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California Governor Signs New Employment Bills

by Robert A. Jones and Jill V. Cartwright

Governor Jerry Brown recently signed bills enacting several new employment statutes. Below are brief explanations of these new laws that affect private employers along with links to the actual bill language. Each of these bills will become effective January 1, 2012. Ogletree Deakins is sponsoring seminars in Los Angeles (October 18), Orange County (October 19) and San Francisco (October 20) where attorneys will discuss these new legislative updates in more detail. On December 7, the firm also will conduct a webinar on the new California laws. For more information or to register for the webinar, contact Moira Cue at (310) 217-8191 (ext. 221).

The first of the following bills is of particular significance to *all* employers of California-based employees.

"The Wage Theft Prevention Act of 2011" (AB 469)

AB 469 has not received much media coverage yet. However, it can be expected to generate a great deal of interest given its newly-provided mandatory employee notification requirements. AB 469 encompasses a number of revisions to various Labor Code sections, and includes provisions classifying certain "willful" actions by employers as misdemeanors. The one provision that will impact all employers, however, is new Labor Code section 2810.5. This section requires all private employers to provide a list of specific written information to all new non-exempt employees who are not covered by the terms of a valid collective bargaining agreement.

Employers must provide the following information to employees upon hiring in a format to be determined by the Labor Commissioner:

- The 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;
- The regular payday designated by the employer in accordance with the requirements of this code;
- The name of the employer, including any "doing business as" names used by the employer;
- The physical address of the employer's main office or principal place of business, and a mailing address, if different;
- The telephone number of the employer;
- The name, address and telephone number of the employer's workers' compensation insurance carrier; and
- Any other information the Labor Commissioner deems material and necessary.

Employers also must provide notification of any changes in the above information within seven days either by information on the employees' next pay statements or in a separate written form.

While there has been no indication how the State Labor Commissioner intends to enforce these new requirements, there can be no question that non-compliance with any of the technical provisions will result in some form of enforcement action, including possible civil penalty assessments.

Prohibited Use of Credit Reports (AB 22)

AB 22 bans employers from obtaining credit information about applicants or employees, except in limited circumstances. Reports can only be sought for employment involving: (1) a position in the California Department of Justice; (2) a managerial position (defined as a position that qualifies for the executive exemption from overtime); (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 (other than in connection with routine solicitation of credit card applications in a retail establishment) to people's bank or credit card account information, social security number and date of birth; (6) a position in which the employee would be a named signatory on the employer's bank or credit card account, authorized to transfer money on behalf of the employer or authorized to enter into financial contracts on behalf of the employer; (7) a position that involves regular access to cash totaling $10,000 or more of the employer, a customer or client during the workday; and (8) a position that involves access to confidential or proprietary information (defined as a legal "trade secret" under Civil Code 3426.1(d)).

Even where an exception applies, employers still must give written notice to the applicant or employee that the credit report is being requested. In addition, the report must be provided free of charge to the employee. If employment is denied on the basis of information obtained from the credit report, the employer must advise the applicant and provide the name and address of the credit reporting agency that supplied the report.

Misclassification of Independent Contractors (SB 459)

SB 459 creates new liabilities for misclassifying workers as independent contractors. The bill makes "willful" misclassification of individuals as independent contractors by "any person or employer"

unlawful. This law also imposes a civil penalty of $5,000 to $25,000 for each violation "in addition to any other penalties or fines permitted by law." The bill also empowers the Employment Development Department (EDD) to develop a form and to require its use as additional reporting when a worker is hired as an independent contractor. Given the recent increased interest by both the Labor Commissioner and EDD in the alleged misuse of independent contractors and union efforts to end their use entirely in many industries, it can certainly be expected that both government and private efforts to enforce this new statute will begin immediately after it becomes effective in January.

Employee Pregnancy Leave (AB 592/SB 299)

AB 592 and SB 299 make it unlawful for employers to interfere with, restrain or deny leave for eligible workers under the California Family Rights Act and the pregnancy disability leave law. In addition, the bill makes it unlawful under the state pregnancy disability leave law for employers to terminate the health coverage of a worker who takes leave because she is disabled by pregnancy, childbirth or a related medical condition. The reasoning for this bill was to close a perceived loophole that did not specifically prohibit employers from making it difficult for employees to exercise their rights to leave.

Maternity Insurance Coverage (SB 222/AB 210)

SB 222 and AB 210 require health insurers issuing individual policies to provide maternity coverage for all insured under the policy.

Gender Identification (AB 887)

AB 887 redefines the term "gender" in existing law, including the Fair Employment and Housing Act. The bill makes it clear that discrimination on the basis of gender identity and "gender expression" is prohibited. Gender expression refers to a person's gender-related appearance and behavior, whether or not stereotypically associated with the person's assigned sex at birth. Employees must be allowed to appear or dress consistently with the employee's gender expression in the workplace.

Electronic Employment Verification (AB 1236)

AB 1236 prohibits the state, and any city or county, from mandating the use of the federal E-Verify program, except as required by federal law. Employers can still choose to use the program.

Commission Agreements (AB 1396)

AB 1396 reestablishes a previous statutory requirement that out-of-state employers must provide written information about commission compensation to employees. Also, for the first time, it requires all employers in the state to have written commission agreements as of January 1, 2013. The contract must set forth the method by which the commissions will be computed and paid. It also provides that upon the expiration of the terms of the contract, if the parties continue working under the expired contract, the contract's terms are presumed to remain in full force and effect until the contract is expressly superseded by a new contract or the employment relationship is terminated. The bill provides a specific definition of what constitutes "commissions," which will be sure to lead to some confusion, and possibly litigation.

Wage Statements for Farm Labor Contractors (AB 243)

AB 243 amends Labor Code section 226(a) to expand the information that must be included on pay statements, but only for Farm Labor Contractors (FLCs). Employers that are FLCs must now disclose on the itemized payroll statement furnished to their employees, the name and address of all applicable growers or other FLCs that secured the employer's services.

Agricultural Labor Relations (SB 126)

SB 126 provides that the Agricultural Labor Relations Board can certify a union as the bargaining agent for employees if it finds employer misconduct, "in addition to affecting the outcome of the election, would render slight the chances of a new election reflecting the free and fair choice of employees."

Conclusion

California employers must be prepared to comply with these new laws, most of which become effective in January of 2012, in a short amount of time. In particular, employers that expect to hire employees in the new year should take the time now to institute procedures to comply with AB 469's notice requirements. Similarly, employers with commissioned employees should start preparing to institute their new written agreements and revising their policies and procedures accordingly.

Should you have any questions about the impact of these new bills, please contact the Ogletree Deakins attorney with whom you normally work or the Client Services Department at 866-287-2576 or via email at clientservices@ogletreedeakins.com.