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New Laws for Employers

Sharon Kirsch, McManis Faulkner partner

Matthew Schechter, McManis Faulkner partner

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It's that time of the year when employers need to check the list to see if any of the new laws affect them. This year, there are more opportunities for employers to be naughty than nice if they aren't careful.

PROHIBITION ON CREDIT CHECKS

There are new restrictions on employers using consumer credit reports, not only for prospective employees but current employees as well. Assembly Bill 22 prohibits employers — except for certain financial institutions — from obtaining or relying on a consumer credit report unless it relates to one of the following: (1) a position within the California Department of Justice; (2) a managerial position (which is defined as one that qualifies for the executive exemption for overtime); (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 to specified personal information (other than the routine processing of credit card applications in a retail establishment), such as bank or credit card account information, social security numbers and dates of birth; (6) a position in which the employee or applicant would be a named signatory on the employer's bank or credit card account, authorized to transfer money on behalf of the employer, or enter into financial contracts on behalf of the employer; (7) a position that involves access to confidential or proprietary information (defined as a "trade secret" under Civil Code §3426.1(d)); or (8) a position that, during the workday, involves regular access to cash totaling $10,000 or more, which belongs to the employer, a customer, or a client.

Employers cannot seek a report, much less rely on it, without first giving written notice to the individual advising him of the reason for requesting the report and providing a check box for the individual to request a free copy of the report. If employment is denied because of information contained within the report, the employer must tell the individual and give him the name and address of the agency that provided the credit report.

WAGE THEFT PREVENTION ACT

AB 469, the Wage Theft Prevention Act of 2011, adds §2810.5 to the labor code. Under this new statutory section, employers are required to provide newly hired, non-exempt employees a notice that contains the following information: the employee's pay rate and basis thereof (i.e., hourly, daily, commission, salaried, or otherwise), along with any overtime rates that are applicable, any allowances claimed as part of the employee's minimum wage, the regular pay date as set by the employer, the employer's name, as well as any fictitious business names that the employer uses, the employer's physical address of its main office, and if different, its mailing address, and the name, address and telephone number of the employer's workers' compensation carrier.

The new law does not repeal the requirement that employers post most of this information. In addition, when any of this information changes, each employee must be given a written amendment or new notice within seven days of the change, unless the changes are shown on the employee's paystub or some other legally required writing.

AB 469 also extends the one-year statute of limitations for the Division of Labor Standards Enforcement to collect statutory penalties to three years and provides criminal penalties for the willful failure to pay wages.

CONTRACTS FOR COMMISSIONS

AB 1396 amends the labor code to require that commission pay agreements be in writing and that all employers must comply by Jan. 1, 2013. Specifically, AB 1396 states that when an employer enters into an employment contract with an employee for services to be performed in California, and the employee's compensation involves commissions, the employment contract must be in writing and set forth the method by which the commissions will be computed and paid. A copy of the written contract must be given to the employee, and the employer retains the employee's signed receipt of

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Sharon Kirsch is a partner at McManis Faulkner, where she leads the firm's employment law practice. She can be reached at 408.279.8700 or via email at skirsch@mcmanislaw.com. Matthew Schechter is a partner at McManis Faulkner. He has a varied civil litigation practice with a particular emphasis on employment law and can be reached at 408.279.8700 or via email at mschechter@mcmanislaw.com.

the contract. If the contract expires by its own terms, but the employer and employee continue to operate as if it is in effect, the contract is deemed to remain in effect until it is superseded expressly by a new contract or the employment relationship ends.

AB 1396 uses the definition of "commission" found in labor code §204.1, which defines "commissions" as "compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof." The new law generally excludes short-term productivity bonuses and profit-sharing plans. Employers should review the commission agreements with their attorneys.

INDEPENDENT CONTRACTOR IS CLASSIFICATION

Employers who hire or employ independent contractors need to take particular note of Senate Bill 459. This law prohibits the "willful misclassification" of employees as independent contractors. Under the new law, "willful" is defined as "voluntarily and knowingly misclassifying" an employee as an independent contractor. SB 459 also prohibits an employer from deducting fees or other charges from paychecks of misclassified employees — such as for licenses, space rental, or equipment — if the employer could not have deducted such fees or charges if the individual had been properly classified as an employee. Violations of the law could result in civil penalties of $5,000 to $15,000 for each violation, and from $10,000 to $25,000 for each violation if there has been a "repeated pattern or practice" of such violations.

SB 459 also imposes joint and several liability on anyone who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status and that individual is later determined to be an employee. This provision does not apply, however, to licensed attorneys providing counsel to an employer, as well as people who are providing advice to their own employer.

NEW INSURANCE OBLIGATIONS

Employers should also be aware of changes to insurance obligations during pregnancy leave, and new laws providing leave for organ and bone marrow donors.

SB 299 requires employers with five or more employees to continue group health coverage for eligible employees on pregnancy disability leave for up to four months. Under the new law, the coverage provided must be kept at the same level and conditions as it would have been had the employee continuously remained employed for the duration of the leave. In other words, if the employer pays the premium in full, it must do so for up to four months of pregnancy disability leave. Similarly, if the employee pays part of the premium, the employee can be required to continue to make those payments while on leave. While employers with five or more employees already had to allow employees up to four months for pregnancy disability leave, prior to SB 299, employees on such leave were only entitled to the same benefits that an employer gave to employees on other types of leave.

If the employee does not return from pregnancy disability leave, the employer can recoup any premiums it paid to continue the employee's coverage, unless the employee did not return due to a continuing disability or because the employee took separate FMLA/CFRA protected leave. Employers should review their policies and modify them as needed, carefully checking the interplay between pregnancy disability leave and FMLA or CFRA leave.

As of Jan. 1, 2011, employees were able to take paid leaves of absence for bone marrow and organ donation. The law allowing such leave applied to any employer with 15 or more employees. The new law, SB 272, clarifies that an employee can take up to 30 business days of leave for organ donation, and up to five business days for bone marrow donation, with the time measured from the date leave begins.

As an initial condition for granting leave, employers can require an employee to take up to five days of earned but unused paid days off for bone marrow donors, and up to two weeks of earned but unused paid days off for organ donors. Any leave for organ or bone marrow donation cannot be deemed a break in the employee's continuous service for purposes of any right to salary adjustments, sick leave, vacation, annual leave or seniority.

GENES AND GENDER

SB 559 adds "genetic information" to California's Fair Employment and Housing Act. "Genetic information" is defined as the genetic tests of an employee or the employee's family members, and the appearance of a disease or disorder among the family members. AB 887 amends FEHA to define the term "gender" to include gender identity and gender expression. Gender expression is an individual's "gender-related appearance and behavior," even if such appearance and behavior is not "stereotypically associated" with the gender given the person at the time of birth.

Under these two new laws, it is illegal to discriminate in hiring or employment based on genetic information and on the basis of gender identity or gender expression. AB 887 also permits an employee to dress in a manner consistent with the employee's gender identity and expression.

Employers should review and amend their policies and procedures to make certain they are in compliance with the new laws.