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Paddling on Each Side: How California Private Sector Employers Must Change Their Operations in 2012

By Christopher Cobey and Isela Pérez

"You paddle a little on the left side, then you paddle a little on the right side and you keep on going right down the middle."

– Governor Jerry Brown, explaining his canoe analogy to policy-making

In 2011, for the first time since 2003, California's legislative process was controlled by a governor and a legislature of the same party. Yet the results at the end of this year's session were not as one-sided as some had predicted or expected.

In the first year of his second administration as Governor of California, Jerry Brown stayed true to his promise to paddle on both sides of the canoe when deciding which of the 889 bills presented to him he would sign, and which he would veto.¹ For California private sector employers, the results reflect the governor's methodology.

Littler has already issued three analyses of some of the major new laws and regulations affecting California private sector employers:

- *California Joins States Restricting Use of Credit Reports for Employment Purposes* (October 2011) [Assembly Bill (A.B.) 22].²
- *The Stork Has Landed: California Employers Must Maintain and Insurers Must Provide Pregnancy Benefits* (October 2011) [Senate Bill (S.B.) 299].
- *California DFEH's New Procedural Regulations Will Facilitate the Claims Process for Employees* (September 2011)³

In addition, a Littler ASAP is forthcoming on the new laws applying to independent contractors in California (S.B. 459).

This article reviews and summarizes the remaining major bills signed into law this month by California's governor that affect all, or many, California private sector employers.

Unless otherwise noted, all legislation described takes effect on January 1, 2012.

The Wage Theft Prevention Act of 2011

The Wage Theft Prevention Act of 2011 (A.B. 469) amends five sections and adds five sections to the California Labor Code.

- New Labor Code section 2810.5 defines new disclosure requirements for private sector employers. Starting January 1, 2012, nonexempt, non-unionized employers must provide employees the following information, in writing, upon hire:
 1. The rate or rates of pay and the basis for pay, *i.e.*, whether the employee will be paid by the hour, shift, day, week, salary, piece, commission, or otherwise. The rate information must also include overtime rates.
 2. Any allowances claimed as part of the minimum wage, including meal or lodging allowances.
 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. The mailing address must also be provided if it differs from the principal physical address.
 6. The telephone number of the employer.
 7. The name, address, and telephone number of the employer’s workers’ compensation insurance carrier.
 8. Any other information the Labor Commissioner deems material and necessary.

An employer’s duty to disclose the above information continues after hiring the employee. When any of the information listed above changes, employers must notify employees in writing within seven calendar days of the change. An employer may satisfy this notice of modification if all the changes are reflected on a timely itemized wage statement (pay stub). An employer may also satisfy the obligation to update its required information if the changes are provided in another writing required by law.

- New Labor Code section 1194.3 allows an employee to recover attorney’s fees and costs that are incurred in enforcing a court judgment for unpaid wages under the Labor Code.
- New Labor Code section 1197.2 increases sanctions for wage violations by imposing new civil and criminal penalties against noncompliant employers. Specifically, an employer who willfully fails to pay a final court judgment or final order issued by the Labor Commissioner for wages due to an employee who has been terminated or who quits within 90 days of the date that the judgment was entered or the order became final may be charged with a misdemeanor, provided the employer had the ability to pay the amount of the judgment or order. In addition, civil penalties may be assessed. The maximum penalties under this new provision vary depending on the amount of wages owed. If the total amount of wages due is less than \$1,000, the employer may be subject to a fine of \$1,000 to \$10,000, or imprisonment in county jail for up to six months. If the total amount of wages due is more than \$1,000, the employer may be subject to a fine of \$10,000 to \$20,000, imprisonment in county jail for six months to a year, or both. The civil and criminal penalties available under this new provision are for *each* offense. In addition, if an employer fails to pay wages to more than one employee, the total amount of wages due to all employees will be aggregated for purposes of determining the level of the fine and the term of imprisonment.
- New Labor Code section 200.5 requires that the Division of Labor Standards Enforcement (DLSE) file a request for entry of judgment on a civil penalty or fee against an employer within three years from the date the penalty or fee became final (within three years from the time that the right to appeal expires with no appeal pending). Once the DLSE commences such an action, the clerk of the superior court must enter judgment immediately.
- New Labor Code section 1206 provides that, notwithstanding any other provisions of law, the Labor Code establishes minimum penalties for failure to comply with wage-related statutes and regulations.

