

## California Employment Laws: What's on the Horizon

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While everyone awaits the California Supreme Court's ruling in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)* – which is expected sometime in early 2012 and will determine the scope of an employer's meal and rest period obligations – employers must not lose sight of other important developments in California employment law. Below are brief summaries of some of the legislative enactments in California that will affect employers. Unless otherwise noted, these laws will take effect on January 1, 2012.

### ***Misclassification of Independent Contractors***

The so-called "Job Killer Act" will prohibit the "willful misclassification" of an individual as an independent contractor and will impose steep penalties on California employers that do so. This new law will also prohibit employers from charging fees to misclassified individuals for items that an employee is not normally required to purchase (such as equipment, space rental, services, or licenses). More than ever, employers should be extremely cautious when classifying an individual as an independent contractor. For more details, see the Epstein Becker Green Act Now Advisory "[New California Laws Increase Penalties for Employee Misclassification and Wage Theft.](#)"

### ***Wage Theft Prevention***

With some narrow exceptions, California employers will now be required to provide each new non-exempt employee with written notice of specific pay data. This notice must be provided at the time of hire and within a certain period of time after that information changes. The communication must contain the employer's contact information, as well as the employer's workers' compensation carrier's contact information, the employer's regular paydays, the employee's pay rate(s), and any allowances (e.g., meals or lodging) included as part of the minimum wage calculation. Failure to do so subjects the employer to penalties, including attorneys' fees and costs. For more details, see the Epstein Becker Green Act Now Advisory "[New California Laws Increase Penalties for Employee Misclassification and Wage Theft.](#)"

## ***Gender Identity/Expression and Genetic Information as Protected Classifications***

In 2005, gender identity became protected in the employment law context when the definition of “gender” was referenced in Section 422.56 of the California Penal Code. But because this definition did not appear alongside other “protected classes,” as defined in the California Fair Employment and Housing Act (“FEHA”), employers were sometimes confused about its appropriate application in the employment context. One new law resolves any confusion by amending FEHA to define the word “gender” as encompassing both gender identity and gender expression. FEHA itself now defines “gender” to include “gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.” In addition, another law amends FEHA by adding genetic information as a protected classification.

### ***Pregnancy Disability Protections***

Two new laws are added on this topic. Employers with five or more employees are now required to continue group health coverage for the period of time that an employee is on pregnancy disability leave pursuant to California’s Pregnancy Disability Act (“PDA”), as if the employee was actively reporting to work. Such coverage must continue for the entire period of the pregnancy disability leave (which could be up to four months). The law will also clarify that it is unlawful for an employer to interfere with or deny an employee any right (including leave) provided under PDA or the California Family Rights Act, or to retaliate against the employee for taking advantage of any such right.

### ***Limitations on Employers’ Use of Credit Checks***

Under this new law, California employers will be banned from using consumer credit reports to screen applicants or employees, unless certain exceptions apply. The list of exceptions includes positions:

- (1) That qualify for the executive exemption;
- (2) For which credit information is required by law to be disclosed or obtained;
- (3) That involve regular access to personal information (e.g., persons’ bank account data and social security numbers);
- (4) In which the person would be a named signatory on an employer's bank or credit card account or given authority to transfer money or enter financial contracts on the employer's behalf;
- (5) That involve access to confidential or proprietary information defined as a trade secret under the California Civil Code; and
- (6) That involve regular access to cash totaling \$10,000 or more that belongs to the employer or a client.

If one of the above exceptions applies, employers must still comply with federal and California fair credit reporting laws, including their procedural requirements.

## ***Requiring Commission Agreements in Writing***

Effective January 1, 2013, all California commission agreements must be in writing and set forth the method by which the commissions will be computed and paid. Employers must also provide a signed copy of a commission agreement to an employee and obtain a signed receipt of the agreement from the employee. Furthermore, the terms of any written commission agreement will remain in effect until superseded or terminated in writing.

## ***Health Care Industry: Lift Teams***

Effective January 1, 2013, the Hospital Patient and Health Care Worker Injury Protection Act will amend California's Occupational Safety and Health Act to require health care employers in California to implement plans and policies protecting employees from musculoskeletal injuries. Acute care hospitals are covered by this law and must provide "lift teams" trained to move patients using proper lift equipment.

## **What Employers Should Do Now**

If you are an employer with operations in California, then, among other preparations, you should do the following:

- Review the contracts of your independent contractors to ensure that they are not misclassified as employees;
- Prepare notices for your non-exempt employees so that, upon hire, new non-exempt employees are provided with proper notice of pay rates and pay dates (along with other information required by law);
- Update any applicable policies and procedures regarding employment discrimination and equal employment opportunity to ensure that gender identity and expression and genetic information are included as protected characteristics;
- Train managers as to the prohibitions against discrimination and harassment based on those characteristics;
- Confirm that you are providing health insurance to employees on protected pregnancy leave under the same terms and conditions as active employees;
- Ensure that employees taking leave under PDA and the California Family Rights Act are not discriminated against or retaliated against for exercising those rights;
- Review your practices regarding credit checks, and ensure that any such practices that pertain to California employees comply with California law;
- Begin ensuring that all commission agreements are in writing, and comply with applicable law;

- If you are a health care employer, begin to review safety policies so that you will be in compliance with “lift team” requirements by the beginning of 2013; and
- Review the terms of these new laws in sufficient detail, and contact your employment counsel if you have questions regarding compliance with any of the above changes to California law.

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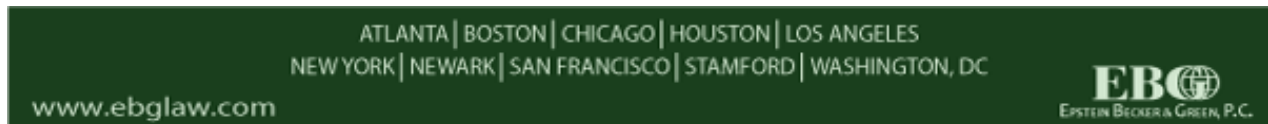
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