New California Labor/Employment Legislation for 2012

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This year, California Governor Jerry Brown signed a number of new employment-related bills. Some relate to public pensions to address fiscal difficulties. Other bills address employment issues that directly impact all employers. Brief summaries of the most far reaching of those laws follow.

AB 22 (Mendoza) prohibits most employers from using a "**consumer credit report**" in making hiring decisions. The federal Fair Credit and Reporting Act (FCRA) covers "consumer reports" used many topics. In addition to covering credit checks, the FCRA also covers general background checks. **AB 22** applies only to credit checks and uses the "consumer credit report" definition in California Civil Code 1785.3: "any written, oral, or other communication of any information by a consumer credit reporting agency bearing on a consumer's credit worthiness, credit standing, or credit capacity, which is used or is expected to be used, or collected in whole or in part, for the purpose of serving as a factor in establishing the consumer's eligibility for . . . employment purposes."

Supporters of **AB 22** contend that the use of credit reports for employment purposes is improper because these reports do not predict employability or future job performance.

AB 22 does not prohibit credit checks in all hiring circumstances. Listed below are the exceptions under **AB 22** that employers should review to see which positions might still allow credit checks:

> 1024.5. (a) An employer or prospective employer **shall not use a** consumer credit report for employment purposes unless the position of the person for whom the report is sought is any of the following:
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> (1) A managerial position.
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> (2) A position in the state Department of Justice.
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> (3) That of a sworn peace officer or other law enforcement position.
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> (4) A position for which the information contained in the report is required by law to be disclosed or obtained.
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> (5) A position that involves regular access, for any purpose other than the routine solicitation and processing of credit card applications in a retail establishment, to all of the following types of information of any one person:
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> (A) Bank or credit card account information.
> (B) Social security number.
> (C) Date of birth.
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> (6) A position in which the person is, or would be, any of the following:
>
> (A) A named signatory on the bank or credit card account of the employer.
> (B) Authorized to transfer money on behalf of the employer.
> (C) Authorized to enter into financial contracts on behalf of the employer.
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> (7) A position that involves access to confidential or proprietary information, including a formula, pattern, compilation, program, device, method, technique, process or trade secret that (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who may obtain economic value from the disclosure or use of the

information, and (ii) is the subject of an effort that is reasonable under the circumstances to maintain secrecy of the information.

(8) A position that involves regular access to cash totaling ten thousand dollars ($10,000) or more of the employer, a customer, or client, during the workday.

For employers who currently use credit checks, parsing which positions are still exempt from **AB 22**'s ban is not clear. Are payroll managers covered under exemption number 5? Do executive directors fall under the "managerial position" exemption? It appears that both would be covered. All employers should review their hiring practices.

SB 559 (Padilla) provides that an employer may not discriminate against an employee on the basis of their "**genetic information**." Genetic information includes the results of the employee's or their family members' genetic tests and "the manifestation of a disease or disorder in family members of the individual." Thus, an individual now may claim that they were impacted negatively based upon a genetic disorder, for example claiming they were terminated because of the cost of providing employer group health coverage for themselves or a sick family member.

SB 299 (Evans) extends **employer health care coverage**. **SB 299** requires employers with five or more employees to maintain group health coverage for employees during the up to four-month duration of a pregnancy disability leave (PDL). Now, employers with 50 or more employees had to maintain health benefits for 12 weeks during a pregnancy leave running concurrently with by the FMLA. **SB 299** adds an extra four weeks of coverage. Smaller employers, not covered by FMLA, previously had no obligation to maintain health coverage. Now, they have up to a four-month obligation.

AB 240 (Bonilla) authorizes the Labor Commissioner to award **liquidated damages** of twice the amount of wages that were unpaid, plus interest, to an employee when the employee successfully claims that he or she was not paid minimum wage. Previously, liquidated damages were only possible if the employee brought his or her minimum wage claim in court.

AB 592 (Lara) adds **new language to the California Family Rights Act** (CFRA) specifying that it is an unlawful employment practice "to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under" the CFRA. Employers can expect that this will appear as an additional, separate claim in any discrimination lawsuit.

AB 1396 (Swanson) imposes new **obligations on employers that pay employees on commission**. **AB 1396** requires that, by January 1, 2013, all employment relationships that involve payment of commissions "be in writing and shall set forth the method by which the commissions shall be computed and paid." The employer must give the employee a signed copy and the employer must obtain a signed receipt from each employee. The contract and the commission terms "are presumed to remain in full force and effect until the contract is superseded or the employment is terminated by either party." Employers with marketing staff will be impacted if those employees are paid commissions.

AB 1236 (Fong) The **federal E-Verify system** provides an automated link to federal databases to help employers determine employment eligibility of new hires and the validity of their Social Security numbers. **AB 1236** prohibits the state, cities and counties from mandating that private employers use E-Verify. Employers, of course, can use the system on a volunteer basis.

