Cooley

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On October 9, 2011, California Governor Jerry Brown signed into law a series of bills impacting the landscape of California employment law. Employers will want to take note of these new laws, which may require revision of existing employment policies and practices. Except where indicated, the new laws are effective January 1, 2012.

Limits on required use of E-Verify

Established by Congress in 1996, "E-Verify" is a free and voluntary web-based system that allows U.S. employers to verify the work authorization of newly hired employees by checking information on Form I-9s with Department of Homeland Security and the Social Security Administration databases.

Under the Employment Acceleration Act of 2011 (AB 1236), California state and local government entities are prohibited from requiring employers to use E-Verify or other electronic employment verification systems except when required by federal law or as a condition of receiving federal funds. In other words, the law ensures that city, county and state governments cannot require the use of E-Verify or similar systems by private business owners; rather, for most private employers, these systems remain optional.

Limits on employer use of consumer credit reports

AB 22 prohibits most public and private employers in California from obtaining "consumer credit reports" for employment purposes, unless the person for whom the report is being sought is applying for one of the following positions: (1) a position in the state Department of Justice; (2) a managerial position (which must meet the executive overtime exemption of California law); (3) a sworn peace officer or other law enforcement position; (4) a position for which the information contained in the report is required by law to be disclosed or obtained; (5) a position that affords regular access to specified personal information other than in connection with the routine solicitation and processing of credit card applications in a retail establishment; (6) a position where the individual is or will be a named signatory on the bank or credit card accounts of the employer and/or authorized to transfer money or authorized to enter into financial contracts on the employer's behalf; (7) a position that affords access to confidential or proprietary information; or (8) a position that affords regular access to at least $10,000 in cash. The law requires that the written notice informing the person that a consumer credit report is being sought for employment purposes also inform that person of the specific justification for obtaining the report.

The law defines a "consumer credit report" as any written, oral, or other communication of any information by a consumer credit reporting agency bearing on a consumer's credit worthiness, credit standing, or credit capacity. This does not include a report that verifies income or employment, or a report omitting credit-related information such as a credit history, score or record. For example, a criminal background check is not included in the definition of "consumer credit report."

Protected classes now explicitly include gender identity and gender expression

The Gender Nondiscrimination Act (AB 887) amends California's antidiscrimination laws (including the Fair Employment and Housing Act) to explicitly include "gender identity" and "gender expression" as protected classifications. California law already indirectly prohibits discrimination based on these characteristics by including them within the legal definition of "gender." AB 887 removes any potential uncertainty by specifically enumerating "gender identity" and "gender expression" as protected categories.

New law strengthens protection for equal health coverage for registered domestic partners

The Insurance Nondiscrimination Act (SB 757) closes a loophole in California law that allowed employers that operate in multiple states to discriminate by not providing the same health coverage for domestic partners as they provide for spouses, as required by current California law. Under the Insurance Nondiscrimination Act, any group health care service plan contract and any group health insurance policy that is marketed, issued or delivered to a California resident must comply with California's requirements for non-discrimination against registered domestic partners.

New law provides significant penalties for employee misclassification

Under SB 459, Sections 226.8 and 2753 will be added to the California Labor Code to impose significant penalties on employers who are found to have engaged in "willful misclassification" of workers as independent contractors, as well as on non-lawyer advisors who knowingly counsel employers to engage in such misclassification.

The new law gives the Labor and Workforce Development Agency (LWDA) the authority to assess civil penalties of $5,000 to $15,000 per violation, in addition to other penalties or fines permitted by law (including additional civil and liquidated damages authorized to be assessed by the California Labor Commissioner). Violators found to have engaged in a pattern of violations are subject to a civil penalty of $10,000 to $25,000 per violation. Violations also require the employer to post a notice displayed prominently on the employer's website advising employees and the general public of the violation. The LWDA must inform the Contractors State License Board when a licensed contractor violates the law and shall require the Board to initiate an action against the licensee.

Non-lawyers who advise an employer to misclassify a worker are subject to joint and several liability with the employer.

New pay-related notices required

Under the Wage Theft Prevention Act of 2011 (AB 469), employers will be required to provide newly hired non-exempt employees with a written notice at the time of hire that contains all of the following:

- 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 the California Labor 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.
- Any other information the Labor Commissioner deems material and necessary.

The Labor Commissioner is required to prepare and make available a template that employers can use that includes the required information. The employer must notify the employee in writing of any changes to the information in the notice within seven calendar days of the time of the changes, unless the new information is already timely reflected on the employee's wage statement.

The law does not apply to public employees or employees who are exempt from overtime under California's wage orders. However, private employers may want to consider providing the notices to all employees as a matter of course in case a dispute later arises as to whether an employee was properly classified.

Health benefits must continue during pregnancy disability leave

Prior to the passage of SB 299, employers were not required to provide continued health insurance coverage for employees taking leave under the Pregnancy Disability Leave Law (PDL) unless the employee was also eligible for leave under the Family Medical Leave Act (FMLA) or unless the employer provided continued health coverage for other temporary disability leaves. SB 299 requires an employer to continue existing group health coverage for an employee taking PDL for the duration of the leave (which can last up to four months), at the same level and under the same conditions that would have been provided if the employee had not been on leave.

Commission plans must be in writing

Under AB 1396, Section 2751 of the California Labor Code is amended to provide that, effective January 1, 2013, all commission agreements must be in writing and must set forth the method by which the commissions shall be computed and paid. The employer must provide a signed copy of the commission contract to the employee and obtain a signed receipt for the contract from the employee. The law also provides that when a commission contract expires but the parties nevertheless continue to work under the terms of the contract, the contract terms will be presumed to remain in full force and effect until the contract is specifically superseded or employment is terminated.

Prohibition against interfering with, restraining, or denying an employee's right to leave under PDL or CFRA

AB 592 clarifies that it is an unlawful employment practice to "interfere with, restrain or deny the exercise or attempt to exercise" rights to a leave of absence under the California Family Rights Act (CFRA) or the PDL. Prior law had only explicitly prohibited the refusal to allow an employee to take leave under CFRA or PDL. AB 592 makes clear that it does not make changes to, but is merely declaratory of, existing law.

If you would like to discuss any of these laws or have questions about this *Alert,* please contact one of the attorneys listed above.

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