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FitzGerald & Mulé LLP
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IN THIS ISSUE – 2012 CHANGES IN THE LAW

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Implementing new employment laws that affect your business is probably not high on the list of fun things to do in the New Year. But, it should be on the list of important things to do. This issue discusses the significant legislative and regulatory new arrivals that have gone into effect this year and that will have an impact on the workplace.

SB 459 – CALIFORNIA ROLLS OUT STIFF PENALTIES FOR INDEPENDENT CONTRACTOR MISCLASSIFICATIONS

Employers who have independent contractors working for them will want to review this new law. SB 459 penalizes employers who willfully misclassify employees as independent contractors. "Willful" is defined as "voluntarily and knowingly misclassifying" an individual. Under SB 459, it is unlawful to charge an individual who has been willfully misclassified any fees or other deductions from compensation to the extent that such fees and deductions would have been prohibited had the person been properly classified as an employee. Penalties for willful misclassifications may range from $5,000 to $25,000 per violation. Further, violators may be ordered to prominently display on their web sites or other areas visible to the general public a notice that explains the employer has been found guilty of committing a serious violation of the law by willfully misclassifying employees. The new law also imposes liability on individuals who knowingly advise an employer to treat an individual as an independent contractor to avoid employee status.

AB 469 – NEW PAY DISCLOSURES TO EMPLOYEES

The Wage Theft Protection Act of 2011 amends several sections of the Labor Code. One significant addition is section 2810.5 to the Labor Code which now requires employers to provide a written notice to each employee at the time of hire containing the following information: (1) rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or

HIGHLIGHTS

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The Labor Commissioner has published an optional template for employers to give employees that complies with the Wage Theft Protection Act.

To view the template, click here or go to www.dir.ca.gov

otherwise, including any rates for overtime, as applicable; (2) allowances, if any, claimed as part of the minimum wage, including meals or lodging; (3) the regular payday designated by the employer; (4) the name of the employer, including any "doing business as" names used by the employer; (5) the physical address of the employer's main office or principal place of business, and a mailing address, if different; (6) the telephone number of the employer; (7) the name, address, and telephone number of the employer's workers' compensation insurance carrier; and (8) any other information the Labor Commissioner deems material and necessary. Further, the employer must notify each employee in writing of any changes to the information set forth in the notice within 7 days of the changes, unless such changes are elsewhere reflected on a timely wage statement or other writing required by law to be provided.

AB 22 – CREDIT REPORTS MAY ONLY BE USED IN LIMITED CASES

For employers who use credit reports as part of their background screening process, be advised of prohibited practices under this new law. Now, employers (with the exception of certain financial institutions) will be prohibited from obtaining or relying on credit reports for applicants and employees, unless the report is sought in relation to a list of specific positions. A short list of those positions is set forth below:

- Executive employees.
- Positions where credit information is required by law to be disclosed.
- Employees with access to bank or credit card information, SSNs, and birth dates.
- Signatories on bank or credit cards.
- Employees authorized to transfer money or authorized to enter into financial contracts.
- Employees who have access to cash totaling $10,000 or more of the employer, a customer, or client during the workday.
- Employees with access to "trade secret" information.

Employers who are allowed to use credit reports will have to first provide written notice to the applicant or employee stating the reason for requesting the report. Also, employers will have to

provide applicants and employees copies of the reports free of charge at the request of the employee or applicant. Finally, if the employer denies employment because of information contained in a credit report, the employer must advise the applicant or employee and give the name and address of the credit-reporting agency that supplied the report.

AB 887 – "GENDER EXPRESSION" DISCRIMINATION

AB 887 amends many state anti-discrimination statutes including the California Fair Employment and Housing Act to make clear that discrimination on the basis of gender identity and "gender expression" is prohibited. Gender expression refers to a person's gender-related appearance and behavior, whether or not stereotypically associated with the person's assigned sex at birth. Under the amended statute, employers must allow employees to appear or dress consistently with the employee's gender expression.

