Employers Be Ready: A Number of New Employment-Related Laws Will Take Effect on January 1, 2012

By Bernadette M. O'Brien

During Governor Arnold Schwarzenegger's term in office, very few employment-related bills were signed into law. That trend changed dramatically under Governor Jerry Brown, who recently signed a plethora of employment-related bills passed by the California State Legislature. The new laws, most of which will take effect on January 1, 2012, pertain to a variety of workplace issues, such as the use of consumer credit reports and genetic information, gender expression, pregnancy disability leave and misclassification of employees as independent contractors. Some of the important new laws are briefly summarized below.

Hiring Practices

AB 22 (Consumer Credit Reports): This law prohibits most employers/prospective employers from obtaining a consumer credit report about an applicant/employee, for employment purposes, unless the position of the applicant/employee is:

- a position in the state Department of Justice;
- a managerial position;[1]
- that of a sworn peace officer or other law enforcement personnel;
- a position that involves access to sensitive financial information;
- 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;
- 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;
- a position that involves access to confidential or proprietary information;
- a position that involves regular access to $10,000 or more of cash; or
- a position for which the information contained in the report is required by law to be disclosed or obtained.

Prior to requesting a consumer credit report for employment purposes, the employer/prospective employer must provide written notice to the applicant/employee. The notice must inform the applicant/employee that a consumer credit report will be requested and specify the reason for use of the report. The notice must also inform the applicant/employee of the source of the report and contain a box that the applicant/employee may check to receive a copy of the credit report. If the applicant/employee indicates that he or she wishes to receive a copy of the report, the employer/prospective employer must request that a copy be provided to the applicant/employee when the employer/prospective employer requests its copy from the credit reporting agency. The report to the applicant/employee must be provided contemporaneously and at no charge.

Failure to comply with AB 22 may subject an employer to a lawsuit for damages, including court costs, loss of wages, attorneys' fees and, if applicable, pain and suffering. Further, a court may award additional damages up to $5,000 for each violation.

The law, which goes into effect January 1, 2012, does not prohibit criminal background checks or verification of prior employment and/or references.

AB 1236 (E-Verify): The E-Verify Program of the United States Department of Homeland Security, in partnership with the United States Social Security Administration, enables participating employers to verify, on a voluntary basis, that the employees they hire are authorized to work in the United States. AB 1236 provides that, except as required by federal law, or as a condition of receiving federal funds, "neither the state nor a city, county, city and county, or special district" shall require an employer to use E-Verify,

[1] "Managerial position" means an employee covered by the executive exemption set forth in subparagraph (1) of paragraph (A) of Section 1 of Wage Order 4 of the Industrial Welfare Commission (8 Cal. Code Regs. 11040).

including as a condition of receiving a government contract, or applying for or maintaining a business license; or, as a penalty for violating licensing or other similar laws. Thus, AB 1236 confirms that the E-Verify Program is available to employers, but on a *voluntary* basis. It is estimated that if E-Verify had been mandatory for all employers in 2010, it would have cost businesses $2.7 billion.

AB 1401 (Employment of Minors): Current law regulates the employment of minors in the entertainment industry by requiring the written consent of the Labor Commissioner and a six month temporary work permit in order for a minor under the age of 16 to participate in certain types of employment. Under the current enforcement structure, a 6-month work permit may be applied for and obtained at no cost by a minor's parent or guardian at any time, via mail. However, if after a period of 10 days from the first permit's issuance, proof that a Coogan Trust Account[2] has not been received by the Labor Commissioner, such permit is revoked.

AB 1401 establishes a new enforcement structure wherein prior to the *first* employment of a minor performer, the minor's parent or guardian can obtain, online, a 10-day temporary work permit, thereby allowing time to gather the required documentation, including establishing a Coogan bank account. However, with the goal of reducing waste, AB 1401 requires that the minor already have obtained employment before the initial 10-day temporary permit can be obtained. In addition, there will be a $50 application fee for issuance of the initial 10 day permit. Thereafter, permit renewals would be processed through the mail only and would continue to be free.

The bill also creates the Entertainment Work Permit Fund, into which application fees, which will be required for the issuance of a minor's first temporary permit by the Labor Commissioner, will be deposited. The proceeds from this fund will be used to pay administration costs for the minor's entertainment work permit program.