A.B. 469 also modifies several Labor Code sections:

- Labor Code section 1174 is amended to extend the time an employer is required to maintain *payroll records* from two years to three years. In addition, an employer may not prevent an employee from maintaining a personal record of his hours worked.
- Labor Code section 98 is amended to allow an employee to recover *liquidated damages* in an action before the Labor Commissioner.
- Labor Code section 240 extends the time required for an employer who commits a violation of this section, or who fails to satisfy a

judgment, to maintain a bond from six months to two years. In addition, if the employer fails to post a bond, the Labor Commissioner may require the employer to provide an accounting of assets.

- Labor Code section 243 as amended provides that a *bond* posted by an employer convicted of a second violation of this section will be payable for *wages, interest, or damages*. In addition, the Labor Commissioner may also require that the employer provide an accounting of assets. An employer who fails to provide a requested accounting is subject to additional sanctions.
- Labor Code section 1197 provides that an employer who fails to pay the required minimum wage must pay restitution to the employee in the amount of unpaid wages in addition to a penalty or penalties.

Other New Laws of General Application to California Private Employers

- The Fair Employment and Housing Act and the workers' compensation laws, among others, are amended to expand the definition of the protected category of "sex" to include *gender*, gender identity and gender expression. Gender expression is defined as a person's gender-related appearance and behavior, whether or not stereotypically associated with the person's assigned sex at birth. ("Gender identity" is not defined by the legislation.) Gender, gender identity and gender expression are added to the enumerated characteristics in existing law that require equal rights and opportunities and prohibit discrimination. (A.B. 887; amended Government Code section 12940 and amended Labor Code section 4600, among others)
- *Discrimination* in employment on the basis of *genetic information is banned* by amendments to the Fair Employment and Housing Act (FEHA) and the Unruh Civil Rights Act. The new law prohibits the consideration of genetic information in a wide variety of associated statutes. (S.B. 559; amended Government Code section 12921 and Civil Code section 51)
- The *organ donor paid leave of absence* statute is amended to provide that the permitted days of leave are business days rather than calendar days, and that the one-year period within which an employee may be eligible for leave is measured from the date the employee's leave begins and consists of 12 consecutive months. The amendment also denotes that the leave of absence is not a break in the employee's continuous service for the purpose of his or her right to paid time off. Finally, the amendment provides that the employer may condition the initial receipt of leave upon the employee's use of a specified number of earned but unused days for paid time off. (S.B. 272; amended Labor Code section 1510)
- An employee may recover *liquidated damages* pursuant to a complaint brought before the Labor Commissioner alleging *payment of less than the minimum wage* fixed by an order of the Industrial Welfare Commission or by statute. (A.B. 240; amended Labor Code section 98, amended Labor Code section 1194.2)
- An employer may not interfere with, restrain, or deny the exercise of, or the attempt to exercise, an eligible employee's right to take up to 12 workweeks of unpaid protected *family or pregnancy leave*. (A.B. 592; amended Government Code section 12945)
- Labor Code sections 2811-2813, known as the Employment Acceleration Act of 2011, is added to the Labor Code and provides that state or local governments *may not require* a private employer to use the *E-Verify Program* of the United States Department of Homeland Security unless required by federal law, or as a condition of receiving federal funds. (A.B. 1236)
- Workers' compensation *notices posted* by employers must now include the *website address* and contact information that employees may use to obtain further information about the workers' compensation claims process and an injured employee's rights and obligations, including the location and telephone number of the nearest information and assistance officer. Several Labor Code sections relating to the *workers' compensation notices* are amended to provide for additional information to employees regarding workers' compensation. The administrative director is required to make available on the department's website informational material regarding the *workers' compensation claims process*, written in *plain English*. (A.B. 335; amended Labor Code sections 138.4, 3550, 4060, 4061, 4658.5, and 5401)
- State income and employment tax laws are conformed to federal income tax laws by removing imputed income tax requirements on employer-paid *medical benefits for dependents* up to age 26 under group health plans pursuant to the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010. This law took effect on April 6, 2011, as an urgency statute. (A.B. 36)

