



The Personnel File

NEWS AND DEVELOPMENTS IN EMPLOYMENT LAW FOR CALIFORNIA'S EMPLOYERS

2012 Employment Law Update for California Private Sector Employers

January 4, 2012

Unlike previous years, 2012 brings several labor and employment law changes for California's private sector employers. Below is a brief summary of these changes (all went into effect on January 1, 2012, unless otherwise noted):

CALIFORNIA LAW

Employment Discrimination

AB 887 – No Discrimination on the Basis of Gender Identity or Gender Expression

AB 887 amended the Fair Employment and Housing Act (FEHA) and the workers' compensation laws to include in the definition of the protected category of "sex" both gender identity and gender expression. Gender identity has been generally protected under FEHA since 2004. This new law expands this protection to cover gender expression and to cover an individual's gender-related appearance and behavior regardless of whether stereotypically associated with the person's assigned sex at birth. This includes requiring an employer to allow an employee to appear or dress consistently with the employee's gender expression.

Amends Government Code sections 12920, 12921, 12926, 12930, 12931, 12935, 12940, 12944, 12949, 12955, 12955.8, 12956.1 and 12956.2 (FEHA); and Labor Code section 3600.

SB 559 – No Discrimination on Basis of Genetic Information

SB 559 expands upon the federal Genetic Information and Nondiscrimination Act of 2008 (GINA) and existing California laws and prohibits discrimination on the basis of genetic information. SB 559 defines genetic information as, with respect to any individual, information about any of the following: (i) the individual's genetic tests; (ii) the genetic tests of family members of the individual; and (iii) the manifestation of a disease or disorder in family members of the individual. Genetic information also includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual. Genetic information does not include information about the sex or age of any individual.

Amends Government Code sections 11135, 12920, 12921, 12926, 12926.1, 12930, 12931, 12935, 12940, 12944, 12955, 12955.8, 12956.1, 12956.2, and 12993 (FEHA).

Independent Contractors

SB 459 – Penalties for Willful Misclassification of Independent Contractors

SB 459 prohibits *willful misclassification* of individuals as independent contractors. Willful misclassification is defined as avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor. This bill also prohibits charging an individual who has been mischaracterized as an independent contractor a fee or making deductions from compensation if those acts would have violated the law if the individual had been properly classified as an employee. SB 459 allows an employee to file a complaint with the Labor Commissioner and authorizes the Commissioner to assess both civil and liquidated damages against a person or employer based on a determination that the person or employer has violated these prohibitions. Outside consultants (except attorneys) who knowingly advise an employer to treat an individual as an independent contractor to avoid employee status can be held jointly and severally liable with the employer if the individual is not found to be a valid independent contractor.

Adds Labor Code sections 226.8 and 2753.

Wage and Hour

AB 240 – Employees Can Recover Liquidated Damages on Minimum Wage Claims before the Labor Commissioner

The Labor Commissioner may investigate employee complaints and provide a hearing in any action to recover wages, penalties and other demands for compensation properly before the Division of Labor Standards and Enforcement (DLSE) and to determine all matters arising under its jurisdiction. Previously, an employee could only recover liquidated damages in a court action alleging payment of less than the state minimum wage. AB 240 permits an employee to recover liquidated damages under a Labor Commissioner complaint alleging payment of less than the minimum wage fixed by an order of the Industrial Welfare Commission or by statute.

Amends Labor Code sections 98 and 1194.2.

AB 469 – The Wage Theft Prevention Act of 2011

The Wage Theft Prevention Act of 2011 mandates that private sector employers provide notice to new hire nonexempt, non-unionized employees regarding certain wage and hour information

in addition to the specific wage and hour information that is already required to be posted in the workplace.

This new law requires an employer to provide each new employee, at the time of hire, a written notice containing the following information:

- (A) 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.
- (B) Allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances.
- (C) The regular payday designated by the employer in accordance with the requirements of this code.
- (D) The name of the employer, including any "doing business as" names used by the employer.
- (E) The physical address of the employer's main office or principal place of business, and a mailing address, if different.
- (F) The telephone number of the employer.
- (G) The name, address and telephone number of the employer's workers' compensation insurance carrier.
- (H) Any other information the Labor Commissioner deems material and necessary.

The new law also requires employers to notify each employee in writing of any changes to the information set forth in the notice within seven calendar days of the changes unless the changes are reflected on a timely wage statement or another writing. The Labor Commissioner has issued a template notice to comply with this new requirement that is available online at:

http://www.dir.ca.gov/dlse/Governor_signs_Wage_Theft_Protection_Act_of_2011.html

Although the new law only expressly applies to new hire covered employees, the Labor Commissioner has opined that this notice be provided to all covered employees – current employees and new hire employees.

