

ROGERS JOSEPH O'DONNELL

## **Labor and Employment Newsletter** *Significant Changes to California Employment Laws for 2012*

In late October, Governor Brown signed into law 22 bills which change California employment law.<sup>1</sup> The following is a list of the most significant employment laws enacted as well as other major changes to employment law. Unless otherwise specified, the new laws will take affect January 1, 2012. Employers who operate in California will want to make it their New Year's resolution to familiarize themselves with these new laws as applicable to their workforces and operations, and revise policies and procedures accordingly.

Bill or Statute	Subject Matter	Description
SB 459	Stiff Penalties for Willful Misclassification of Independent Contractors	Civil penalties ranging from \$5,000 to \$25,000 against any employer that willfully misclassifies workers as independent contractors and a prohibition against charging fees or making deductions from the compensation of misclassified workers when the fees or deductions would have been prohibited if the worker had been classified as an employee.
AB 240, 243, 469	The Wage Theft Protection Act	Employers required to provide a written disclosure of specified basic job terms to nonexempt employees, including the rate of pay, the regular payday, and the address and phone number of the employer.  Also expands record requirements, increases penalties, and creates new penalties or employers who violate Labor Code provisions.

<sup>1</sup> In pleasant news for California employers, Governor Brown vetoed several unappealing employment bills in October 2011. The bills he vetoed include (1) AB 267, which would have invalidated forum selection and choice of law provisions in employment contracts with California employees; (2) AB 325, which would have required California employers to provide bereavement leave; and (3) SB 931, which would have imposed new requirements for use of payroll cards.

AB 22	Employer's Use of Credit Checks for Employment Decisions	Prohibits employers and prospective employers, with certain exceptions, from obtaining and using consumer credit reports (credit information) about applicants or employees.
AB 1396	Written Commission Pay Arrangements	Employers who have commission pay arrangements must have those arrangements memorialized in a signed written contract, by January 1, 2013, setting forth the method by which the commissions will be computed and paid.
SB 299	Pregnancy Disability Leave	All employers with five or more employees must maintain and pay for health coverage under a group health plan for an eligible employee who takes Pregnancy Disability Leave up to a maximum of four months. The benefits must be at the same level and under the same conditions as if the employee had continued working during the leave period.
San Francisco Minimum Wage Ordinance	Minimum Wage Increase	Minimum Wages for employees working in San Francisco County increases to \$10.24 per hour.
SB 559	Genetic Information Used for Employment Decisions	Employers are prohibited from discriminating against employees on the basis of genetic information.
AB 997	Gender Expression	Amends the Fair Employment and Housing Act to further define "gender" to include both gender identity and "gender expression," and to prohibit discrimination on either basis.
Labor Code § 515.5	Minimum Pay Rate for Computer Professionals	To meet the computer professional exemption from overtime pay, an employee's minimum hourly rate, monthly salary, and annual salary have increased.

Labor Code § 515.6	Minimum Pay Rate for Licensed Physicians/Surgeons	To meet the licensed physician/surgeon exemption from overtime pay, employees must earn at least \$70.86 per hour.
SB 272	Paid Organ and Bone Marrow Donor Leave	Clarifies California’s organ and bone marrow donor leave law.
AB 551	Prevailing Wage Violations	Increases the penalty for prevailing wage violations.
SB 117	State Contractors and Equal Benefits for Same Sex Spouses	Prohibits the state of California from entering into contracts of more than \$100,000 with companies that discriminate against the employees on the basis of gender or sexual orientation with regard to benefits.
National Labor Relations Act	Notice of Right to Organize Under NLRA	As of April 31, 2012, most private sector employers are required to post a notice advising employees of their rights under the National Labor Relations Act.
AB 1236	Authorized to Work in the United States	Prohibits California state agencies and local governments from passing laws that require employers to use E-Verify as a means to verify whether the employees they hire are authorized to work in the United States.

