NEW CALIFORNIA EMPLOYMENT LAWS PRESENT MORE CHALLENGES

By Ken Rose

A NUMBER OF NEW EMPLOYMENT-RELATED bills that Governor Brown approved became law on January 1, 2012. The new employment regulations consist of significant changes for California employers. As with any new legislation, businesses must bring their employment policies and practices into compliance.

Wage Theft Prevention Act of 2011 (AB 469)

California's Wage Theft Prevention Act of 2011 ("Act") took effect on January 1, 2012. The Act gives greater protection to employees, and makes changes in the way most workers are notified of basic employment information.

The Act amends existing employment laws (California Labor Code sections 98, 226, 240, 243, 1174, and 1197.1) and adds new requirements (Labor Code sections 200.5, 1194.3, 1197.2, 1206, and 2810.5) which criminalizes willful violations for non-payment of wages after a court judgment or final administrative order; requires restitution to the employee in addition to a civil penalty for failure to pay minimum wages; extends the time period for obtaining judgments on final orders for collection of penalties by the California Division of Labor Standards Enforcement (DLSE); enhances bond requirements for employers with convictions or court judgments for non-payment of wages including requiring an accounting of assets upon request by DLSE or court order; establishes that penalties under the Labor Code for failure to comply with wage-related statutes are minimum penalties; and allows employees to recover attorney's fees and costs incurred to enforce a judgment for unpaid wages.

Labor Code Section 2810.5

The provision in the Act that will be of most immediate concern for California employers is the new Labor Code section 2810.5. This statute requires that private sector employers provide a written form notice to newly hired non-exempt employees, and to current non-exempt employees when changes occur, about their wages and other employment-related information. This "Notice to Employee" requirement is codified as California Labor Code Section 2810.5.

Labor Code section 2810.5 specifically requires that all employees hired on or after January 1, 2012 must receive the Notice to Employee at the time of hiring, with the following exceptions: (1) governmental/public sector employees; (2) employees who are exempt from the payment of overtime wages under the California Labor Code and the Wage Orders of the Industrial Welfare Commission (e.g., employees properly classified as professional, executive, or administrative, outside salespersons, and some employees who receive more than half their compensation in commissions); and (3) employees who are covered by a Union collective bargaining agreement if the agreement states working conditions of the employee, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage.

Labor Code section 2810.5 also requires that the employer notify covered employees, in writing of any changes to the information set forth in the Notice To Employee within seven calendar days after the time of the changes, unless all changes are reflected on a timely itemized wage statement (i.e., paystub) furnished in accordance with Labor Code section 226, or notification of all changes is provided in another writing required by law within seven days of the changes.

If the wage rate is the only change, a Notice to Employee is not required where there is an increase in a rate and the new rate is shown on the itemized wage statement with the next payment of wages.

Per Labor Code section 2810.5, the Notice to Employee must contain at least the following information:

- 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
- regular payday designated by the employer in accordance with the requirements of the Labor Code
- name of the employer, including any "doing business as" ("dba") names used by the employer
- physical address of the employer's main office or principal place of business and a mailing address, if different

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

Moreover, the statute authorizes the Notices to Employee to include any other information that the California Labor Commissioner "deems material and necessary."

Employers may use any form of written notice provided it contains all the required information specified in Labor Code section 2810.5. The Act instructed the California Labor Commissioner to issue a template format for employers' optional use to comply with Labor Code Section 2810.5. In accordance with that directive, the Labor Commissioner prepared a template Notice to Employee, and published it on the California Department of Industrial Relations' website.

The template is available in six languages in both Word and PDF formats. Concurrently, the Labor Commissioner's Division of Labor Standards Enforcement ("DLSE") issued Frequently Asked Questions on the new Notice to Employee requirement.

The Labor Commissioner's template Notice to Employee includes additional items of information not particularized in Labor Code section 2810.5. Among the added categories of information in the Labor Commissioner template that are not specified in Labor Code section 2810.5 are the following:

- hire date and position
- business form of employer—corporation, partnership, etc.
- identity of any other entities used to hire employees or administer wages or benefits, excluding recruiting services or payroll services
- whether the employment agreement is oral or written
- workers' compensation policy number or certificate number for permissible self-insurance
- name and signature of the employee and the date the notice was received and signed
- name and signature of the employer representative providing the notice and the date notice is provided

Whether the template is intended as an indirect statement from the Labor Commissioner that these add-ons are now required under its "[a]ny other information the Labor Commissioner deems material and necessary" authority, is not clear. Obviously, the prudent course of action for employers is to assume for now that all of the information on the Labor Commissioner's template form should be included in whatever Notice to Employee format the employer elects to use.