- Records requirements relating to employers required to keep itemized written wage statements have been revised. (A.B. 243; amended Labor Code section 226)

New Laws Affecting Selected California Employers

- If the Agricultural Labor Relations Board (ALRB) sets aside an election because of employer misconduct, the Board may, as an additional remedy, certify the labor organization as the bargaining representative if it finds it unlikely that a new election would “reflect the free and fair choice of employees.” The law’s amendments also cover: the factors a court may consider in determining a request for temporary or permanent restraining order; the time for filing a declaration that the parties have failed to reach a collective bargaining agreement; and confirmation that the filing of a petition for review of the Board’s order does not stay mandatory mediation. (S.B. 126; amended Labor Code sections 1156.3, 1158, 1160.4, and 1164)
- Extends the expiration date that *prevailing wage provisions apply to volunteers*, as defined in amended Labor Code section 1720.4, from January 1, 2012, to January 1, 2017. (A.B. 587)
- Expands the definition of *hauling refuse* (from a public works site to an outside disposal location) to include the handling of specified materials other than some recyclable metals, thereby expanding the definition of “public works,” and thus requiring the payment of *prevailing wages* for that activity. (A.B. 514; amended Labor Code section 1720.3)
- Amends, repeals and adds eight Labor Code sections (among other code amendments) to modify the manner by which the Department of Industrial Relations sets reimbursement rates for its costs of performing *prevailing wage monitoring* and enforcement on specified public works projects, when the reimbursement to the Department may be waived, and exempts certain public works projects from these requirements. (A.B. 436)
- Increases the *maximum penalty* from \$50 to \$200 per calendar day for each worker paid less than the determined *prevailing wage* and increases the minimum penalty from \$10 to \$40 per day for violations of prevailing wage provisions. Penalties are also increased, from \$25 to \$100 for each calendar day, per worker, against contractors and subcontractors that fail to respond to a written request for payroll records within 10 days. In addition to the monetary penalty, failure to comply with the written request for payroll records within 30 days may subject the contractor or subcontractor to debarment. (A.B. 551; amended Labor Code section 1775; amended Labor Code section 1776; amended Labor Code section 1771.1)
- An employer must provide, upon request, non-redacted copies of *certified payroll records* to agencies included in the Joint Enforcement Strike Force on the Underground Economy or other law enforcement agencies. An employer is not liable in a civil action for any reasonable act or omission taken in good faith in compliance with this requirement. (A.B. 766, amended Labor Code section 1776)
- Removes the January 1, 2012, expiration date on the law that allows a *motion picture payroll services company* to serve as the employer of motion picture production workers for purposes of payroll tax reporting and employee benefits pursuant to the unemployment insurance and state disability insurance programs. (A.B. 55; amended Unemployment Insurance Code section 679)
- Labor Code section 6403.5 is added to the Labor Code to provide that general *acute care hospitals* must maintain a safe patient handling policy for patient care units, including trained lift teams or training in safe lifting techniques for staff, to comply with the California Occupational Safety and Health Act of 1973. (A.B. 1136)
- *Farm labor contractors* must disclose, in the itemized wage statement to employees, the name and address of the legal entity that secured the employer’s services. Willful violation of this law is a crime. (A.B. 243; amended Labor Code section 226(a))
- “Sunsets” on January 1, 2017, the existing exemption for hours of work restrictions on minors employed in *Lake County agricultural packing plants*. (A.B. 1398; amended Labor Code section 1393.5)
- Prohibits persons under 18 years of age from using an ultraviolet tanning device in tanning facilities. (S.B. 746; amended Business and Professions Code section 22706)