*Click on the links or see below for a more detailed explanation of the impact of each of the laws listed above.*

**Tougher Penalties for Misclassification of Independent Contractors, Including a “Scarlet Letter” - SB 459**

SB 459 adds two Labor Code provisions creating heavy penalties for willful misclassification of employees as independent contractors. The law defines “willful” as “voluntarily and knowingly misclassifying” an individual. The law also makes it unlawful for an employer to charge any fees or other deductions (e.g., for licenses, space rental, equipment) from a willfully misclassified individual’s compensation if those fees and deductions would have been prohibited had the individual been properly classified as an employee. In the event of a finding of willful misclassification, penalties may be assessed in the range of \$5,000 to \$15,000 per violation, and the penalty can be increased to \$25,000 per violation if there is a “pattern and practice” of willfully misclassifying workers. These new penalties are *in addition* to existing taxes, possible unpaid overtime wages, and other penalties and interest which may be imposed by various agencies, including the Department of Labor Standards and Enforcement, California’s Workers’ Compensation Board, the

Unemployment Insurance Appeals Board, the Employment Development Department, and of course, the IRS.

A penalty of public notice may now be imposed where a willful misclassification is found: an employer found to have willfully misclassified employees as independent contractors may be ordered to display prominently on its website a notice that explains the employer has been found guilty of committing a “serious violation” of the law, along with other prescribed information. An employer who does not have a website will be required to prominently display the notice in an area that is accessible to all employees and the general public (at each location where a violation occurred). The notices are to be posted for *one year* after a final decision has been issued.

The new law also imposes joint and several liability on individuals who knowingly advise an employer to treat an individual as an independent contractor to avoid employee status. Excepted from liability are employees who provide advice to their employer, and licensed attorneys providing legal advice to the employer. Consultants and tax advisors, however, are not excluded from liability.

Employers who use independent contractors should work with counsel to undertake a comprehensive review of these relationships to ensure those workers have been properly classified, and if issues exist, develop an appropriate plan for resolving any issues.

### **The Wage Theft Prevention Act Pay Rate Notices Required for Newly Hired Non-Exempt Employees, Expanded Record Requirements, and Increased Penalties for Labor Code Violations - AB 240, 243, 469**

The Wage Theft Prevention Act of 2011 adds Labor Code section 2810.5, which requires employers to provide non-exempt employees with a notice upon hiring specifying:

- (1) the employee’s rate of pay and the basis thereof (i.e., whether hourly, salary, commission or otherwise, as well as overtime rates);
- (2) allowances, if any, claimed as part of the minimum wage, including meals or lodging;
- (3) the employer’s regular paydays;
- (4) the name of the employer, including any “doing business as” names used by the employer;
- (5) the physical address and telephone number of the employer’s main office or principal place of business, and a mailing address if different, and
- (6) the name, address, and telephone number of the employer’s workers’ compensation carrier.

Additionally, if the information contained on the new hire notice changes at a later date, the employer must notify affected employees of the changes in writing within seven days of the changes, unless the changes are reflected elsewhere, such as on the employee's pay stubs. Section 2810.5, provides an exception to non-exempt employees subject to collective bargaining agreements (CBAs) so long as the applicable CBA addresses wages and provides for an hourly rate exceeding 30-percent of the state minimum wage. Section 2810.5 does not apply to public employees.

Unless one of the exceptions apply, employers should be prepared to provide these notices immediately to newly hired non-exempt employees. As a best practice, employers should consider providing similar notices to all employees regardless of exempt status.

In addition to the new hire notice requirement, employers should be aware that the Wage Theft Prevention Act expands record requirements, increases penalties, and creates new penalties for employers who violate Labor Code provisions. For example:

- Labor Code section 1174 has been amended to extend the time an employer is required to maintain payroll records from two years to three years. In addition, an employer may not prevent an employee from maintaining a personal record of his hours worked. Labor Code section 226 has also been amended to require employers who are farm labor contractors to disclose on itemized wage statements (pay stubs) the name and address of the legal entity that secured the employer's services.
- Newly added Labor Code section 200.5 expands the statute of limitations for the Labor Commissioner to collect statutory penalties and fees from one to three years.
- Newly added Labor Code section 1197.2 imposes civil and criminal penalties on employers who willfully fail to pay a final court judgment or final order issued by the Labor Commissioner for wages due to an employee whose employment ended within 90-days of the date that the judgment became final. Violating employers face civil penalties ranging between \$1,000 to \$20,000 per violation and may be charged with a misdemeanor.
- Newly added Labor Code section 1194.3 allows employees to recover attorneys' fees and costs incurred in conjunction with enforcing a court judgment for unpaid wages.
- Labor Code section 98 is amended to allow an employee recover liquidated damages for minimum wage violations in an action before the Labor Commissioner. Existing law allows such damages in any complaint before a civil court, but not in an administrative proceeding before the Labor Commissioner. This new law would allow the Labor Commissioner to also award such damages. Under the new liquidated

damages provision, an aggrieved employee would be entitled to recover an amount equal to the wages unlawfully unpaid, plus interest.