AB 469 also: (1) Extends the Labor Commissioner's ability to require employers to pay restitution for unpaid wages below minimum wage; (2) Makes it a misdemeanor if an employer willfully violates specified wage statutes or orders; and (3) Extends the statute of limitations for collection actions from one to three years

Amends Labor Code sections 98, 226, 240, 243, 1174 and 1197.1, and adds Labor Code sections 200.5, 1194.3, 1197.2, 1206 and 2810.5.

AB 1396– Employee Commission Written Contract Requirement

AB 1396 will, **by January 1, 2013**, require employers who enter into a contract of employment involving commissions as a method of payment for services to be rendered to put the contract in writing and to set forth the method by which the commissions are required to be computed and paid.

Amends Labor Code section 2751, and repeals Labor Code section 2752.

AB 243 – Additional Information Required on Itemized Wage Statements for Employees of Farm Labor Contractors

Employers have already been required to furnish each employee with an accurate itemized statement showing, among other things, the name and address of the legal entity of the employer and that a knowing and intentional violation of this provision is a misdemeanor. AB 243 revises the records requirements and requires an employer who is a covered farm labor contractor to disclose in the itemized statement the name and address of the legal entity that secured the employer's services.

Amends Labor Code section 226.

Leaves of Absence

SB 299/AB 592 – Employers Must Maintain Health Insurance Benefits for Employees on Pregnancy Disability Leave

California's Pregnancy Disability Leave law (PDL) entitles a female employee disabled by pregnancy, childbirth or a related medical condition to take a leave of absence for the period of disability of up to four months with a right to reinstatement. However, prior to January 1, 2012, PDL did not mandate that an employer maintain the pregnant employee's health insurance benefits unless it did so for employees on similar leaves of absence. As a result, the only legal mandate during this time to maintain and continue health benefits for a pregnant employee was as provided under the federal Family and Medical Leave Act (FMLA), assuming the pregnant employee qualified for FMLA leave.

SB 299/AB 592 modified PDL and now require an employer to maintain health insurance benefits for an employee who takes PDL at the level and under the conditions that coverage would have been provided if the employee had continued in employment continuously for the duration of the leave. The employer may recover the premiums paid if the employee does not return from leave because of any reason other than the employee taking leave under the California Family Rights Act (CFRA), or the continuation, recurrence, or onset of a health condition that entitles the employee to leave or other circumstance beyond the control of the employee.

Amends Government Code section 12945.

AB 592 – No Employer Interference with the Use of CFRA Rights

AB 592 now clarifies that it is unlawful for an employer to *interfere* with an employee's use of California Family Rights Act (CFRA) leave, in addition to protections preventing discrimination and retaliation against an employee who takes CFRA leave.

Amends Government Code sections 12945.2.

SB 272 – Clarifies Terms of Employee Organ or Bone Marrow Donor Leave Rights

California law requires a private sector employer to grant a leave of absence to an employee who is an organ donor or a bone marrow donor. The leave of absence to an organ donor is for up to 30 days in a one year period. The leave of absence for a bone marrow donor is up to five days in a one year period. The leave of absence for either donor is not a break in continuous service for the purpose of the right to salary adjustments, sick leave, vacation, annual leave or seniority. As a condition of an employee's initial receipt of this leave of absence, an employer may require the employee to take up to five days of earned but unused sick or vacation leave for bone marrow leave and up to two weeks of such leave for organ donation leave, unless that would violate provisions of an applicable collective bargaining agreement. SB 272 now clarifies that the days of leave are business days rather than calendar days, and that the one year period is measured from the date the employee's leave begins and consists of 12 consecutive months. SB 272 also provides that the leave of absence is not a break in the employee's continuous service for the purposes of the employee's right to paid time off. SB 272 further clarifies that an employer may condition the initial receipt of leave upon the employee's use of the earned but unused days for paid time off.

Amends Labor Code section 1510.

Health Insurance

AB 210 – All Group Health Insurance Policies Must Provide Coverage for Maternity Services

AB 210, **commencing July 1, 2012**, requires every group health insurance policy to provide coverage for maternity services for all insureds covered under the policy. Once federal regulations and guidance are issued pursuant to the federal Patient Protection and Affordable Care Act (Public Law 111-148) that define the scope of benefits to be provided under the maternity benefit requirement of that act, the definition of that term under the federal act and associated regulations and guidance shall apply for purposes of this new law.

