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Employment Law Alert

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California Governor Signs Important New Employment Laws for 2012

By the time the deadline to sign or veto legislation expired at midnight on October 9, Governor Brown had signed a number of important employment-related bills into law -- including measures that impact employer obligations regarding commission agreements, credit checks, health coverage during leaves of absence, independent contractors, and more. Here is a brief overview of the key measures, which take effect on January 1, 2012, unless otherwise noted:

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A.B. 22 prohibits employers, excluding financial institutions, from obtaining consumer credit reports on applicants or employees, except in limited circumstances. The law does not bar employers from conducting criminal background checks or checking references, or from doing credit checks where required by law. The measure also contains a number of other exceptions to the credit check prohibition. For example, credit checks are permissible if the position of the person for whom the report is sought (a) is a managerial-level job covered by the executive exemption from overtime, (b) involves being a named signatory on the employer's bank or credit card account, or (c) includes the authority to transfer money or enter into financial contracts on the employer's behalf. Also, prior to obtaining a credit report, an employer must notify the individual of the specific basis/exception for the request (managerial position, etc.).

A.B. 240 permits employees, in proceedings before the Labor Commissioner for underpayment of minimum wages, to recover liquidated damages of twice the amount of wages that were unpaid, plus interest. Previously, employees could recover liquidated damages only in court actions.

A.B. 592 adds new language to the California Family Rights Act (CFRA) specifying that it is an unlawful employment practice “to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under” the CFRA. This amendment should not result in significant changes for California employers because it is similar to existing language in the federal Family and Medical Leave Act (FMLA).

A.B. 887 revises the Fair Employment and Housing Act (FEHA) to include gender, gender identity, and gender expression in the list of protected characteristics (along with race, sex, age, disability, etc.). Gender expression is defined as a "person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."

A.B. 1236 prohibits the state, counties, or cities from requiring private employers to use the federal government's E-Verify system. Note that, for most employers, the use of E-Verify is voluntary.

A.B. 1396, which takes effect January 2013, imposes substantial new obligations on employers that pay employees on commission. Employers will be required to (a) use written commission agreements that specify the method for calculating the commission, (b) provide a copy of the agreement to the employee, and (c) obtain a signed receipt from the employee signifying that he or she has received the agreement. These contracts will remain in effect, even if they expire, until superseded by a new agreement or employment terminates. The law defines commission wages as compensation paid for services rendered selling the employer's property or services and based proportionately on the amount or value of the sale. Commissions do not include bonus and profit-sharing plans, unless the amounts are a fixed percentage of sales or profits as compensation for work to be performed, and do not include short-term productivity bonuses such as are paid to retail clerks.

S.B. 272 clarifies the organ/bone marrow donor paid leave law that took effect on January 1, 2011. The law now specifies that the paid leave periods under the existing law (30 days for organ donors and five days for bone marrow donors) are measured in business days and that employers must maintain an employee's health benefits during the leave.

S.B. 299 requires employers with five or more employees to maintain group health coverage for employees on a pregnancy disability leave (PDL), for the four-month duration of the PDL. This new law will have an impact for all employers. For employers with 50 or more employees, the requirement to maintain health benefits was capped at 12 weeks during a pregnancy leave covered by the FMLA. And, smaller employers had no obligation to maintain health coverage during a PDL (unless the employer did so for other types of leaves).

S.B. 459 imposes a fine -- from $5000 to $25,000 -- on employers that "willfully" misclassify someone as an independent contractor, and prohibits charging someone who has been misclassified a fee or making deductions from his or her compensation where the fee or deduction would have violated the law had the person not been misclassified. The new law also imposes liability on non-attorney consultants who knowingly advise employers to treat someone as an independent contractor to avoid employee status. If the Labor and Workforce Development Agency (LWDA) or a court determines that there has been a violation under this statute, the employer will be required to post a notice inviting any employee who believes they are misclassified to contact the LWDA. The measure defines “willful misclassification” as “avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor.”

S.B. 559 expands the FEHA and Unruh Civil Rights Act to prohibit discrimination on the basis of genetic information, similar to federal GINA (the Genetic Information Nondiscrimination Act). Note that existing California law already barred employers from subjecting applicants or employees to genetic testing or from discriminating based on genetic characteristics.

We will have full details on all of these measures -- and other employment law developments -- in our annual Year in Review Webinar, to be held in December. We will send out registration details as the date approaches.

Miller Law Group exclusively represents business in all aspects of California employment law, specializing in litigation, risk management, wage and hour class actions, ERISA litigation, and appellate law. If you have questions about your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or Carolyn Rashby (cr@millerlawgroup.com), or call (415) 464-4300. To learn more about our firm, visit our website at www.millerlawgroup.com.

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