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Reporter

Employment Law

New Law Wrap Up

Throughout the year we keep you updated on the legal developments that we believe are important for our clients and friends to know. In addition, we are providing this summary of the most important new employment laws and rules that confront employers at year end. Federal and state legislatures are always busy making laws (what do you expect from a bunch of lawyers?), and 2011 has been no exception. So sit back (because you will want to be sitting down for this), try to relax and enjoy!

California Employees on Pregnancy Disability Leave Now Entitled to Four Months of Health Benefits

Governor Jerry Brown recently signed SB 299, which requires California employers to provide up to four months of group health benefits to employees on Pregnancy Disability Leave ("PDL"). Prior to passage of SB 299, employees on PDL were entitled to the same benefits provided to employees on other types of disability leaves. However, many employers chose to limit the continuation of health benefits to twelve weeks in compliance with the requirements of the Family Medical Leave Act ("FMLA") and CFRA for family and medical leaves of absence.

Effective January 1, 2012, California employers must provide health benefits for no less than four months during PDL. Group health benefits must be continued on the same terms and conditions as if the employee continued reporting to work, *i.e.* an employee who normally pays a portion of the premium may be required to continue making such contributions during the leave while an employer who pays the entire premium for employee coverage must continue to do so for up to four months.

The employee may be required to reimburse the employer for any premiums the employer paid if the employee fails to return to work, but the employee will not be required to reimburse the employer where the employee did not return to work because of a continuing disability or because the employee took a separate protected leave under the FMLA or CFRA.

by Kevin J. Pavlik, Esq.

New Credit Report Restrictions

California Governor Jerry Brown recently signed Assembly Bill 22 ("AB 22") into law restricting employers or prospective employers in the state, with the exception of certain financial institutions, from obtaining consumer credit reports to use for employment purposes. AB 22 will amend Section 1785.20.5 of the *Civil Code* and add related provisions to the *Labor Code*.

AB 22 bans the use of pre-employment credit checks for many employers and prohibits employers or prospective employers from obtaining a consumer credit report for employment purposes 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); (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 people's 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 where an employer is permitted to obtain a credit report under one of the above-mentioned exceptions, 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. The copy of the report must be provided free of charge and must be given to the employee contemporaneously with employer's receipt of the report. On or after taking adverse action, *i.e.,* denying employment, on the basis of, in whole or in part, the credit report, the employer must also provide notice of the adverse action and the name, address and telephone number of the agency that prepared the report.

While similar versions of AB 22 had been torpedoed in the past by Governor Arnold Schwarzenegger, this time around proponents of the bill were able to convince lawmakers that Californians should not be penalized in future employment based on the credit hit they may have experienced in the recent economic downturn. The law will take effect January 1, 2012.

by Lauren J. Katunich, Esq.

California Cracks Down on Worker Misclassification

Last month, California Governor Jerry Brown signed Senate Bill 459 into law. Effective January 1, 2012, this law seriously ups the ante for employers who misclassify their employees as independent contractors. The new law not only provides for substantial penalties of between $5,000 and $15,000 for each initial violation, but these penalties may be increased to $10,000 to $25,000 per violation if the employer is found to engage "in a pattern or practice of those violations". Non-lawyers who advise an employer to misclassify a worker are also subject to joint and several liability with the employer. If the offending employer is a licensed contractor, the law also requires that the contractor be referred to the Contractor's State License Board for disciplinary proceedings.

In addition to substantial penalties, the law also contains a "Scarlet Letter" provision which requires employers who are found to have engaged in such misclassification "to display prominently" for one year on their internet websites a notice to employees and the general public announcing that the employer "has committed a serious violation of law by engaging in willful misclassification of employees". If the employer has no website, the notice must be prominently posted "in an area which is accessible to all employees and the general public." The notice, which must be signed by a corporate officer, must state: (a) that the employer has been found to have "committed a serious violation of the law by engaging in willful misclassification of employees," (b) that the employer has "changed its business practices to avoid committing further violations," (c) that any employee who believes he or she has been misclassified may contact the state labor and workforce development agency whose mailing address, email address and telephone number must be listed in the notice, and (d) that the notice is being posted "pursuant to a state order". The notice must remain posted for a full year.