Adds Insurance Code section 10123.866.

SB 757– Discrimination in Health Insurance for Domestic Partners

SB 757 specifies that an insurance plan or policy may not discriminate in coverage between spouses or domestic partners of a different sex and spouses or domestic partners of the same sex. SB 757 also provides that every group health care service plan contract and every group health insurance policy that is marketed, issued, or delivered to a California resident is subject to the requirements to provide equal coverage to domestic partners as is provided to spouses, notwithstanding any other provision of law.

Amends Health and Safety Code section 1374.58, and adds Health and Safety Code section 1367.30. Amends Insurance Code sections 10112.5 and 10121.7.

Hiring Practices

AB 22 – Limits on the Categories of Jobs for Which an Employer Can Request a Consumer Credit Report

AB 22 prohibits an employer, with the exception of certain financial institutions, from obtaining a consumer credit report for employment purposes concerning an employee or applicant unless the position of the person for whom the report is sought is:

- (1) A position in the state Department of Justice,
- (2) A managerial position, as defined,
- (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 involves regular access to specified personal information for any purpose other than the routine solicitation and processing of credit card applications in a retail establishment,
- (6) A position in which the person is or would be a named signatory on the employer's bank or credit card account, or authorized to transfer money or enter into financial contracts on the employer's behalf,
- (7) A position that involves access to confidential or proprietary information, as specified, or
- (8) A position that involves regular access to \$10,000 or more of cash, as specified.

AB 22 also requires the written notice informing the person for whom a consumer credit report is sought for employment purposes to also inform the person of the specific reason for obtaining the report, as specified.

Amends Civil Code section 1785.20.5, and adds Labor Code section 1024.5, et. seq.

Electronic Personal Information

SB 24 - Requirements for Security Breach Notifications

California law requires any person or business conducting business in California, that owns or licenses computerized data that includes personal information to disclose any breach of the security of the system or data following discovery or notification of the security breach, where unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. SB 24 adds to this law and now also requires any person or business that is required to issue a security breach notification to more than 500 California residents as a result of an incident to also electronically submit a single sample copy of that security breach notification to the California Attorney General.

Amends Civil Code sections 1798.29 and 1798.82.

SB 850 – Electronic Medical Record Systems Must Record Changes or Deletions

The Confidentiality of Medical Information Act (CMIA) already requires that every provider of health care, health care service plan, pharmaceutical company, and contractor who creates, maintains, preserves, stores, abandons, destroys, or disposes of medical records do so in a manner that preserves the confidentiality of the information contained in the record, and provides that negligence in conducting these activities may result in damages or an administrative fine or civil penalty. SB 850 now also requires that covered providers who administer an electronic health or medical record system automatically record and preserve any change or deletion of electronically stored medical information. This new law also requires the record of the change/deletion of the record to include, the identity of the person who accessed and changed the medical information and the change that was made to the medical information.

Amends Civil Code section 56.101.

Employment Safety

A.B. 1136 - Hospital Patient and Health Care Worker Injury Protection Act

This new law amends the California Occupational Safety and Health Act (Cal-OSHA) to require general acute care hospital employers to maintain a safe patient handling policy for patient care units, and to provide trained lift teams or staff trained in safe lifting techniques. The safe patient handling policy requires the replacement of manual lifting and transferring of patients with powered patient transfer devices, lifting devices, or lift teams. As part of the injury and illness prevention programs (IIPP) required by existing law, employers are required to adopt a patient protection and health care worker back and musculoskeletal injury prevention plan, which shall include a safe patient handling policy component to protect patients and health care workers in health care facilities.

Adds Labor Code section 6403.5.

Labor Relations

SB 126 – Revisions to Agricultural Labor Relations Act

SB 126 provides that, if the Agricultural Labor Relations Board (ALRB) refuses to certify an election regarding certification of a labor organization of agricultural employees because of employer misconduct, the labor organization shall be certified as the exclusive bargaining representative for the bargaining unit if the employer's misconduct would render slight the chances of a new election reflecting the free and fair choice of the affected employees.

SB 126 also specifies what the Superior Court is to consider in determining whether temporary relief or a restraining order is just and proper as related to an injunction filed by the ALRB in regards to an unfair labor practice issue. When the alleged unfair labor practice would interfere with the free choice of employees to choose or not choose an exclusive bargaining representative, appropriate temporary relief or a restraining order shall issue on a showing that reasonable cause exists to believe that the unfair labor practice has occurred. The order shall remain in effect until an election has been held or for 30 days, whichever occurs first. The temporary relief or restraining order shall not be stayed pending appeal.

