

November 7, 2012

Employee Handbooks: New Developments Highlight Need for 2013 Updates

As we near the close of 2012, California employers should consider conducting a thorough review and update of their employee handbooks. The California legislature has enacted a host of new laws that will impact workplace policies and procedures for 2013. And, courts and the National Labor Relations Board (“NLRB”) were in full swing this year, resulting in a host of other new employer obligations. This Alert provides an overview of key recent developments of which employers need to be aware.

New California Laws for 2013

The California legislature was busy in 2012, enacting a number of important employment laws. All laws mentioned below take effect on January 1, 2013.

Restrictions on employer access to social media (A.B. 1844): Employers are prohibited from requiring or requesting an employee or applicant for employment to: (1) disclose their username or password for personal social media (for example, on sites such as Facebook and Twitter); (2) access personal social media in the presence of the employer; or (3) divulge any personal social media, with certain exceptions. Employers may request that an employee divulge personal social media if it is reasonably believed to be relevant to an investigation of employee misconduct, provided that the social media is used solely for the purposes of the investigation. Additionally, employers may require an employee to disclose a username or password if necessary to access an employer-issued electronic device. The new law prohibits retaliation against employees or applicants who refuse to comply with requests that violate the statute.

Accommodation of religious dress and grooming requirements (A.B. 1964): This law clarifies that an employer’s existing duty under the California Fair Employment and Housing Act (“FEHA”) to reasonably accommodate employees’ religious beliefs and observances includes accommodations for religious dress and grooming practices. See our [September 17, 2012 Employment Law Alert](#) for more details on this new law.

111 SUTTER STREET
SUITE 700
SAN FRANCISCO
CA 94104
415 464 4300 T
415 464 4336 F

12121 WILSHIRE BLVD.
SUITE 1300
LOS ANGELES
CA 90025
310 943 8500 T
310 943 8501 F

Breastfeeding as a protected classification (A.B. 2386): “Breastfeeding” and “medical conditions related to breastfeeding” have been added to the statutory definition of “sex” under the FEHA.

Employee access to personnel records (A.B. 2674): This law expands employer obligations regarding employee requests to inspect their personnel files. The law specifies that employees may make a written request to inspect the records or obtain a copy, and employers must make the records available within 30 days. The law also directs employers to prepare a form that employees may, optionally, use to request the records, and clarifies that former employees have a similar right to review and obtain a copy of personnel files. We are preparing a separate Employment Law Alert that provides full details on A.B. 2674.

Written commission agreements (A.B. 1396, A.B. 2675): Pursuant to A.B. 1396, which was passed in 2011 but takes effect January 1, 2013, employers are required to put commission agreements in writing -- this applies to all employees who are on commission, whether exempt from overtime or not. The law exempts from its coverage certain types of payments: (1) short-term productivity bonuses such as are paid to retail clerks; and (2) bonus and profit-sharing plans, unless the employer offers to pay a fixed percentage of sales or profits as compensation for work to be performed. A.B. 2675 adds a third excluded category for “temporary, variable incentive payments that increase, but do not decrease, payment under the written contract.” For full details on the new requirements, you can access our complimentary recorded webinar, [“Commission Agreements in California: A Toolkit for Managing Your Risks and Obligations Within the Law.”](#)

Wage agreements (A.B. 2103): This bill specifies that payment of a fixed salary to a nonexempt employee includes compensation *only* for the employee’s regular, non-overtime hours. Employers are barred from entering into private agreements with nonexempt employees for the payment of a fixed salary that includes overtime hours.

Wage statement violations (A.B. 1744, A.B. 2674, S.B. 1255): This law defines what is an injury for purposes of wage statement (pay stub) violations. An employee suffers injury if the employer fails to provide a wage statement or fails to provide accurate and complete information and the employee cannot promptly, and with reference only to the wage statement, determine gross or net wages for the pay period, deductions, employer’s name and address, and employee’s name and last four digits of SSN or employee identification

number. This law also includes a number of provisions specific to temporary services employers. Most temporary services employers must now include on wage statements the name and address of each entity that obtained the temporary employee's services, the pay rate, and total hours worked for each entity. In addition, on new hire notices required under the Wage Theft Prevention Act (Labor Code sec. 2810.5), temporary services employers must include the name, physical and/or mailing address, and telephone number of the legal entity for whom the employee will perform work.

Wage garnishment (A.B. 1775): The amount of wages exempt from wage garnishment has been increased. In addition, the law provides new definitions and formulas to determine "disposable earnings" for wage garnishment purposes.

Retirement savings (S.B. 1234): Employers must offer a payroll deposit retirement savings arrangement so that eligible employees, as defined, could contribute a portion of their salary or wages to a retirement savings account in the California Secure Choice Retirement Savings Program.

Human trafficking poster (S.B. 1193) requires certain businesses as specified in the statute to post a notice, where it can be seen by employees and the public, with information about organizations that provide services to eliminate slavery and human trafficking. A model notice will be developed by the Department of Justice, and the posting deadline is April 1, 2013.

Employers can access any of the bills online at www.leginfo.ca.gov.

Other 2012 Key Developments Impacting Employee Handbooks

In addition to new California legislation, there are a number of other developments that impact employee handbooks and other workplace policies and procedures for 2013, as follows:

The Brinker decision: In April 2012, the California Supreme Court issued the landmark decision in *Brinker Restaurant Corp v. Superior Court*, 53 Cal. 4th 1004 (2012), underscoring the importance of having compliant policies, procedures and practices

regarding meal and rest break periods, as well as a policy prohibiting off-the-clock work. In *Brinker*, the California Supreme Court:

- Held that employers need not ensure that meal periods are taken -- they only must provide a meal period;
- Held that employers are not required to provide a meal period for every five consecutive hours worked;
- Explained what it means for employers to provide a rest break for every four hours worked or major fraction thereof; and
- Held that employers are not required to provide a rest break before a meal period.

For more information on the *Brinker* decision and implications for wage and hour compliance, see our [April 26, 2012 Employment Law Alert](#).

NLRB memoranda and decisions. The National Labor Relations Board made an impact in 2012, with a number of memoranda and decisions making it clear that employer social media and other workplace policies (including confidentiality, conduct, and more) must be carefully drafted to avoid interference with employee rights under the National Labor Relations Act (“NLRA”). The NLRB found a variety of social media policies and provisions, ranging from no-defamation/non-disparagement rules to confidentiality requirements to policies limiting the use of logos, trademarks and communications with the media, to be overly broad and in violation of employee rights under the NLRA. See our Employment Law Alerts ([September 26](#), [June 4](#), and [April 9, 2012](#)) for more details on these NLRB developments and the implications for your handbook review.

Handbook Updates and Year in Review Webinar

In light of these developments, employers should be certain before year’s end to undertake a thorough review and update of their employee handbooks and other workplace policies and procedures, to ensure compliance as of January 1, 2013. Also, be sure to join Miller Law Group on December 11, 2012 for our annual “Year in Review and Look Ahead” webinar, where we will review these developments and more, and provide practical compliance tips. You can register at www.millerlawgroup.com/webinars.html.



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, trials 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.

This Alert is published by Miller Law Group to review recent developments in employment law. This material is designed to provide informative and current information as of the date of the Alert, and should not be considered legal advice.