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California Enacts New Round Of Employee-Friendly Laws (In Other News, State Unemployment Rate Hovers Near 12%)

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California Governor Jerry Brown has signed into law a number of bills that could significantly impact employers in the New Year. Below is a survey of some of these new laws and their key provisions.

Misclassification Of Independent Contractors

Consistent with the trend toward government "crackdowns" on employers who misclassify their employees as independent contractors, California's SB 459 (pdf) provides a comprehensive approach to enforcing wage laws. The legislature enacted the new law prohibiting the "willful misclassification" of individuals as independent contractors as well as the practice of deducting from the paychecks of misclassified individuals any fees or other charges that could not be deducted from the paychecks of employees (*e.g.*, for workspace, licenses and equipment). The "willful misclassification" of an individual is defined as "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor."

SB 459 also provides for the assessment of civil penalties in the range of $5,000 to $15,000 for each violation and, for individuals found guilty of a "repeated pattern or practice" of such violations, the penalty may increase to between $10,000 and $25,000 per violation. The law imposes joint and several liability upon any person who, for money or other valuable consideration, "knowingly advises" an employer to treat an individual as an independent contractor to avoid employee status where that individual is later found to be an employee. Excepted from this provision are persons providing advice to their employer and licensed attorneys dispensing legal advice during the course of practicing law. The new law becomes effective January 1, 2012.

California's New "Anti-Wage Theft" Law

AB 469 (pdf), dubbed the "Wage Theft Prevention Act of 2011," adds Section 2810.5 to the Labor Code and requires employers to furnish to non-exempt employees, at the time of hiring, a notice specifying the employee's rate or rates of pay and the basis on which the employee's wages are to be calculated (*e.g.*, hourly, daily, piece, salary, commission or by some other method). The notice must include applicable overtime rates; allowances, if any, claimed as part of the minimum wage; the employer's designated regular pay day; the name of the employer, including any fictitious names under which the business operates; and the employer's physical and mailing addresses. Further, the employer must notify each employee in the form of a new or amended written notice of any changes made to this information within 7 days of their implementation, unless such changes are reflected on a timely wage statement or other writing required to be provided by law. The statute also clarifies existing law to expressly require that employers pay, in addition to applicable civil penalties, restitution to any employee who has been paid a wage less than the minimum fixed by the Industrial Welfare Commission wage orders. AB 469 also criminalizes certain wage violations by providing that any employer who willfully violates specified wage statutes or orders, or who willfully fails to pay wages due under a final court judgment or final order of the Labor Commissioner is guilty of a misdemeanor. Additionally, beginning January 1, 2012, the statute of limitations for the Division of Labor Standards Enforcement ("DLSE") to collect statutory penalties increases from one year to three years.

Limitations On The Use Of Consumer Credit Reports In Employment

AB 22 (pdf) limits the use by employers of consumer credit reports. Specifically, the law prohibits employers and prospective employers (except certain financial institutions) from obtaining or relying on consumer credit reports regarding employees or job applicants, unless the position occupied or sought is (1) a position within the California Department of Justice; (2) a "managerial" position, defined as a position that qualifies for the executive employee overtime exemption; (3) a sworn peace officer or other law enforcement position; (4) a position for which credit information is required by law to be disclosed or obtained; (5) a position that involves regular access to specified personal information (except for the routine processing of credit card applications in a retail establishment), including bank or credit card account information, Social Security numbers, and dates of birth; (6) a position in which the employee or applicant would be a named signatory on the employer's bank or credit card account, or given authority to transfer money or enter into financial contracts on the employer's behalf; (7) a position that involves access to confidential or proprietary information, defined as a "trade secret" under California Civil Code Section 3426.1(d); or (8) a position that involves regular access to cash totaling $10,000 or more which belongs to the employer, a customer, or a client. To the extent an employee or applicant falls within one of the above-enumerated categories, before obtaining a credit report an employer must provide written notice to the consumer specifying the basis for requesting the report, informing the person of the source of the report, and providing a box to check to request a free copy of the report.

Additional Pregnancy Disability Leave Protections

As currently written, the California Family Rights Act ("CFRA") does not explicitly prohibit "interference" with an employee's right to take a leave of absence. Although merely "declarative of existing law," the recently enacted AB 592 (pdf) clarifies that it is an unlawful employment practice for an employer to "interfere with," restrain, or deny the exercise of any right provided under the CFRA, or due to disability by pregnancy, childbirth, or related medical conditions.

SB 299 (pdf) requires employers with five or more employees to maintain and pay for health coverage under a group health plan for any eligible female employee who takes up to four months of leave due to pregnancy, childbirth or a related medical condition in a 12-month period. The employee's benefits must be maintained at the same level and under the same conditions as coverage would have been provided had the employee continued in employment continuously for the duration of the leave.

Gender Identity And Expression

AB 887 (pdf) amends the Fair Employment and Housing Act ("FEHA") and defines "gender" to include both gender identity and "gender expression." "Gender expression" is a person's "gender-related appearance and behavior," "whether or not stereotypically associated" with the sex assigned to the person at birth. AB 887 prohibits discrimination in the workplace both on the basis of one's gender identity (*i.e.*, how the person sees him or herself) and gender expression (*i.e.*, how other people view the person). Under the new law, an employee must be permitted to dress consistent with the employee's gender identity and expression.