### **Limits on Use of Credit Checks by Employers - AB 22**

In recent years, many employers have used credit checks during the hiring process to screen applicants, presumably to assess, among other things, applicants' honesty, integrity and ability to manage their personal finances. Under previous California law, employers were permitted to request credit reports so long as they provided employees and prospective employees with specific notices. The new law, AB 22, limits California employers' ability to use credit reports for employment purposes. Under the new law, employers (with the exception of certain financial institutions) are prohibited from obtaining or relying on credit reports for applicants and employees, unless the report is sought in relation to:

- (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 consumers' 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 if the employer is permitted to obtain a credit report under one of the exceptions outlined above, the employer must first provide written notice to the applicant or employee, specifying the permissible basis for requesting the report and providing a box for the employee/applicant to check off to request a copy of the report, which must be provided free of charge and at the same time the employer receives its copy of the report. If employment is denied based on information in a credit report, the employer must advise the

applicant/employee and provide the name and address of the credit reporting agency that supplied the report.

Going forward, employers should assess whether or not credit checks are authorized and revise their applicant forms and hiring procedures accordingly.

### **Written Commission Plans Required – AB 1396**

This new law requires commission pay arrangements to be set forth in a written contract. Under the new law, whenever an employer enters into a contract of employment with an employee for services to be performed in California and the employee's compensation involves commissions, the contract must be in writing and set forth the method by which the commissions will be computed and paid. The employer must give a signed copy of the contract to the employee and must retain the employee's signed receipt of the contract. In the event the contract by its terms expires but the parties nevertheless continue to work under the expired contract, its 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 deadline for employers to reduce all commission agreements to writing is **January 1, 2013**.

For purposes of the new law, "commissions" are defined in accordance with Labor Code section 201.4 as compensation paid to any person in connection with the sale of the employer's property or services and based proportionately upon the amount or value thereof. However, the new law specifies that "commissions" does not include short-term productivity bonuses or bonus and profit-sharing plans, unless they are based on the employer's promise to pay a fixed percentage of sales or profits as compensation for work. Failure to comply could subject an employer to an action for penalties of \$100 per pay-period per aggrieved employee under Labor Code section 2698, the Private Attorneys General Act.

### **Group Health Plans Must Be Continued Throughout Duration of Pregnancy Disability Leave - SB 299**

SB 299 requires California employers to continue group health coverage to employees on pregnancy disability leave for up to four months. California employers with five or more employees have long been required to comply with California's law permitting employees disabled by pregnancy, birth, or related medical condition to take a protected leave of absence of up to four months. This leave is in addition to statutorily required federal Family Medical Leave (FMLA) and the state counterpart, the California Family Rights Act (CFRA) leave of absence, which separately provides employees up to 12 weeks of leave for, among other things, baby bonding (if the employer has 50 or more employees within 75 miles and the employee meets the FMLA/CFRA eligibility requirements).

Prior to the passage of SB 299, employees on pregnancy disability leave were entitled to the same benefits provided by an employer to employees on other types of disability leaves. With respect to continuation of group health benefits, many employers limit the continuation of such coverage to 12 weeks, as this is the required time period for

continuation of coverage under the FMLA/CFRA for family and medical leaves of absence. With the passage of SB 299, California employers must extend the continuation period to four months for pregnancy disability leaves.

As specified in the legislation, group health benefits must be continued on the same terms and conditions as if the employee continued actively reporting to work. Therefore, if the employer pays the entire premium for employee coverage, it must continue to do so for up to four months of pregnancy disability leave. If the employee normally pays a portion of the premium, the employee may be required to continue making such contributions (either for self or for dependent coverage) during the leave. Additionally, if the employee fails to return from pregnancy disability leave, the employer may recoup from the employee the premiums the employer paid to continue the employee's coverage during the leave, unless the reason the employee did not return is because of a continuing disability or because the employee took a separate protected leave (e.g., leave under the FMLA/CFRA).

