

2012 Labor Law Update

LEGISLATIVE AND REGULATORY CHANGES AND IMPORTANT COURT DECISIONS during this last year made significant changes for employers. Here is a summary of some of the most important ones you need to know to prepare for this year.

STATE LABOR LAWS

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NEW STATE LAWS

This year, as in years past, the Legislature presented Governor Brown with a number of workplace-related bills. Below are the bills the Governor chose to sign:

WAGE THEFT PREVENTION ACT AB 469

Notice of Pay Details:

Requires employers to provide non-exempt employees, at the time of hire or whenever there is a change to their rate of pay, a notice that specifies:

- *The rate of pay and the basis, whether hourly, salary, piece commission or otherwise, including any overtime rate;*
- *Allowances, if any, claimed as part of the minimum wage, including meal and lodging allowances;*
- *The regular pay day designated by the employer as required under the Labor Code;*
- *The name of the employer, including any "doing business as" names;*
- *The physical address of the employer's main office or principal place of business and any mailing address, if different;*
- *The telephone of the employer; and*
- *The name, address and telephone and policy number of the employer's workers' compensation carrier.*

Administrative Penalties AB 240:

Allows an employee that alleges a minimum wage violation to recover liquidated damages before both the Division of Labor Standards Enforcement (DLSE) and the Labor Commissioner.

Wage Penalties AB 551:

Increases the maximum penalty from \$50 to \$200 per

calendar day for each worker paid less than the determined prevailing wage. It increases the minimum penalty from \$10 to \$40 per day for violations of prevailing wage obligations and increases the penalty from \$25 to \$100 per calendar day, per worker, against contractors and subcontractors that fail to respond to a written request for payroll records within 10 days.

Commission Agreements AB 1396:

Law now requires that commission agreements must be in writing. This important change in the law goes into effect January 1, 2013. Employers who pay employees in a manner that includes commissions must put the terms of the compensation system in writing.

The contract that is created must describe the method by which commissions will be computed and paid. The employer must give a signed copy of the agreement to every employee who is a party to it and obtain a signed receipt from each employee. The new law creates the presumption that if a contract expires but the employee and employer continue to work under the terms of the expired contract, the contract terms are presumed to remain in full force and effect until the contract is superseded or employment is terminated by either party.

Credit Checks AB 22:

Prohibits employers and prospective employers, not including certain financial institutions, from obtaining and using consumer credit reports regarding applicants or employees.

Department of Fair Employment and Housing Procedural Regulations (DFEH):

Effective October 7, 2011, DFEH instituted 56 pages of new regulations on procedures for filing, investigating and processing discrimination and harassment claims.

E-Verify AB 1236:

Allows employers to continue to choose to use E-Verify, but prohibits California state agencies and local governments from requiring employers to use E-Verify.

Farm Labor Contractors—Wage Notices AB 243:

Expands the information that must be included on pay statements for farm labor contractors. Employers that are farm labor contractors must disclose on the itemized payroll statement furnished to their employees, the name and address of all legal entities that secured the employer's services.

Agricultural Labor Relations Elections SB 126:

Affects certification of bargaining representatives for agricultural employees.

Genetic Information SB 559:

Revises the Fair Employment and Housing Act (FEHA) to state that employers are prohibited from discriminating against employees on the basis of genetic information.

Gender Expression AB 887:

Revises the FEHA to further define "gender" to include both gender identity and "gender expression" and to make clear that discrimination on either basis is prohibited. Also, an employee must be allowed to dress consistently with both the employee's gender identity and gender expression.

Insurance Non-Discrimination Act SB 757:

Prevents employers that operate in multiple states from discriminating against same-sex couples by not providing the same insurance coverage for domestic partners as they do for spouses.

Leave Law Interference AB 592:

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.

Pregnancy Disability Leave SB 299:

Requires all employers with 5 or more employees to continue to maintain and pay for health coverage, if they have a group health plan, for eligible female employees who take Pregnancy Disability Leave (PDL) up to a maximum of four months in a 12-month period.

