Employment CPDB

A Review of the New 2012 Employment/Labor Laws

Compliance Check

Is your company in compliance with new California employment laws?
The 2011 legislative year was busy for lawmakers. Effective January 1, 2012, employers are: mandated to make specific wage disclosures; restricted from conducting credit checks; and required to extend coverage for pregnancy disability leaves. The new laws also expand current laws governing family leave rights, organ and bone marrow donor leave, genetic information, and gender express and gender identity. Below is a short summary of employment laws that took effect on January 1, 2012 to remind you of what your company needs to do to stay compliant with state laws.

Wage Theft Prevention Act ("WTPA")

This new law requires all private sector employers to provide, at the time of hiring, a notice to all non-exempt employees (except employees covered under certain collective bargaining agreements) with a written wage disclosure ("Notice") that contains the following information: (a) name of employer (including dba names), physical address of employer's main office or principal place of business, mailing address, if different, and telephone number; (b) rate and basis of pay (hourly, salary, piece, commission); (c) overtime rate of pay; (d) allowances claimed as part of minimum wage (including meal or lodging allowances), if any; (e) regular pay day designated by the employer; (f) name, address, and telephone number of employer's workers' compensation carrier; and (g) additional information that is deemed "material and necessary" by the Labor Commissioner.

Pursuant to its authority under the WTPA, the Division of Labor Standards Enforcement (DLSE) created a model Notice. The model notice requires employers to disclose even more information than those specifically required by section 2810.5. This information includes: (a) the type of business entity (e.g., sole proprietorship, limited liability company, corporation, or general partnership); (b) whether the employer is a staffing agency; (c) whether the employer is a "worksite" employer that uses another other business or entity (except a recruiting service or payroll processing service) to hire employees or administer wages or

benefits, and if so, additional information about the other business; (d) workers' compensation insurance policy number, self-insured status, and certificate number for consent to self-insure; and (e) whether the employment agreement is oral or written.

If any of the information on the Notice changes (e.g., an employee gets a raise), the employer has seven calendar days to provide notice of the change in writing to the employee, unless: (a) all changes are reflected on a timely wage statement compliant with California Labor Code section 226 (for paystubs and wage statements) or (b) notice is provided in another writing required by law within seven days of the change.

In addition to the plain language of the WTPA, the Labor Commissioner interprets the new law as follows:

- The WTPA requires that the Notice must be on its own form, separate from materials presented at the time of hire.

- Use of the DLSE template is not mandatory. However, if employers prepare their own form, they must include all of the information contained in the DLSE template.

- The Notice must include all pay rates on the Notice if the employee has multiple pay rates (e.g., hourly, salary, piece, and/or commission).

- The Notice must also include a description as to how overtime rates of pay are calculated. It is important to remember that the overtime rates of pay (also referred to as the "regular rate of pay") is based on total compensation earned. For example, if any employee is paid based on an hourly rate plus commission, the regular rate of pay must be calculated to reflect both the types of pay. But if commissions fluctuate, it is sufficient to state on the Notice the minimal regular rate and add that it is "subject to upward adjustment when other specified forms of wages are earned during the applicable pay period."

- The Notice may be given electronically, as long as there is a system where the employee can acknowledge receipt of the notice and print out a copy of the notice.

- If the wage rate is the only change, the Notice is not required as long as there is an increase in a rate and the new rate is shown on the pay stub (itemized wage statement) with the next payment of wages. Decreases in wage rates can only be made prospectively and not retroactively where work was performed and earned under a specified rate. In other words, the notice of a decrease in wage rate should be sent out before it becomes effective.

- Although the WTPA requires that the Notice be given only at the time of hire and within seven days after a change in information, the DLSE states in its FAQs that it would be a "best practice" to also provide the Notice to current employees.

For your reference, the following are links to the Labor Commissioner's Answers to the FAQs and the DLSE template:

http://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html
https://www.dir.ca.gov/dlse/Governor_signs_Wage_Theft_Protection_Act_of_2011.html

If you have any questions about the WTPA or would like advice on preparing Notices required by the new law, feel free to contact any member of the firm's Labor and Employment team.

Benefits for Employees Taking Pregnancy Disability Leave

Formerly, state law required certain employers to provide benefits for employees on pregnancy leave to the same extent and length of time as employees on other temporary disability leaves.

SB 22 now requires covered employers to do even more—continue to maintain and pay for health coverage for employees who take pregnancy disability leave (PDL) for up to four months even if the employer does not provide health coverage for other temporary disability leaves.

SB 22 applies to all employers with five or more employees. It prohibits an employer from refusing to maintain and pay for coverage under a group health plan for an employee with a pregnancy disability under the conditions the employer would have provided had the employee continued to work during PDL leave "not to exceed four months over the course of a twelve month period."

