



Law Offices of Mary L. Topliff

Workplace Wave



Get Ready for Some Changes: California Enacts Variety of New Employment Laws

By Mary L. Topliff, Esq.

Requirement to Provide Group Health Benefits During Pregnancy Disability Leaves and Mandated Maternity Insurance Coverage

Private sector employers covered by the California Fair Employment and Housing Act (FEHA) (generally those with five or more employees) have long been required to provide unpaid, job-protected leaves of absence for employees during periods of pregnancy disability for up to four months. However, employers were not required to continue group medical plan benefits for pregnant employees during their leaves of absence – unless the federal Family and Medical Leave Act (FMLA) or the California Family Rights Act (CFRA) (covering employers with 50 or more employees) applied or if they voluntarily provided such benefits to employees on temporary disability leaves. Common scenarios in which benefits have not been continued during pregnancy leaves include those in which the employer has less than 50 employees or employees did not meet the eligibility requirements under the FMLA/CFRA (e.g., because they had not worked for their employer for 12 months or they worked in an office of less than 50 employees).

A new California law, SB 299, changes this. Beginning on January 1, 2012, private sector employers covered by FEHA (i.e., those

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Announcement

Ms. Topliff has been selected as a member of the United States Technical Advisory Group for the American National Standards Institute, charged with developing the position of the U.S. towards human resource management international (ISO TC 260) standards. Additional information will be provided in subsequent newsletters.

with five or more employees) must continue group health benefits for employees during pregnancy leaves for up to four months. Mirroring FMLA's requirements in this regard, employers will pay their usual portion of premiums and covered employees must pay their usual portion to maintain coverage during the leave period. The employer may also recover the premiums it paid if the employee does not return from the leave, so long as the failure is not because the employee is continuing on leave status due to baby bonding leave, the employee is unable to return to work because of continuing medical issues relating to the pregnancy or other circumstances beyond the employee's control.

In related legislation, the Governor signed companion bills (SB 222 and AB 210) that require individual and small group medical

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insurance plans to include maternity coverage, along with another bill (AB 592) that prohibits employers from interfering with or denying an employee's rights to take pregnancy disability leave.

****Action Items:** Review your Employee Handbook and any leave of absence forms and guidelines to determine appropriate updates. Consider how to handle any employees who are on pregnancy leave at the end of the year. Coordinate changes to applicable employee benefit summary plan descriptions with your employee benefit representative.

Significant Penalties for Independent Contractor Misclassifications

As state and federal tax agencies have heightened their scrutiny of independent contractors, not to mention the success of some class action lawsuits in this regard, the California legislature has now upped the ante through SB 459. This new law provides that organizations who are found to have misclassified individuals as independent contractors, rather than employees, will be subject to fines of \$5,000 to \$15,000 for each "willful misclassification." The term, "willful misclassification," is defined as voluntarily and knowingly misclassifying the individual, which does not require a showing of an intent to violate the law. The law also makes it unlawful to charge fees or to make deductions in the compensation of an independent contractor who is misclassified (e.g., deducting for materials or repairs). If a government agency or a court finds that a company has engaged in a pattern and practice of misclassifications, the penalties increase to \$10,000 to \$25,000 per violation.

This law further allows the California Labor Commissioner to issue these fines, which means that an individual could file a wage claim, arguing that he or she should have been an employee and the employer

potentially would be subject to these fines. Upon a finding that a violation occurred, the company would also be required to post a public notice (on its website or someplace visible to all employees and the public) that such a violation had occurred. These penalties are in addition to other penalties that currently exist (e.g., fines for failure to pay proper payroll taxes).

There is a bright spot on the federal level, however. The IRS has implemented a Voluntary Classification Settlement Program to enable companies to reclassify contractors as employees while paying past payroll taxes.