Organ and Bone Marrow Donor Leave SB 272:

Clarifies California's organ and bone marrow donor leave law to state that the days of leave are business days, not calendar days, and that the one-year period is measured from the date the employee's leave begins.

Safe Lifting—Hospitals AB 1136:

Requires general acute care hospitals to maintain a safe patient handling policy for patient care units, including trained lift teams or training in safe lifting techniques for staff.

Gender or Sexual Orientation Discrimination in State Contracts SB 117:

Will not allow the state of California to enter into contracts of more than \$100,000 with companies that discriminate against employees on the basis of gender or sexual orientation with regard to benefits.

Misclassification of Independent Contractors SB 459:

New penalties established (between \$5,000 to \$25,000) for the "willful misclassification" of independent contractors.

Apprentice Programs SB 56:

Changes audit requirements for apprenticeship programs. This law eliminates random audits during five-year increments, and directs the Division to conduct audits of apprenticeship programs instead.

Labor Compliance Programs

Labor Code section 1771.5 authorizes the establishment of Labor Compliance Programs ("LCPs") to enforce prevailing wage requirements on public works construction projects. LCPs enforce prevailing wage laws on behalf of public agencies that award public works contracts (known as "awarding bodies") and serve as an alternative to the traditional enforcement role of the Division of Labor Standards Enforcement.

Compliance Monitoring Unit (CMU)

The Compliance Monitoring Unit or "CMU" is a new unit within the DLSE that was created to monitor and enforce prevailing wage requirements on public works projects that receive state bond funding and on other projects that are legally required to use the CMU. The CMU began operations on January 1, 2012, following the recent adoption of AB 436 and approval of revisions to program regulations. By actively monitoring compliance on an ongoing basis while work is being performed, the CMU will play a special role in ensuring that public works construction workers are promptly paid the proper prevailing wage rates and in helping maintain a level playing field for contractors who comply with the law.

Only projects for which the public works contract is awarded on or after January 1, 2012 are subject to the CMU requirements. Contracts awarded prior to January 1, 2012 will be subject to the prior monitoring and enforcement rules (labor compliance programs for some bond-funded or design-build projects or no specific monitoring requirement) for the life of those projects.

Workers' Compensation Legislation**AB 335**

Requires the workers' compensation administrative director (AD) to work with the Commission on Health and Safety and Workers' Compensation (CHSWC) to develop regulations regarding notices to injured workers.

AB 378

Establishes guidelines for dispensing compound drugs, the circumstances under which those drugs would be covered and the reimbursement amount, and removes the incentives for physicians to refer patients to pharmacies in which the physician or physician's family has a financial interest.

AB 397

Contractors that do not have workers' compensation coverage but that are exempt from having coverage at the time they are licensed must certify they are still exempt or have gotten coverage at the time of their license renewal.

AB 1168

Establishes a fee schedule for vocational experts' services.

AB 1426

Eliminating the court administrator position.

AB 228

Amends the California Insurance Code to authorize the State Compensation Insurance Fund (SCIF) to provide workers' compensation coverage to a California employer whose California employees temporarily work outside the state.

AGENCY CHANGES

IRS Mileage Reimbursement Rate:

Beginning January 1, 2012, the recommended IRS reimbursement rate for business miles driven is 55.5 cents per mile.

Pay for Exempt Computer Professionals Goes Up 1-1-12

California's Department of Industrial Relations has announced that the minimum pay required for computer professionals to qualify for overtime exemption in California is increasing effective January 1, 2012. The increase is 2.5% higher than the current minimum pay rate and requires that these employees be paid at least \$38.89 per hour, which translates to a monthly salary of \$6,752.19 and an annual salary of \$81,026.25. Employers should note that these minimum pay thresholds are applicable only to California computer professionals.

Physicians and Surgeons Overtime Exemption Rate:

Effective January 1, 2012, the hourly rate is \$70.86.