A year ago the United States Labor Department promised to crack down on independent contractor misclassification, and the IRS assisted in the initiative by committing to audit 6,000 employees over a three-year period with respect to such issues. This new California law ups the ante for employers regarding independent contractor misclassification issues. Employers who are already subject to employment and withholding tax obligation with regard to all individuals who were misclassified as independent contractors now will be liable for additional potential claims and penalties by the State Labor Commissioner. For these reasons, employers should work with experienced employment counsel to review their independent contractor relationships and ensure that this classification is proper and, if a current classification is incorrect, to work to remedy the situation.

by Randall S. Leff, Esq.

Written Commission Contracts are Required

In response to *Lett v. Paymentech, Inc.* (N.D. Cal., 1999) 81 F.Supp.2d 992, the legislature enacted AB 1396 which amends *Labor Code* § 2751. Specifically, AB 1396 requires that whenever an employer enters into a contract of employment with an employee for services to be rendered within California and the method of payment involves commissions, the contract must be in writing and must set forth the method by which commissions shall be computed and paid. The employer must provide a copy of the contract to each employee and must also keep a copy which has been signed by the employee. In the event the contract expires and the parties continue to work under the terms of the expired contract, the contract terms will be presumed to remain in effect until the contract is superseded or employment is terminated by either party. The term "commissions" is defined to have the same meaning as set forth in *Labor Code* § 204.1 and does not include short term productivity bonuses, such as paid to retail clerks, nor bonus and profit sharing plans unless there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed. AB 1396 repeals a related provision that made any employer who violated the requirements of *Labor Code* § 2751 liable in a civil action for triple damages.

All employers must comply with the new law by January 1, 2013. While *Labor Code* § 2751, as amended, is relatively straightforward, the nuances of drafting a commission contract are more complicated. Indeed, the timing of the payment of commissions as well as the definition of how commissions are "earned" can have far reaching implications for the employer. Accordingly, employers are well advised to contact counsel for the drafting of a commission contract.

by Kelly O. Scott, Esq.

National Labor Relations Board's "Employee Rights" Notice Requirement Postponed to January 31, 2012

The National Labor Relations Board (the "NLRB") pushed back the deadline to post its recently issued "Employee Rights" notice until January 31, 2012. The notice informs employees of their rights to unionize and bargain collectively under the National Labor Relations Act. The poster is available at no cost through the NLRB's website, https://www.nlrb.gov/poster.

The delay may in part be a result of coming under both legislative and legal attack. The National Association of Manufacturers recently filed a lawsuit in a Washington, DC Federal District Court claiming that the NLRB lacks the authority to mandate a posting requirement. In addition, Congress introduced HR 2833, The Employee Workplace Freedom Act, which specifically provides that the NLRB shall not require employers to post notices relating to the National Labor Relations Act ("NLRA").

As of now, the posting requirement will apply to all private-sector employers subject to the NLRA. The NLRA excludes agricultural, railroad and airline employers. According to the NLRB's website, it has chosen not to assert its jurisdiction over very small employers, not large enough to have more than a slight effect on interstate commerce. The NLRB has not elaborated on what very small means in this context.

Failure to post the notice may be treated as an unfair labor practice under the NLRA. The NLRB does not have the authority to levy fines. In most cases, the NLRB will simply inform non-compliant employers of the rule and allow them an opportunity to comply. The NLRB may also extend the six month statute of limitations for filing a charge involving other unfair labor practice allegations against the employer. If an employer knowingly and willfully fails to post the notice, the failure may be considered evidence of unlawful motive in an unfair labor practice case involving other alleged violations of the NLRA.

With months until the posting requirement goes into effect, it is difficult to predict how it will ultimately be implemented. The NLRB may change the posting requirement or may further postpone the effective date, or the requirement may be abolished altogether by the NLRB, the federal courts or Congress.

by Kevin J. Pavlik, Esq.

New 2012 Exemption Pay Rates

California's Department of Industrial Relations ("DIR") recently announced rate changes for the computer software employee exemption: The minimum hourly rate of pay exemption increased to $38.89 from its previous rate of $37.94; the minimum monthly salary is now $6,752.19 from its previous rate of $6,587.50, and; the minimum annual salary exemption increased to $81,026.25 from its previous rate of $79,050.00. The requirement for monthly salaries for employees under the executive, administrative and professional exemptions remains set at the equivalent of no less than two times the state minimum wage for full-time employment.

by Kelly O. Scott, Esq.

