful violations. Additionally, employers may be fined $100 per employee per calendar day for payroll violations, an increase from $25 per day. The new law also extends to three years the period of time during which a business found to have committed two or more separate willful violations within a three-year period is ineligible from bidding on, being awarded, or performing work as a subcontractor on a public works contract.

## VETOES

Not surprisingly, Governor Brown vetoed very few labor and employment bills. Some of his vetoes were to the benefit of employers. Most notable was his veto of AB 325, a bereavement leave bill that would have prohibited employers from refusing to grant employees up to three days of unpaid leave. Governor Brown's veto message noted that the vast majority of employers voluntarily make this accommodation, but that the measure would have created a far-reaching private right to sue.

Similarly, in his veto message for SB 931, which would have authorized payment to employees using a payroll card, Governor Brown stated that the law would have created costly, complicated new requirements for use of payroll cards by employers.

Governor Brown vetoed AB 267, which would have made choice of law provisions in employment contracts void as a matter of public policy. Governor Brown's veto message noted that California law already prohibits application of laws that substantially diminish California employees' rights.

## CONCLUSION

With the exception of AB 1396, the requirement that commission agreements be in writing, all of the above legislation is effective January 1, 2012. Employers should review their employee handbooks and policy manuals to make sure their existing policies are consistent with the new legislation.

As to new hires for non-exempt employees, the Labor Commissioner is to issue a form that can be filled out by the employer and provided to new hires to supply the necessary information. It is unknown whether the Labor Commissioner will make that form available before January 1, 2012, when the statute becomes effective.

Employers who retain significant numbers of independent contractors must also review their practices. SB 459 creates serious risks not only for companies that utilize independent contractors but for consultants who advise on that practice.

# LAWYER CONTACTS

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