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Governor Brown Signs Significant New Employment Laws

October 18, 2011 by Nick Schnermann & Gregg A. Fisch

On October 9, 2011, California Governor Jerry Brown finally addressed the bulk of the labor and employment-related bills passed by the California state legislature during the first half of the 2011-2012 session. Although Governor Brown vetoed several proposed bills on the stated ground that they potentially would harm California businesses, some of those bills he did sign into law likely will do just that when they officially become law on January 1, 2012. The new employment laws relate to various and diverse areas such as hiring practices, required leaves of absence, health insurance, and worker classification.

The following provides a brief description of the most significant new employment laws that were signed by Governor Brown:

AB 1236 – E-Verify: This new law prohibits local governments in California from requiring private employers to use the electronic employment verification system as part of their hiring practices. Ultimately, this law imposes no new requirements on employers and, instead, should maintain consistency throughout the state with respect to this issue (leaving it to the federal government to control the applicable regulations).

SB 559 – Discrimination Based on Genetic Information: This new law adds "genetic information" to the list of prohibited bases for discrimination under the Unruh Civil Rights Act and the Fair Employment and Housing Act (FEHA). This

is largely duplicative of federal law, although the California version expands the applicability to a broader range of employers, since the California state law applies to employers who have five or more employees, whereas the federal analog (the Genetic Information Non-Discrimination Act (GINA)) applies only to employers who have fifteen or more employees.

AB 592 – Interference: This new law adds language to the California Family Rights Act (CFRA) and the Pregnancy Disability Leave Law (PDL) that makes it unlawful to interfere with or in any way restrain the exercise of rights under these laws. This added language is similar to what already is contained in the federal Family Medical Leave Act (FMLA) and, thus, should not be a major change to existing law or an employer's legal obligations.

SB 299 – Health Coverage During Maternity Leave: This law will prohibit an employer from refusing to maintain and pay for health insurance coverage under a group health plan for an employee who takes leave for pregnancy, childbirth, or a related medical condition for a reasonable time of up to four months. Employers can recover the cost of the insurance premiums paid if the employee fails to return to work for reasons within his or her control. There is the possibility that this law may be deemed to be preempted by ERISA or the Affordable Care Act. But, if it is properly enforceable, many employers likely will need to revise their existing policies to comply with this new law.

AB 887 – Gender Identity: This law refines the definitions of the words "sex" and "gender" (at least as they apply in several anti-discrimination laws, including the FEHA). These terms, as they are newly defined, now will encompass a person's gender identity and whether gender-related appearance and behavior stereotypically correspond with his or her sex at birth.

AB 22 – Credit Reports: Under existing law, an employer is permitted to request a report detailing the credit history of an employee or applicant, provided that the individual in question is given prior written notice. Going forward, the use of credit reports in employment decisions will be forbidden

unless the job in question falls within any of the identified categories, such as the following: (1) a managerial position; (2) a law enforcement officer; (3) the position is one for which a credit report screening is required by law; (4) a position that requires regular access to confidential information; (5) a position in which the employee will be entitled to enter into financial transactions on the company's behalf; and (6) a position that involves regular access to cash totaling $10,000 or more. This law does not apply to financial institutions and other employers required by law to conduct credit checks. Any company that utilizes employee or applicant credit histories in any way as part of the hiring process should evaluate their existing policies and procedures in light of this new law.

SB 459 – Independent Contractors: This new law probably is the most significant of the bills signed by Governor Brown this Term. Specifically, it prohibits the "willful misclassification" of independent contractors and authorizes the Labor and Workforce Development Agency (LWDA) to assess severe civil penalties against employers who do so. Monetary penalties can range from $5,000 to $25,000 for each violation, depending on whether the LWDA finds that the company engaged in a pattern or practice of misclassification. The law also will impose an embarrassing posting penalty on employers found to have engaged in such willful misclassification. For one year following the final decision, the employer must post on its website (or in an area available to employees and customers) a notice stating the following: (1) that the LWDA has found that the employer committed a violation of the law by engaging in the willful misclassification of employees; (2) that the company has changed its practice to avoid committing further violations; (3) that any employee who believes that he or she is misclassified may contact the LWDA (along with the LWDA's contact information); (4) that the notice is being made pursuant to state order; and, finally, (5) the signature of an officer or owner of the company. These same penalties will apply if the employer charges fees to a misclassified independent contractor where those fees would have been unlawful had the individual been properly classified. Those fees could include such things as

space rental, material costs, license fees, and equipment rental. Lastly, the new law imposes joint and several liability on consultants who advise an employer to classify an employee incorrectly, although this does not apply to in house advisors or attorneys.

Notably, the new law does not provide a clear definition of “willful misclassification.” Rather, the term “willful misclassification” is given the imprecise and somewhat circular definition of “avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor.” Given the complexity of the analysis required to properly classify employees, it seems that this new law likely will inevitably create substantial risk for even those employers who make a good faith effort to properly classify those individuals who work for them, in whatever context and under whichever classification.

We hope that the above provides you with a sufficient description of these new laws that soon will go into effect in California. If you have any questions about these laws or how they could impact your employment practices, Sheppard Mullin’s labor and employment attorneys are able to assist you.