SB 299 – GROUP HEALTH COVERAGE EXTENDED FOR PREGNANCY DISABILITY LEAVE FOR UP TO 4 MONTHS

Up until SB 299 California employers were required to comply with California's Pregnancy Disability Leave Law which gives employees disabled by pregnancy the right to a leave of absence for up to four months for the disabling condition. Pregnancy disability leave is separate from maternity leave, which is available to FMLA/CFRA eligible employees for up to 12 weeks of leave for baby bonding. Prior to SB 299, employees on pregnancy disability leave could enjoy the same benefits provided to employees on other types of disability leaves, such as FMLA/CFRA. But, since employers often limit the continuation of group health benefits to the required 12-week FMLA/CFRA period, employees on pregnancy disability leave would not be entitled to benefits for the full four months.

California employers now must provide four months of coverage for pregnancy disability leaves. Group health benefits must be continued on the same terms and conditions as if the employee continued actively reporting to work. For example, if an employer pays the entire employee premium, it will now have to do so for up to four months of pregnancy disability leave. Conversely, if an employee typically pays a portion of the premium, then the

REMINDER: Computer professionals must now be paid at least $38.89 per hour ($81,026.25/year) to qualify for the overtime exemption in California.

employee may be required to continue making a similar contribution during the pregnancy disability leave. Finally, if an employee does not return from pregnancy disability leave, the employer may recoup the paid leave premiums from the employee, unless the reason the employee did not return is because of a continuing disability or because the employee took a separate protected leave (e.g. maternity leave) under the FMLA/CFRA.

SB 272 – ORGAN DONOR LEAVE CLARIFIED

Last year California passed a new leave law requiring employers to allow their employees to take up to 30 days per year to donate an organ and up to 5 days per year to donate bone marrow. This year, SB 272 was passed to address the inevitable questions that arise upon the advent of new laws. Specifically, SB 272 explains that employers are to measure the one-year period on a 12-month basis rolling forward from the date an employee uses the leave. The legislation also clarifies that the leave entitlement is measured in business days, not calendar days, and that leave taken pursuant to these leave provisions is not considered a break in service for purposes of benefit accruals and seniority. Finally, the legislation clarifies that an employer may require an employee taking bone marrow leave to use up to five days of accrued paid time off, and an employee taking organ donation leave to use up to two weeks of accrued paid time off.

AB 243 – FARM LABOR CONTRACTORS

Farm labor contractors must now disclose to their employees the name and address of the legal entity that secured the employer's services (typically, the grower). This information must be disclosed as part of the employees' itemized wage statements required by *Labor Code* § 226.

AB 1236 – THE ONGOING E-VERIFY SAGA

Except as otherwise required by federal law or as a condition of receiving federal funds, this new law prohibits the state, a city or county, from requiring employers to use E-Verify as a means of verifying employees they hire are authorized to work in the United States.

AB 1396 – NEXT YEAR COMMISSION PAY PLANS WILL HAVE TO BE IN WRITING

Starting on January 1, 2013, this new law will require commission pay plans to be spelled out in a written contract. Whenever an employer enters into a contract of employment with an employee for services to be performed in California and the employee's compensation involves commissions, the contract will have to be in writing setting forth the method by which the commissions will be calculated. Employers will also have to provide a signed copy of the contract to employees and will have to retain a signed receipt of the contract.

IRS AMNESTY PROGRAM FOR INDEPENDENT CONTRACTOR VIOLATORS

On September 21, 2011 the Internal Revenue Service launched a new program that it says will enable many employers to resolve past worker classification issues and achieve certainty under the tax law at a low cost by voluntarily reclassifying their workers.

The Voluntary Worker Classification Settlement Program allows employers to voluntarily reclassify workers that were improperly classified as independent contractors into employees and pay a minimal payment (federal payroll taxes, interest and penalties) to cover past federal payroll tax obligations for the contractor-turned-employee. To be eligible for the Program, an employer must:

- Have treated the workers in the past as nonemployees;
- Have filed all required 1099s for the previous three years;
- Not currently be under audit by the IRS; and
- Not currently be under audit by the Department of Labor or a state agency concerning the classification of these workers.

With the federal and state authorities increasing their enforcement in this area, the primary benefit of this Program is that it allows employers who believe they may have misclassified workers as independent contractors to be assured, by paying the minimal amount to the IRS (10% of the back payroll taxes owed), that they will have not have any further past federal tax liability.

Can I get that in writing, please?

Make sure that your employee handbook is up to date and reflects recent developments in the law.

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