National Labor Relations Board -- New Election Rules

The time period between the filing of an election petition and the actual election may be dramatically shortened. The NLRB justified the changes based on the purported benefit of reducing unnecessary litigation in representation cases. However, the primary effect will likely be that employers have much less time to mount a campaign against the union organizing effort. Key provisions include:

- NLRB hearing officers can limit evidence in pre-election hearings
- Hearing officers have more discretion over the need for or scope of post-hearing briefs
- Eliminates right to request pre-election review of a Regional Director's rulings
- Eliminates current 25-day waiting period between post-hearing decisions and election
- More limited appeals

Also

National Labor Relations Board – Poster Delayed

And

National Labor Relations Board -- Social Media Issues

FEDERAL LAWS

DOT Bans Commercial Drivers Hand-Held Phones

Two DOT agencies, the Federal Motor Carrier Safety Administration and the Pipeline and Hazardous Materials Safety Administration, published a final rule Dec. 2 that will prohibit use of hand-held mobile phones by commercial drivers while on the road. Although both the National Transportation Safety Board and FMCSA's Motor Carrier Safety Advisory Committee recommended a rule to ban CMV drivers' use of hands-free mobile phones, as well, the agencies did not go that far.

SAN FRANCISCO LAWS

San Francisco raises minimum wage to over \$10 an hour

San Francisco is the first city in the nation requiring employers to pay more than \$10 an hour to those earning minimum wage. The increase to \$10.24 from \$9.92 an hour went into effect on January 1, 2012. The 32-cent increase is

the result of a proposition voted in by San Franciscans in 2003 increasing the minimum wage each year, using a formula tied to inflation.

CA COURT DECISIONS OF NOTE

Cuiellette v. City of Los Angeles (Cal. Ct. of Appeals, April, 2011) — Employer must independently assess ability to return to work regardless of workers' compensation conclusion

Sonic-Calbassas v. Moreno (Cal. Supreme Court, February, 2011) — Labor Commissioner claim survives arbitration agreement

Ralphs Grocery v. UFCW (Cal. Ct. of Appeals, January 2011) — Moscone Act unconstitutional

Lamps Plus Overtime (Cal. Ct. of Appeals, May, 2011) -- Employers must "provide" meal period.

Arechiga v. Dolores Press (Cal. Ct. of Appeals, February, 2011) — Mutually explicit wage agreements.

Starbucks v. Sup. Ct. (Cal. Ct. of Appeals, April, 2011) - Job applications and criminal background.

CA SUPREME COURT DECISIONS

CA Supreme Court finds claims adjusters exempt

In a long-awaited decision, the California Supreme Court reversed a court of appeal ruling that claims adjusters were not exempt from overtime. **Harris v. Superior Court (Liberty Mutual Insurance Company)**, Cal. Sup. Ct. No. S156555. The case reverses prior precedents in California starting with *Bell v. Farmers Ins. Exchange*, which held that state law incorporated the administrative/production worker dichotomy, and that insurance adjusters were among the "production" workers of the insurance business and therefore could not be exempt from overtime.

PENDING CASE

Brinker v. Superior Court

The California Supreme Court is on the brink of a decision in the widely talked about Brinker meal and rest periods case. Decision due on April 17, 2012

FEDERAL COURT DECISIONS

Wal-Mart v. Dukes (U.S. Supreme Court, June 2011) - No commonality among putative class

Thompson v. North American Stainless (U.S. Supreme Court, January, 2011)-Third Party Retaliation

Kasten v. Saint-Gobain Performance Plastics (U.S. Supreme Court, March, 2011)- Oral complaint may be sufficient to invoke FLSA retaliation protection

AT & T Mobility v. Concepcion (U.S. Supreme Court, April, 2011) — Arbitration agreements may include class action claims

Whiting v. John Hopkins (Federal Fourth Circuit, April, 2011) — Waiver of FMLA claims