### **Other Notable Changes and Developments in Employment Law Affecting Employees Working in California**

- Increase to San Francisco Minimum Wage: On January 1, 2012, the minimum wage for employees working in the City and County of San Francisco increases to \$10.24 an hour (a 32 cent increase from the 2011 rate which was \$9.92 an hour.)
- Employment Decisions Based on Genetic Information Prohibited – SB 559: This new law amends the Fair Employment and Housing Act such that employers are now expressly prohibited from making employment decisions based upon an employee's genetic information. This is California's version of the relatively recent federal law known as GINA (the Genetic Information Nondiscrimination Act), which among other things, bars employers from intentionally acquiring genetic information from employees and applicants. The FEHA already prohibited employers from subjecting applicants to genetic testing. Employers should make sure that their policies and medical certification forms are updated to comply with these laws.
- FEHA Amended to Clarify that Gender Identity and Expression Are Protected Characteristics – AB 997: This new law amends the Fair Employment and Housing Act (as well as various other laws) to make 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. The new law also requires employers to allow an employee to appear or dress consistently with the employee's gender expression.
- Increase to Minimum Rate of Pay for Computer Professional Exemption: Under Labor Code section 515.5 certain computer software employees can be exempt from overtime provided various criteria are met, including a minimum rate of pay.

Beginning in the new year, to meet the computer professional exemption, employees must earn at least \$38.89 per hour (a 95 cent increase from the prior minimum hourly rate of \$37.94), the minimum monthly salary has increased to \$6,752.19 (previously \$6,587.50 per month), and the minimum annual salary has increased to \$81,026.25 (previously \$79,050.00 per year).

- Increase to Minimum Rate of Pay for Licensed Physicians/Surgeons Exemption: Labor Code section 515.6 provides an exemption for licensed physicians and surgeons provided certain criteria are met, including a minimum hourly rate requirement. As of January 1, 2012, the minimum hourly rate necessary to satisfy this exemption increases to \$70.86 (the 2011 minimum rate was \$69.13 per hour).
- Requirements for Paid Organ and Bone Marrow Donor Leave Clarified – SB 272: In 2011, Labor Code section 1508 *et seq.* was added requiring employers with 15 or more employees to provide up to 30 days of paid leave for employees to donate an organ and up to five days to donate bone marrow. SB 272 clarifies the existing law to provide that the 30—day paid leave is 30 business days, not calendar days, and that employers are required to maintain their employee's health benefits at the same level during the leave.
- Increased Penalties for Prevailing Wage Violations – AB 551: This law increases the penalty for prevailing wage violations to between \$40 to \$200 per violation, per worker for each calendar day. The law also increases the penalty assessed to contractors and subcontractors with prior prevailing wage violations from \$20 to \$80, and from \$30 to \$120 for willful violations. Additionally, the law increases the penalty to \$100 per calendar day per worker for contractors and subcontractors who fail to respond within 10 days to a written request for payroll records.
- State Contractors Must Provide Equal Benefits to Employees with Same Sex Spouses – SB 117: As a result of this new law, the state of California is prohibited from entering into contracts of more than \$100,000 with companies that discriminate against the employees on the basis of gender or sexual orientation with regard to benefits. The new law makes it clear that companies doing business with the state of California cannot deny equal benefits to same-sex spouses.
- Employers Required to Post Notice of Right to Organize: As of April 31, 2012, most private sector employers are required to post a notice advising employees of their rights under the National Labor Relations Act, including the right to organize a union or otherwise engage in collective bargaining. (The original effective date was postponed due to litigation.) The notice should be posted in a conspicuous place, where other notifications of workplace rights and employer rules and policies are posted. Employers

also should publish a link to the notice on an internal or external website if other personnel policies or workplace notices are posted there.

- E-Verify Requirements Prohibited – AB 1236:  
This new law prohibits the state, or a city, or county from requiring employers to use E-Verify as a means of verifying employees they hire are authorized to work in the United States.

If you employ workers in California and have questions on how these new laws will affect you, please contact the Rogers Joseph O'Donnell attorney with whom you regularly work or any member of our Labor and Employment Practice Group.

Gayle M. Athanacio (gathancio@rjo.com)  
Dennis C. Huie (dhuie@rjo.com)  
Alexis J. Morris (amorris@rjo.com)  
Charlie Y. Chou (cchou@rjo.com)  
Christine S. Liyanto (cliyanto@rjo.com)  
Suzanne M. Mellard (smellard@rjo.com)  
Sharon Ongerth Rossi (srossi@rjo.com)

Rogers Joseph O'Donnell, P.C.  
Robert Dollar Building, 10th Floor  
311 California Street  
San Francisco, CA 94104  
Phone: 415.956.2828  
Fax: 415.956.6457

*The content of this article is intended to provide a general guide to the subject matter, and is not a substitute for legal advice in specific circumstances.*