Discrimination

SB 559 (Genetic Information): The California Fair Employment and Housing Act ("FEHA")[3] prohibits discrimination in housing and employment on certain specified bases, including age, ancestry, disability, marital status, national origin, race, religion, sex and sexual orientation. SB 559 amends various laws, including the FEHA, to add genetic information as a protected category. Therefore, in line with the federal Genetic Information Nondiscrimination Act ("GINA"),[4] harassment or discrimination in hiring or employment that is based on genetic information will become unlawful under California state law.

In regards to an employee, "genetic information" refers to information about the (1) employee's genetic tests; (2) genetic tests of family members of the employee; or (3) manifestation of a disease or disorder in family members of the employee. Under SB 559, "genetic information" also includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an employee or his or her family member. However, "genetic information" does not include information about the sex or age of an employee.

A violation of these provisions, which go into effect on January 1, 2012, is a misdemeanor.

AB 887 (Gender Identity and Expression): Anti-discrimination laws, such as the FEHA, contain various provisions defining *sex* to include gender. AB 887, which is effective immediately, modifies the definition of *gender* under these anti-discrimination laws to include a person's *gender identity* and *gender expression*. 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." Gender identity is defined as pertaining to an individual's feeling of being either male or female. Therefore, AB 887 requires an employer to allow an employee to appear or dress consistently with the employee's gender identity.

Employee Benefits/Group Health Insurance

SB 117 (Benefits to Same-Sex Spouses/Registered Domestic Partners): This law prohibits the State of California from entering into contracts for more than $100,000 with businesses/employers that do not provide equal benefits to an employee's same-sex spouse or registered domestic partner. This law goes into effect January 1, 2012.

SB 222 and AB 210 (Maternity Coverage): Effective July 1, 2012, this law requires that group health insurance plans and individualized health insurance plans provide maternity coverage.

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[2] This type of account requires 15 percent of a minor's earnings be set aside for the minor and blocked from use until the minor reaches age 18.

[3] Cal. Gov't Code § 12900 et seq.

[4] 42 U.S.C. § 2000ff et seq.

SB 299 (Health Benefits During Pregnancy Disability Leave): In general, under existing law, an employer must allow a female employee disabled by pregnancy, childbirth, or a related medical condition to take job-protected pregnancy disability leave ("PDL") for up to four months (16 weeks). During this time, however, an employer is not required to maintain or continue to pay for group health insurance benefits for an employee on PDL, unless the employer does so for non-pregnancy related temporary disability leaves.

SB 299 requires that during the duration of PDL (but not to exceed four months over the course of a 12-month period) the employer *must* maintain and continue to pay for group health insurance benefits. Such benefits must be maintained by the employer at the level and under the conditions that the benefits would have been provided if the employee had continued in employment for the duration of the leave. However, an employer may recover from the employee the premium that the employer paid for maintaining such coverage if the employee fails to return from PDL.

This law takes effect on January 1, 2012.

SB 757 (Domestic Partners and Health Coverage): California law defines *domestic partners* as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring."[5] An individual who is part of a domestic partnership is entitled to certain benefits such as Paid Family Leave to care for the domestic partner's ill child, provided the couple fulfills certain criteria, such as filing a Declaration of Domestic Partnership with the California Secretary of State.

Existing law also requires that a health care plan and a health insurance policy provide group coverage to the registered domestic partner of an employee, subscriber, insured, or policyholder that is equal to the coverage it provides to the spouse of those persons. SB 757 specifies that a 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. However, a health care plan may require that the employee verify the status of the domestic partnership by providing to the plan a copy of a valid Declaration of Domestic Partnership. The plan may also require that the employee notify the plan if the domestic partnership is terminated.

Family and Medical Leave

SB 1304 (Leave for Bone Marrow or Organ Donation): SB 1304 provides that private employers who employ 15 or more employees must permit employees to take *paid* leaves of absence for the purpose of organ or bone marrow donations, and prohibits retaliation against employees who take such leave. The employer must provide up to 30 days of paid leave for an organ donation and up to five days of paid leave for a bone marrow donation.