In some situations, employees entitled to FMLA/CFRA leave may be entitled to up to seven months of leave, since CFRA leave (up to twelve weeks) does not run concurrently with PDL leave (up to four months). The bill and the amended statute, however, do not specifically address whether employees entitled to the maximum seven months of combined FMLA/CFRA and PDL leave are also entitled to health coverage throughout the entire seven-month leave. If your company is presented with this issue, you should consult legal counsel.

Further, if your company has not already updated its employee handbook, this is a good time to update and ensure that written policies concerning pregnancy disability leave reflect these changes.

Credit Checks

The new state law created by AB 22 applies to all employers and prospective employers, except certain financial institutions.

AB 22 adds additional restrictions on employers' right to use or collect consumer credit reports for employment purposes and requires additional notice requirements than those currently required by federal law.

The new law provides that covered employers may obtain consumer credit reports for employment purposes for only the following types of positions: (a) a managerial position (which is defined as an employee covered by the executive exemption set forth in subparagraph (1) of paragraph (A) of Section 1 of Wage Order 4 of the Industrial Welfare Commission); (b) a position in the state Department of Justice; (c) a sworn peace officer or other law enforcement position; (d) a position for which the information contained in the report is required by law to be disclosed or obtained; (e) 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 all of the following types of information of any one person: bank or credit card account information, social security number, and date of birth; (f) a position in which the person is, or would be, a named signatory on the bank or credit card account of the employer; authorized to transfer money on behalf of the employer; or authorized to enter into financial contracts on

behalf of the employer; (g) a position that involves access to confidential or proprietary information; and (h) a position that involves regular access to cash totaling ten thousand dollars ($10,000) or more of the employer, a customer, or client, during the workday.

Additionally, covered employers utilizing credit reports must notify the employees of the specific basis permitted under Labor Code section 1024.5(a) for using the consumer credit report.

This new law does not apply to reports that (a) verify income or employment, and (b) do not include credit-related information, such as credit history, credit score, or credit record.

Organ and Bone Marrow Donor Leave

SB 272 clarifies an ambiguity in current law concerning organ and bone marrow donor leave. Employers with fifteen or more employees must provide up to thirty business days of leave for a one-year period for organ donors and up to five business days of leave for a one-year period for bone marrow donation. The one year period is measured from the date the employee's leave begins. Further, SB 272 clarified that employers may require covered employees to use PTO (in addition to sick and vacation leave).

Again, if your company has not already updated its employee handbook, this is a good time to update and ensure that written policies reflect these changes.

Genetic Information, Gender Identity, and Gender Expression

The Fair Employment and Housing Act (FEHA) has been amended by SB 559 and AB 887 to: (a) extend the definition of "gender " to include both gender identity and gender expression, so that discrimination on the basis of gender identity or gender expression is prohibited and (b) include a prohibition against discrimination based on genetic information.

Genetic information is defined as information about any of the following: (a) an individual's genetic tests; (b) the genetic tests of family members of the individual; and (c) the manifestation of a disease or disorder in family members of the individual. This definition includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services by an individual or any family member of the individual.

Your company should update its EEOC policy and harassment policy to include genetic information, gender identity, and gender expression as protected categories.

Willful Misclassification of Independent Contractors:

SB 459 makes it unlawful to: (a) willfully misclassify employees as independent contractors and (b) charge fees, or make any deductions, from an employee misclassified as an independent contractor if those fees or deductions would have violated the law if the individual had not been misclassified.

SB 459 applies to all persons and employers. In additional to prohibiting willful misclassification and unlawful fees or deductions, the new law: (a) authorizes the Labor and Workforce Development Agency (LWDA) to assess steep civil penalties (between $5,000 to $10,000 for first violations and up to $25,000 for repeat for violations of these prohibitions); (b) requires the LWDA to notify the Contractors' State License Board of a violator that is a licensed contractor and requires the Board to initiate an action against the licensee; (c) allows an individual to file a complaint to the Labor Commissioner; (d) authorizes the Labor

Commissioner to assess civil and liquidated damages against violators; and (e)imposes joint liability on any person who, for money or other valuable consideration, except a person who provides advice to his/her employer (e.g., HR representatives) or an attorney providing legal advice, knowingly advises an employer to misclassify an individual as an independent contractor.

SB 459 defines "willful misclassification" as voluntarily and knowingly misclassifying that individual as an independent contractor. But it does not define what "voluntarily and knowingly" means. This will likely be the subject of future litigation.

Another subject of future litigation will likely be the issue of whether individual litigants may recover a portion of civil penalties by bringing a Private Attorneys General Act (PAGA) claim.

If your company employs independent contractors, it is important for the company to conduct audits to ensure that these individuals are properly classified.

Prohibition Against Interference with California Family Rights Act and Pregnancy Disability Leave Rights

The California Family Rights Act and Pregnancy Disability Leave law (PDL) have been amended by AB 592 so that is now unlawful to interfere with or in way restrain the exercise of rights under these laws (which is consistent with FMLA's prohibition against unlawful interference).

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