The Gender Nondiscrimination Act

Governor Brown recently signed AB 887, the Gender Nondiscrimination Act, into law barring discrimination based on a person's gender identity and gender expression. The new law becomes effective on January 1, 2012 and specifically defines gender expression as "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." The point of AB 887 is to simply clarify California's existing anti-discrimination laws by making gender identity and gender expression its own protected class and to ensure that transgender individuals are adequately protected from discrimination occurring in the workplace, in school, in housing, in public accommodations and in business.

by Rodney C. Lee, Esq.

NLRB Issues Guidance on Social Media Issues

The National Labor Relations Board ("NLRB") issued a report on the outcome of fourteen cases involving employee use of social media and/or the application of social media policies by employers. The report was issued with the specific intention of assisting employment counsel and human resource professionals.

In general, the cases that are the subject of the report pertain to what is – and what is not – protected concerted activity for employees' social media postings. The report also includes cases that rule on employers' social media policies that violate the National Labor Relations Act ("NLRA"), because the prohibitions therein may "chill" employees in the exercise of their rights under the Act.

Notably, the majority of the cases reported do **not** pertain to union workers. On the contrary, the report makes clear that Section 7 of the NLRA protects the rights of all employees to engage in concerted activities for the purpose of their mutual aid or protection, regardless of whether the employees are represented by a union. Accordingly, many of the cases address issues of social media postings which resulted in termination or suspension of the non-union employees involved. Upon examination, however, the NLRB determined that these postings, which were directed to other employees and which mention, often in derogatory fashion, terms and conditions of employment, did in fact constitute protected concerted activity. The terminations were therefore found to violate the NLRA. Other cases which involved individual complaints of a caustic nature were determined to not be protected activity. Employer social media policies that were found to be overbroad and which did not permit employees to discuss the terms and conditions of employment were held to violate the NLRA.

The NLRB report sheds considerable light on what has been a murky area for employers. Employers should seize this opportunity to review their social media policies and to tread carefully before acting on those policies in connection with any individual employee activity. And take note: just as the report serves as an opportunity for employers to improve their human resource practices, it will also serve as a blueprint for plaintiff attorneys seeking to capitalize on employer missteps.

by Kelly O. Scott, Esq.

The Employment Acceleration Act of 2011

Effective January 1, 2012, the Employment Acceleration Act of 2011 ("AB 1236") protects businesses from being required by city, county or state governments to use the E-verify program. Established by congress in 1996, "E-verify" is a free and voluntary electronic verification system that uses employee's social security numbers to determine eligibility for employment. AB 1236 strictly prohibits city, county and state governments from requiring employers to use E-verify or similar systems. This law extends only to private employers and exceptions are made for city or county workers, or if E-verify is required by federal law or as a condition of receiving federal funds.

The supporters of AB 1236 argue that the mandated use of E-verify imposes a major financial burden on business, especially small businesses, that E-verify correctly detects unauthorized workers only about half the time and that there is a history of substantial error rates under the E-verify system. Opponents argue that the federal E-verify system is one of our most effective and valuable tools in ensuring that employers are giving jobs to legal U.S. workers. California employers should understand that as a result of the passage of AB 1236, they are still allowed to use E-verify if they so choose, but cannot be required to use this program by any city or county government.

by Randall S. Leff, Esq.

Written Statement Required at Time of Hire

AB 469: This law, known as the Wage Theft Prevention Act of 2011, adds Section 2810.5 to the *Labor Code,* requiring that, at the time of hire, every non-exempt employee be provided with a written statement with the following information: (1) the pay rate and the basis for calculating it, as well as any overtime rates; (2) allowances, if any, claimed as part of the minimum wage, including meals or lodging; (3) the regular payday; (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. This written notice must be stated in the language the employer normally uses to communicate with the employee. In addition, subject to certain exceptions, if any of the above information changes after the employee is hired, the employer must communicate that change in writing within seven days.

by Karina B. Sterman, Esq.

If you have any questions regarding this bulletin, please contact Kelly O. Scott, Esq., Editor of this publication and Head of ECJ's Employment Law Department, at (310) 281-6348 or kscott@ecjlaw.com. If one of your colleagues would like to be a part of the Employment Law Reporter mailing list, or if you would like to receive copies electronically, please contact Brandi Franzman at (310) 281-6328 or bfranzman@ecjlaw.com.