In order to be entitled to the leave of absence, the employee may be required to provide written verification to the employer that he or she is an organ or bone marrow donor and that there is a medical necessity for donation of the organ or bone marrow. Any period of time during which the employee is required to be absent from his or her position due to being an organ or bone marrow donor is not a break in continuous service for purposes of the employee's right to salary adjustments, sick leave, vacation, annual leave, or seniority. In addition, the employer must maintain the employee's coverage under a group health insurance plan for the full duration of the leave, in the same manner as if the employee had not taken such leave.

Upon expiration of the leave, the employee will be entitled to reinstatement to the same or an equivalent position. An employer may not interfere with an employee's ability to take such leave, or retaliate against the employee for taking the leave. An employer may require the employee to use up to five days of accrued sick or vacation leave for a bone marrow donation and up to two weeks of earned and unused sick or vacation leave for organ donation. Bone marrow donation and organ donation leave will not run concurrently with any leave pursuant to the federal Family and Medical Leave Act ("FMLA")[6] or the California Family Rights Act ("CFRA").[7] Further, bone marrow or organ donation leave may be taken in one or more periods.

Although this law went into effect on *January 1, 2011*, it is included here as a reminder to employers of their obligation to provide *paid* leave under the circumstances detailed above.

AB 592 (Interference with Family Leave): Under existing law, pursuant to CFRA, it is unlawful for an employer to refuse to grant a request by an eligible employee to take up to 12 work weeks of unpaid job-protected leave during any 12-month period (1) to bond

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5 Cal. Fam. Code 297(a).

6 29 U.S.C. § 2601 et seq.

7 Cal. Gov't Code §§ 12945.2, 19702.3.

with a child who was born to, adopted by, or placed for foster care with, the employee; (2) to care for the employee's parent, spouse, or child who has a serious health condition; or (3) because the employee is suffering from a serious health condition rendering him or her unable to perform their job duties. Further, pursuant to CFRA, it is unlawful, unless based upon a bona fide occupational qualification ("BFOQ"), for an employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions to take leave on account of pregnancy for a reasonable period of time, not to exceed 4 months and, thereafter, to return to work. CFRA also makes it unlawful for an employer to refuse to provide a reasonable accommodation for an employee for conditions related to pregnancy, childbirth, or a related medical condition, if she so requests, with the advice of her health care provider.

AB 592 also makes it unlawful for an employer to *interfere with, restrain, or deny the exercise of* an employee's right to protected leave under CFRA (i.e., provides for an interference claim). (Previously the law only prohibited an employer's *refusal* to allow leave under CRFA.) This law is similar to such provisions of the FMLA, and goes into effect on January 1, 2012.

Union Activity

SB 126 (Farm Labor Union Organization): This law concerns the ability of farm workers to organize labor unions. Specifically, it provides that if the Agricultural Labor Relations Board ("ALRB") sets aside an election because of employer misconduct that, in addition to affecting the outcome of an election, would render slight the chances of a new election reflecting the free and fair choice of employees, the labor organization shall be certified as the exclusive bargaining representative for the bargaining unit.

SB 126 also imposes time limits for certain ALRB proceedings and provides that when an alleged unfair labor practice is such that it will interfere with employee free choice, 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. Such injunctive relief shall remain in effect until an election has been held, or for 30 days, whichever occurs first. This law goes into effect on January 1, 2012.

Wage and Hour

SB 459 (Independent Contractors): This law prohibits an employer from engaging in a "pattern and practice" of "willfully misclassifying" individuals as independent contractors, imposing civil penalties, ranging from $5,000 to $25,000, for violation of its provisions. Further, if a violation does occur, the employer must post a notice in the workplace advising of the violation.

SB 459 also prohibits an employer from charging individuals who have been misclassified as independent contractors a fee or making deductions from compensation, where those acts would have violated the law if the individuals had not been misclassified. Further, any person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for the individual shall be jointly and severally liable with the employer if the individual is not found to be an independent contractor. The law, which goes into effect January 1, 2012, exempts from this joint and several liability provision any person who provides advice to his or her employer, or an attorney who provides legal advice in the course of practicing law. This legislation is likely to have a chilling effect on the ability of businesses, especially small businesses, to retain the services of independent contractors.