The penalty for non-compliance is not specified in the Act, and, presumably, the penalties contained in the Labor Code Private Attorneys General Act of 2004 ("PAGA"), Labor Code sections 2699 (f)(1) (2), apply. The PAGA penalties are $100 per employee per pay period for the initial violation and $200 per pay period per employee for subsequent violations.

New Restrictions on Employers' Use of Credit Reports (AB 22)

Many employers want to obtain employees' and applicants' credit information as part of their hiring processes and for other employment-related reasons. Assembly Bill 22, which took effect on January 1, 2012, significantly restricts employers' ability to procure credit reports. The new law specifically applies to credit checks and does not address criminal record and other background checks.

This bill generally prohibits employers from using an applicant's or employee's credit history in making employment decisions. Prior to this legislation, employers could request a credit report for employment purposes if they provided prior written notice of the request to the person for whom the report was sought.

This bill significantly changes prior law by prohibiting employers, other than some financial institutions, from using credit reports for employment purposes unless the report is used for one of the following limited purposes: (1) a managerial position; (2) position in the State Department of Justice; (3) a sworn peace officer or other law enforcement; (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 confidential information such as credit card account information, social security number or date of birth; (6) a position in which the person can enter into financial transactions on behalf of the company; (7) a position that involves access to confidential or proprietary information; or (8) a position that involves regular access to cash totaling $10,000 or more of the employer, a customer, or client during the workday.

State and Local Governments Cannot Require Employers to Use E-Verify to Confirm Employees' Legal Worker Status (AB 1236)

The E-Verify Program of the United States Department of Homeland Security, in partnership with the United States Social Security Administration, enables participating employers to use the program, on a voluntary basis, to verify that the employees they hire are authorized to work in the United States.

This bill prohibits the state, or a city, county, or special district, from requiring an employer other than one of those government entities to use an electronic employment verification system except when required by federal law or as a condition of receiving federal funds. This new law does not prohibit employers to use E-Verify to confirm employees' work eligibility, but merely bars cities or counties from requiring private employers to do so.

Prohibition of Employers' Interference with Employee Leaves of Absence Under the California Family Rights Act and the Pregnancy Disability Leave Law (AB 592)

The California Family Rights Act and the Pregnancy Disability Leave Law prohibits an employer from denying an eligible employee's request for leave to care for a family member with a serious health condition, to bond with a child, to attend to the employee's own serious health condition, or for disability due to pregnancy or childbirth.

This bill additionally makes it explicit that it is unlawful for an employer to interfere with, or restrain the exercise or attempted exercise of, any right provided to an employee under the California Family Rights Act and Pregnancy Disability Leave Law. This new law amends sections 12945 and 12945.2 of the California Government Code.

Expansion of Fair Employment and Housing Act to Include Discrimination on Basis of Genetic Information (SB 559)

This bill adds discrimination "on the basis of genetic information" as another protected class under the California Fair Employment and Housing Act (FEHA). Genetic information is broadly defined, and includes information relating to an 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 would be considered a violation of law. This bill amends Section 12921 of the California Government Code.

New Consequences for Willful Misclassification of Employees as Independent Contractors (SB 459)

Intentional and willful misclassification of employees as independent contractors has become an increasing problem in the United States, and certainly in California. Existing law provides extensive protections relating to the employee-employer relationship. When companies misclassify workers as independent contractors instead of employees, these workers do not receive standard worker protections mandated by existing law. These existing legal protections relate to wage standards, workers' compensation, employment contracts, working conditions and many other issues.

This new law ups the ante for employers with respect to independent contractor misclassification issues. The bill prohibits willful misclassification of individuals as independent contractors. The law defines willful misclassification as "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor."

Employers also will no longer be permitted to make deductions from contractors' pay that could not be made if the contractors were employees. The bill authorizes the California Labor Commissioner to issue determinations that a person or employer has violated these prohibitions with regard to an individual filing a complaint, and to assess civil and liquidated damages against a person or employer based on a determination that the person or employer has violated these provisions. The bill imposes a fine of between $5,000 and $25,000 for willfully misclassifying workers as independent contractors.

Moreover, the bill provides that 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 shall be jointly and severally liable with the employer if the individual is not found to be an independent contractor. Exempt from these provisions regarding joint and several liability is any person who provides advice to his or her own employer or an attorney who provides legal advice in the course of practicing law. This bill adds sections 226.8 and 2753 to the California Labor Code.

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