This new law also provides new deadlines related to the use of mandatory mediation where an agreement has not been reached by an employer and a labor organization.

Amends Labor Code sections 1156.3, 1158, 1160.4, and 1164.

Public Works and Prevailing Wage

AB 551 – Public Contracts: Prevailing Wage

This new law increases penalties for violations of prevailing wage provisions to a minimum of \$40 and maximum of \$200 per calendar day for each worker paid less than the prevailing wage. The bill also increases the penalty assessed to contractors and subcontractors with prior violations from \$20 to \$80, and from \$30 to \$120 for willful violations. This law increases the penalty for each contractor and subcontractor performing work on a public works job who fail to keep accurate payroll records regarding his or her employees from \$25/day per employee to \$100/day per employee.

AB 551 also revises a provision of law making a contractor or subcontractor on a public works project who is found to have committed two or more separate willful violations within a three-year period ineligible for a period of up to three years to either bid on or be awarded a contract or perform work as a subcontractor of a public works project. The new law also penalizes a contractor or subcontractor performing work on a public works project who fails to provide a timely response to a request to produce certified payroll records as required by law. For such a violation, the contractor or subcontractor would be ineligible to bid on or be awarded a contract or perform work as a subcontractor on a public works project for a period of not less than one year and no more than three years under most circumstances.

Amends Labor Code sections 1775, 1776, and 1777.1.

AB 587 – Exemption of Prevailing Wage for Volunteers Extended to 2017

Existing law governing public works does not apply to volunteers. These provisions were set to be repealed as of January 1, 2012, but this bill extends that repeal date to January 1, 2017.

Amends Labor Code section 1720.4.

AB 514 - Prevailing Wage: Hauling Refuse

This bill expands the definition of public works projects to include “hauling of refuse” activities at such projects. This is defined to include the hauling of soil, sand, gravel, rocks, concrete, asphalt, excavation materials, and construction debris to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California, or any political subdivision of the state. Such activities are now considered public works requiring the payment of prevailing wages.

The “hauling of refuse” at public works projects does not include the hauling of recyclable metals such as copper, steel, and aluminum that have been separated from other materials at the jobsite prior to transportation and that are to be sold at fair market value to a bona fide purchaser.

Amends Labor Code section 1720.3.

AB 766 –Payroll Records

AB 766 requires **unredacted** copies of certified payroll records maintained by contractors and subcontractors on public works projects be provided upon request to any agency included in, and for the purposes of, the Joint Enforcement Strike Force on the Underground Economy, or to any law enforcement agency.

Amends Labor Code section 1776.

FEDERAL LAW

NLRB Posting Rule Effective April 30, 2012

A new regulation from the National Labor Relations Board (NLRB) requires private sector employers to post in the workplace a notice of employee rights under the U.S. National Labor Relations Act (NLRA). The NLRA governs collective bargaining and union organizing rights for most private sector employees. This posting requirement was set to go into effect on November 14, 2011. The NLRB postpones the effective date of this posting requirement to January 31, 2012 in order to allow more time for employers to become acquainted with this new requirement and to ensure compliance. **Recently, the NLRB postponed the effective date of the notice once again to April 30, 2012.**

The Rights Notice provides a summary of employee rights under the NLRA. It generally provides that "*employees have the right to act together to improve the wages and working conditions, to form, join and assist a union, to bargain collectively with their employer, and to refrain from any of these activities.*" The notice will also provide employees with examples of unlawful conduct by employers and unions and inform employees how to contact the NLRB with questions or complaints.

Employers may not simply post the NLRA Rights Notice where other legally mandated notices are posted. Instead, the NLRB is requiring this notice to be posted "*wherever notices to employees regarding personnel rules and policies are customarily posted and are readily seen by employees.*" This includes internet or intranet sites maintained by the employer where such policies are readily available for employee viewing. Employers will also be required to post the NLRA Rights Notice in languages other than English under certain circumstances. Retailers with a gross annual volume of business less than \$500,000 and nonretail entities that sell or purchase fewer than \$50,000 in annual goods or services may be exempt from this rule. Employers are encouraged to consult with legal counsel for advice on their duties under these posting requirements.

2012 IRS Mileage Reimbursement Rate Stays at 55.5 Cents Per Mile

The IRS mileage reimbursement rate will stay at 55.5 cents per mile during 2012. This rate became effective on July 1, 2011 in a mid-year adjustment. This mileage reimbursement rate is an effective tool in reimbursing employees for personal vehicle usage incurred within the course and scope of employment pursuant to Labor Code section 2802.

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