AB 887 (Atkins) This **Transgender Non-Discrimination Law** clarifies the definition of gender in state anti-discrimination laws to include "gender identity" and "gender expression" where now only the term

"gender" appears. It defines gender expression as meaning a person's gender-related appearance and behavior.

SB 117 (Kehoe) prevents the state from entering into contracts in excess of $100,000 with businesses that deny **equal benefits to the same-sex spouses** of their employees. Thus, an employer with a state contract worth more than $100,000 must have non-discrimination policies in place for gay, lesbian, bisexual and transgender employees.

SB 459 (Corbett) increases the penalties for employers that **wrongly classify employees as independent contractors**. **SB 459** adds Sections 226.8 and 2753 to the Labor Code. Section 226.8 prohibits the "willful misclassification" of an individual as an independent contractor and prohibits an employer from charging fees to a misclassified individual for items that an employee is not normally required to purchase, such as equipment, space rental, services, or licenses.

Section 228.6 imposes a penalty of between $5,000 and $15,000 for each violation, in addition to other penalties permitted by law. If an employer is found to have engaged in a pattern or practice, the penalty increases to between $10,000 and $25,000 per violation. In addition, similar to an NLRB remedy, an employer may be ordered to post on its website (or, if the employer has no website, in a prominent physical location) a notice stating that the employer has committed a "serious violation of the law." The notice must be posted for a year and must invite impacted persons to contact the Labor and Workforce Development Agency.

SB 459 defines "willful misclassification" as "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor." Given the vagueness of that definition, employers are well served to be rigorous in their assessments of any independent contractor arrangement.

AB 469 (Swanson), the **Wage Theft Prevention Act** (WTPA), adds Section 2810.5 to the Labor Code. Under **AB 469**, employers **must provide each new non-exempt employee** with a written notice at the time of hiring, in the language that the employer normally uses to communicate employment-related information, which contains the following:

1) The employee's pay rate or pay rates, and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any overtime rates, as applicable;
2) Allowances included as part of the minimum wage calculation, including meal or lodging allowances;
3) The employer's regular payday;
4) The employer's name, including any "doing business as" names;
5) The employer's physical address of its main office or principal place of business, and a mailing address, if different;
6) The employer's telephone number;
7) The name, address, and telephone number of the employer's workers' compensation insurance carrier; and
8) Any other information the California Labor Commissioner ("Commissioner") deems material and necessary.

The WTPA excludes the following individuals from the notice requirements:

- Employees who work for the state or any political subdivision, including any city, county, city and county, or special district;
- Employees exempt from the payment of overtime wages by statute or Industrial Welfare Commission wage orders; and
- Employees covered by collective bargaining agreements who earn not less than 30 percent more than California's minimum wage.

The WTPA also requires that employers notify their employees, in writing, of any changes to the information set forth in the notice within seven calendar days after the time of the changes, unless all the changes are reflected in a Labor Code Section 226 statement or in another writing required by law within seven days of the changes.

According to the Department of Industrial Relations, a template for employers should be available on its website in December 2011. In addition to the new notice requirements, the WTPA also increases penalties and creates new penalties for employers that violate the Labor Code.

In summary, employers are facing numerous new obligations in 2012. With the exception of **AB 1396** involving commissioned employees, all laws take effect January 2012. Some of these new statutes presumably could be a basis for California's Private Attorneys General Act (PAGA) and Unfair Competition Law claims – two laws that have wreaked havoc on employers in the wage and hour arena.

On the federal front:

National Labor Relations Board (NLRB): New Posting Regulation

Most CALA members are employers subject to the National Labor Relations Act (NLRA). Claiming that "many employees protected by the NLRA are unaware of their rights" the National Labor Relations Board (NLRB) issued its final rule requiring employers to post notices informing their employees of their NLRA rights in print and in electronic form on an intranet or internet site" if the employer customarily communicates with its employees about personnel rules or policies by such means."

Notices in printed form are available on the NLRB's website in English and other languages. Covered employers must post the notice in all areas in which personnel rules or policies are posted. In workplaces in which 20 percent of the employees speak English as a second language, the employer must provide the notice in one of those languages in addition to English. The regulation does not require any reporting or recordkeeping by employers. However, a failure to post the notice prevents an employer from raising a defense that an unfair labor practice charge is untimely as the failure to post the Notice tolls the statute of limitations for an employee filing an unfair labor practice under Section 10(b).

Earlier this month, the NLRB postponed implementation of the notice requirement until January 31, 2012. The National Association of Manufacturers and the National Federation of Independent Business have sued, challenging the constitutionality of the regulation and seeking an injunction. Additionally, the U.S. Senate introduced legislation that would prevent the NLRB from implementing the regulation.