Pushing Back On E-Verify: The Employment Acceleration Act

Known as the Employment Acceleration Act of 2011, AB 1236 (pdf) prohibits the state, a city, or a county from requiring employers to use an electronic employment verification system to verify that the employees they hire are authorized to work in the United States as a condition of receiving a government contract or of obtaining a business license, or as a penalty for violating licensing laws. The new law specifically exempts from this prohibition electronic verification systems the use of which is required by law or as a condition of receiving federal funds. Moreover, nothing in AB 1236 alleviates an employer's obligation to require employees to complete an I-9 Employment Eligibility Verification Form upon hire.

Commission Agreements To Be In Writing By 2013

AB 1396 (pdf) amends the Labor Code to require, by January 1, 2013, that when an employer enters into a contract of employment with an employee for services to be rendered within the State of California and the "contemplated method of payment" involves commissions, the contract must be in writing and must set forth the method by which the commissions are to be computed and paid. Here, the meaning of the term "commissions" is imported from Labor Code Section 204.1, which generally excludes short-term productivity bonuses and profit-sharing plans.

Organ And Bone Marrow Donor Leave

SB 272 (pdf) clarifies a law enacted last year (SB 1304) allowing employees to take paid leaves of absence for bone marrow and organ donation. This year's installation of the law makes clear that under SB 1304, which applies to employers with 15 or more employees and took effect January 1, 2011, employees may take leaves for organ donation of up to 30 business days and for bone marrow donation of up to 5 business days in a one-year period, measured from the date the employee's leave begins. The employer may require the employee to take up to five days of earned but unused paid days off (for bone marrow donors) and up to two weeks of earned but unused paid days off (for organ donors) as an initial condition of granting leave. However, leaves of absence for either type of donation may not be treated as a break in the donor's continuous service for the purpose of his or her right to salary adjustments, sick leave, vacation, annual leave, or seniority.

Since the bill specifies that it is declarative of existing law, employers should apply SB 272's amendments as if effective January 1, 2011.

Discrimination Based On "Genetic Information"

During this active legislative session, the California Legislature saw fit to add genetic information to the list of protected categories under the Fair Employment and Housing Act ("FEHA"). SB 559 (pdf), discussed further on our California employment law blog, defines "genetic information" as: the individual employee's genetic tests, the genetic tests of the employee's family members, and the "manifestation of a disease or disorder" in the employee's family members. Under the new law, discrimination in hiring or employment based on any of these characteristics is unlawful.

Medical Debts Exempt From Wage Garnishment

Current law provides that an employer must withhold from an employee's wages the amount stated on an earnings withholding order, up to the portion of the earnings the debtor proves is necessary to support himself or his family. AB 1388 (pdf) adds an exemption from wage garnishment for debt that is incurred "for the common necessaries of life furnished to the judgment debtor" or his or her family, including, e.g., hospital services and other medical debts.

Coverage Of California Domestic Partners Under Health Insurance Plans Issued To Out-of-State Employers

SB 757 (pdf) expands the reach of the California Insurance Equality Act, which currently requires insurance companies to provide the same coverage for registered domestic partners as for spouses. Existing law provides that a policy marketed, issued, or delivered to a California resident is subject to the nondiscrimination provisions of the California Insurance Code; however, SB 757 closes the gap that has, for the past several years, allowed out-of-state policies issued to employers who maintain their principal place of business and a majority of their employees outside of the state to limit benefits to spouses. Under the new law, every group health insurance policy provided to a California resident, regardless of the situs of the contract, must offer equal coverage for spouses and registered domestic partners.

Minors In The Entertainment Industry

This new law establishes a temporary work permit program for minors in the entertainment industry. Under current law, the Labor Commissioner must furnish his or her written consent in order for a minor under the age of 16 to participate in certain projects. AB 1401 (pdf) creates a program to be administered by the Labor Commissioner that allows the parent or guardian of a minor performer to obtain a temporary permit for the minor's employment under certain circumstances.

New Time Limit For Acceptance Of Conditional New Trial Orders

AB 1403 (pdf) amends the California statute governing additur and remittitur by setting a deadline for parties to accept or reject a judge's proposed modified award of damages. Under current law, a party can request a new trial on grounds that the jury returned an inadequate or excessive damage award; the judge may order a new trial but condition the order on acceptance or rejection of a modified award. Pursuant to AB 1403, in the absence of a deadline stated in the court's conditional order, the default deadline for parties to respond will now be 30 days from the date the order is served by the court's clerk. A party's failure to respond by the deadline is deemed a rejection of the offer, which will trigger a new trial on the issue of damages.

AB 1403 also prohibits trial judges from establishing absolute or blanket time limits for voir dire and provides that counsel for each party should be given reasonable time to evaluate any written questionnaire responses from prospective jurors before oral questioning begins. Attorneys also will be permitted to deliver brief opening statements. Finally, "to help facilitate the jury selection process," under the new law judges "should" provide lists of potential jurors, both in alphabetical order and in the order in which they will be called.

Related Professionals

- **Anthony J. Oncidi**
  Partner
- **Harold M. Brody**