Other Laws Taking Effect on January 1, 2012

A relatively recent legislative phenomenon is passage of bills with an extended effective date, *i.e.*, beyond the traditional “first of the following year” effective date. One such bill is the California Transparency in Supply Chains Act of 2010 (passed in 2010), effective January 1, 2012. This new law requires retail sellers and manufacturers doing business in California to disclose their efforts to eradicate slavery and human trafficking from their direct supply chains for tangible goods offered for sale. The legislation is not intended to apply to a retail seller or manufacturer having less than \$100,000,000 in annual worldwide gross receipts. (2009-2010 Session S.B. 657; new Civil Code section 1714.43)

New Laws Effective After January 1, 2012

Recent legislation addressing written commission agreements also includes a delayed effective date. At present, an employer who (1) has no permanent and fixed place of business in the state and (2) who enters into a contract of employment involving *commissions as a method of payment* with an employee for services to be rendered within the state must enter into a written contract that expressly sets forth the method by which the commissions will be computed and paid. An employer who does not comply with the requirements is liable to the employee in a civil action for triple damages. As of January 1, 2013, the same requirements will apply to **all** California employers entering into employment agreements involving services to be rendered within this state where commissions are intended as the method of payment. The new law repeals the provision making an employer who violates this requirement liable in a civil action for triple damages. (A.B. 1396; amended Labor Code section 2751)

Vetoed Bills

Demonstrating that there is rarely perfect agreement between a governor and a legislature even where they share the same party affiliation, Governor Brown vetoed the following bills:

- A.B. 325: This bill would have prohibited an employer from refusing to grant a request by an employee to take up to three days of bereavement leave or to interfere or restrain an employee from taking such leave.
- A.B. 267: This bill would have made void and unenforceable a provision in any employment contract that required an employee to use a forum other than California, or to agree to a choice of law other than California, to resolve any employment-related issues that arose in California.
- S.B. 24: This bill would have increased penalties associated with texting and using non-hand-free cell phones while driving.

Recommended Action Items for Employers

In response to the legislation enacted this year, it is important that employers have policies and/or modifications to employee handbooks in place by January 1, 2012, that conform with the new legislation. In particular:

1. Effective January 1, 2012, employers must provide each employee with a written notice, at the time of hiring, that specifies all of the information required by new Labor Code section 2810.5. A template form for this purpose is to be developed by the California Labor Commissioner. Any modification to the information specified in section 2810.5 must be provided, in writing, to an employee within seven calendar days of the change.
2. Confirm that employee payroll records are retained for at least three years. (Amended Labor Code section 1174)
3. Consider adding an affirmative confirmation (if it is not already included) on every hourly employee’s time sheet or record, that the hours entered are a completely accurate statement of all of the employee’s hours worked during the period covered by the time sheet or record.
4. Modify workers’ compensation postings to include the website address and contact information that employees may use to obtain further information about the workers’ compensation claims process and an injured employee’s rights and obligations, including the location and telephone number of the nearest information and assistance officer.

5. If you have employees to whom the 2013 requirement of written commission agreements (A.B. 1396; amended Labor Code section 2751) may apply, it is best to begin the necessary revisions now.

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¹ Brown's veto rate of 2011 legislation was 14%, which was higher than the veto rate in his previous term as governor (1975-1983), but lower than his predecessor's last veto rate.

² All California bills and their committee reports and votes are available at www.leginfo.ca.gov.

³ Major legislative developments in Washington are covered in other Littler ASAPs and publications. Of note is that the jobs bill presented to Congress by President Obama on September 8th includes a prohibition of discrimination against job applicants who are unemployed at the time of their application. This is a policy proposal that has been showing up with increasing frequency in state legislatures.