****Action Items:** Take a look at your current independent contractors and have counsel review those in which it is unclear whether they qualify. Remember that different government agencies use different tests to determine appropriate classifications. Going forward, employers are well-served by having a formalized process for reviewing individuals before they perform services as independent contractors and entering into written agreements with them.

New Hire Disclosures and Increased Enforcement Powers of Labor Commissioner

Many conscientious employers sometimes forget that there is another world out there where workers continue to be exploited. Indeed, the so-called "underground economy" is alive and well in California and elsewhere. The following new California law is surely prompted by this fact.

AB 469 requires employers, at the time of hiring an overtime-eligible/nonexempt employee, to provide each employee with a written notice, in the language the employer normally uses to communicate employment-related information to the employee, with the following information:

rate of pay; whether pay is hourly, salary, commission, piece rate or otherwise; applicable overtime rates; any allowances for meals or lodging; the payday schedule; the name of the employer including any names the employer is "doing business as"; the physical address of the employer's main office or principal place of business and a mailing address, if different; the telephone number of the employer; and the name, address and telephone number of the employer's workers' compensation carrier. The Labor Commissioner is to provide a template that employers may use to comply.

Employees excluded from this notice requirement are those that are overtime exempt, those covered by a collective bargaining agreement if the agreement provides for wages and hours of work, and public sector employees.

AB 469 includes a variety of other amendments to existing laws. For example, it provides that an employer who has paid an employee less than the minimum wage per the applicable Wage Order must pay restitution of wages to the employee and makes it a misdemeanor if an employer willfully violates wage laws. This new law extends the period of time for the Labor Commissioner to bring a collection action against an employer for statutory penalties from one year to three years.

****Action Items:** This disclosure information can easily be added to job offer letters or otherwise incorporated into existing new hire paperwork. For those lacking such formalities, watch for the Labor Commissioner's template.

Limitations on Credit Checks for Applicants/Employees

California employers who request credit reports as part of their background investigations of applicants or employees will be limited in their ability to do so by

AB 22. This law prohibits the use of credit reports for employment purposes unless the position falls within an enumerated exception as follows: a managerial position that qualifies under the Executive Overtime Exemption classification under California law; a California Department of Justice, sworn peace officer or law enforcement position; a position that involves regular access to bank or credit card information other than during routine solicitation or processing of credit card applications in the retail industry; those who are named signatories or authorized to transfer money on behalf of the employer or have regular access to at least \$10,000 in cash; the position involves access to confidential and proprietary information; or a position that another law requires to have a credit check.

Prior to requesting a credit report for a position that is allowed by this new law, the employer must provide written notice to the applicant or employee that identifies the specific basis for requesting the report (that is, which exception applies) and the source of the report. The applicant/employee must be able to request a copy of the report.

Various states have enacted restrictions on background investigation reports. Employers who are subject to different state laws are well-served by ensuring compliance in each state.

Miscellaneous New California Laws

The California legislature enacted a variety of other laws (which go into effect on January 1, 2012 unless otherwise noted):

* The bone marrow and organ donor leave law, extended to private sector employers in 2011, has been clarified; the amount of time off is based on business, not calendar days (SB 272).

* The E-Verify Program of the Department of Homeland Security is confirmed to be

voluntary (AB 1236).

* Gender identity is now a subset of gender for purposes of various legal protections, such as employment discrimination (AB 887).

* Health care service plans and health insurance policies 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).

* By January 1, 2013, employees paid on a commission basis must have individual written agreements that describe the method by which the commissions are computed and paid (AB 1396).

Significant Vetoes

Governor Brown did not please everyone this term. He vetoed bills supported by the California Employment Lawyer's Association, a well-respected plaintiffs' attorney group. For example, a bill that would have required bereavement leave was vetoed (as was the case by former Governor Schwarzenegger). Governor Brown also vetoed a bill that would have provided for attorneys' fee awards in small-dollar amount discrimination lawsuits.

For more information about any of these new laws and how best to comply, please contact Ms. Topliff at Topliff@joblaw.com.