AB 240 (Liquidated Damages): Pursuant to current law, an employee may file a complaint alleging that an employer failed to pay the employee minimum wage, in court or before the Labor Commissioner. Although the employee can recover liquidated damages equal to the wages owed, plus interest from the Labor Commisser, it cannot award liquidated damages. AB 240, which takes effect on January 1, 2012, permits the Labor Commissioner to award liquidated damages, in addition to unpaid wages, interest, and penalties.

AB 243 (Farm Labor Wage Statements): An employer who is a farm labor contractor must now disclose in an employee's itemized wage statement, the name and address of the entity that retained the employer's services.

AB 469 (The Wage Theft Prevention Act of 2011): Private employers must now provide new non-exempt employees, at the time of hiring, with written notice of certain basic job information, including:

- the employee's rate of pay and the basis thereof, specifically whether the employee is paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, if applicable;
- any allowances claimed as part of the minimum wage, such as meal or lodging allowances;
- the regular payday designated by the employer;

- the employer's name, including any "doing business as" names;
- the employer's physical address or principal place of business, and a mailing address, if different from the physical address;
- the employer's telephone number; and
- the name, address, and telephone number of the employer's workers' compensation insurance provider.

The law only applies to nonexempt employees, and public employers are exempt.

If an employer makes changes to information contained in the notice then, within seven days of such changes, the employer must provide employees with written notice of such changes on a timely issued wage statement, or issue a new notice. The Labor Commissioner will be preparing a template of the notice for employers to use.

In addition to the above requirements, the new law amends certain Labor Code sections as follows:

(1) Labor Code section 1174 is amended to provide that employers must retain payroll records for 3 years (as opposed to 2 years under existing law), and an employee must be permitted to maintain his or her own personal record of hours worked;

(2) Labor Code section 1197 is amended to provide that an employer who fails to pay an employee minimum wage must pay restitution in the amount of the unpaid wages, in addition to penalties.

AB 469 takes effect on January 1, 2012.

AB 551 (Public Contracts; Violating Wage Requirements): Pursuant to this law, the maximum penalty for wage and hour violations is increased from $50 to $200 per calendar day for each employee who was paid less than the prevailing wage, and the minimum penalty is increased from $10 to $40 per day for violations of wage and hour provisions. Penalties are also increased from $25 to $100 for each calendar day, per worker, against contractors and subcontractors who do not respond to a written request for payroll records within 10 days of the request.

AB 1396 (Commissions): Current statutory law, which has been held invalid by existing case law, requires that an employer who has no permanent and fixed place of business in the state, and who enters into a contract of employment involving commissions as a method of payment with an employee for services to be rendered within the state, must put the contract in writing and set forth the method by which the commissions are required to be computed and paid. The employer must also give a signed copy of the contract to every employee who is a party thereto and must obtain a signed receipt for the contract from each employee.

In the case of a contract that expires and, thereafter, the parties nevertheless continue to work under the expired terms, such terms are presumed to remain in full force and effect until the contract is superseded, or employment is terminated by either party. An employer who does not comply with these requirements is liable to the employee in a civil action for triple damages.

AB 1396, which will take effect on January 1, 2013, makes this contract requirement applicable to *all* employers entering into a contract of employment involving commissions as a method of payment with an employee for services to be rendered in the state. The law does repeal the provision which makes an employer who violates this requirement liable in a civil action for triple damages.

Workers' Compensation

AB 228 (Out-of-State Workers' Compensation Coverage): Pursuant to existing law, California employers must obtain a separate workers' compensation policy for their employees who are working out of state. AB 228 specifies that the State Compensation Insurance Fund will provide workers' compensation coverage to California employers for their employees who sustain a work-related injury while on a temporary out-of-state job assignment that triggers workers' compensation liability in another state.

AB 335 (Workers' Compensation Notices): Workers' compensation notices posted in the workplace by employers must now include the website address and contact information necessary to obtain further information about the workers' compensation claims process and an injured worker's rights and obligations.

Workplace Safety

AB 1146 (Injury Prevention Program): In order to comply with the California Occupational Safety and Health Act ("Cal-OSHA"),[8] hospitals must implement and maintain safe patient handling policies and procedures, including training staff on safe lifting techniques. This law goes into effect on January 1, 2012.

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[8] Cal. Lab. Code § 140 et seq.; Cal. Lab. Code § 6300 et seq.

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