CALIFORNIA EMPLOYMENT AND LABOR UPDATE

Preview of New 2012 California Labor and Employment Laws

As we enter 2012, employers in California are faced with a number of significant new obligations imposed by recently passed legislation and NLRB decisions. Prudence dictates that employers review their human resources policies to ensure compliance with these laws and decisions. Please feel free to contact any member of the Sidley Labor and Employment practice group if you wish to discuss these new laws in more detail or would like our assistance with reviewing your current policies.

Compensation and Wage Statements

The Wage Theft Prevention Act – New Notice Requirements for all Newly-Hired Non-Exempt Employees

Adding to the already complex requirements of California's paystub reporting, the Wage Theft Prevention Act (AB 469) requires employers to provide all newly-hired, non-exempt employees with a written notice at the time of hiring that specifies: (1) the rate and the basis of the employee's wages (i.e., hourly, salary, commission, or otherwise); (2) any allowances claimed as part of the minimum wage (i.e., meals or lodging allowances); (3) the regular payday designated by the employer; (4) the physical address of the employer's main office; (5) the telephone number of the employer; (6) the name, address, and telephone number of the employer's workers' compensation carrier; (7) any other information the Labor Commissioner deems material and necessary. In addition, the new law may be interpreted to require employers to provide notice of any changes to this information to all employees, although the requirement is satisfied if the updated information appears in another notice required by law within seven days of the change or a timely paystub. The Department of Industrial Relations published a template form on its website (http://www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf) as well as responses to "Frequently Asked Questions" (http://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html).

Additionally, AB 469 increases the time employers must keep payroll records to a minimum of three years and creates new penalties for employers who violate the Labor Code. Employers should modify new hire and on-boarding procedures to include the new disclosure requirements, ensure that they provided updated information to employees via a notice form or paystub and ensure that record retention policies comply with the new law.

Commission Agreements Must Be in Writing By January 1, 2013

Effective January 1, 2013, AB 1396 requires all California employers to use written commission agreements that set forth the method by which commissions are computed and paid. In addition, employees are entitled to receive a signed copy of the agreement and must provide employers with a signed acknowledgment of receipt. Thus, all

This **Sidley update** has been prepared by Sidley Austin LLP for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers.

Attorney Advertising - For purposes of compliance with New York State Bar rules, our headquarters are Sidley Austin LLP, 787 Seventh Avenue, New York, NY 10019, 212.839.5300 and One South Dearborn, Chicago, IL 60603, 312.853.7000.

Prior results do not guarantee a similar outcome.

California employers who pay employees commissions should begin the process of developing their written commission agreements so that they are prepared to implement the agreements by January 1, 2013. This is particularly important for any employer who uses a commission plan that does not undergo annual revision or contractual commission arrangements that are at-will or for terms longer than one year.

The Labor Commissioner May Now Award Employees Liquidated Damages for an Employer's Violation of California's Minimum Wage Laws

Employees may now recover liquidated damages in Department of Labor proceedings for violation of California minimum wage laws, thus expanding the remedies available at such hearings. AB 240 permits employees to recover liquidated damages pursuant to a complaint filed with the Labor Commissioner for an employer's failure to pay minimum wage. This means that employers are now subject to the same relief in an action before the Labor Commissioner as in a civil suit for failing to pay minimum wage. The Labor Commissioner has notified many employers that are defending a minimum wage claim before the Division of Labor Standards Enforcement that it has added a request for liquidated damages to the claimant's request for relief.

Leaves of Absence and Employee Benefits

Employers Required to Provide Health Coverage during Pregnancy Leave

An explicit requirement to maintain health coverage now applies for the benefit of employees who take pregnancy leave. SB 299 requires an employer with five or more employees to maintain and pay for an employee's group health coverage while that employee is on leave for pregnancy, childbirth, or related medical condition for a period of up to four months under the same terms and conditions as active employees. Existing law had only prohibited an employer from refusing to allow an employee to take a leave for pregnancy, childbirth, or related medical conditions. An employer may, however, recover the cost of the insurance premium it paid during the employee's leave if the employee fails to return to work for reasons within his or her control. Therefore, California employers should update their pregnancy, leave of absence, and benefits policies and forms.

Equal Health Benefits for Same-Sex Spouses and Domestic Partners of State Contractor Employees

Employers who do business with the State must now re-examine the terms of their benefit plans to ensure they offer coverage to same-sex spouses and partners. SB 117 prohibits employers with state contracts worth $100,000 or more from discriminating when providing health benefits between employees with different sex spouses or domestic partners and employees with same-sex spouses or domestic partners. Thus, employers with state contracts worth $100,000 or more that currently provide medical benefits to their employees and different sex employee spouses or domestic partners must now make those benefits equally available to employees and their same-sex spouses or domestic partners.

Unlawful Employment Practice to Interfere with the Exercise of Employee Rights under the California and Federal Family and Medical Leave Acts

A perceived loophole in the anti-interference and retaliation provisions of the California Family Rights Act ("CFRA") and Pregnancy Disability Law ("PDL") has now been closed. Existing law prevents an employer from refusing to grant an employee's request for a leave of absence if the employee is eligible under one of the grounds provided by the CFRA and the PDL. AB 592 now makes it an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under these Acts. Thus, the new law underscores the need for employers to implement proper leave of absence policies and anti-retaliation policies to protect employees who take protected leaves.

Independent Contractors

New Penalties for Wrongful Misclassification of Independent Contractors

Employers who use independent contractors face stiff new penalties and potential litigation exposure for the "willful" failure to properly classify such people as employees. SB 459 imposes new penalties on employers who "willfully misclassify" an employee as an independent contractor. Willful misclassification is defined as "voluntarily and knowingly misclassifying an individual as an independent contractor." Employers that violate SB 459 are subject to a civil penalty of no less than $5,000 and no more than $15,000 for single violations. Employers may also be subject to civil penalties of up to $25,000 if found to have engaged in a pattern or practice of willful misclassification. Moreover, SB 459 requires any employer found to have violated the new law may have to post a notice of such violation on the employer's Internet website or in an area accessible to all employees and the general public. Though there may be arguments to the contrary, employers may face new legal theories seeking to impose the newly enacted penalties through the Labor Code Private Attorney General Act of 2004 ("PAGA") and class actions. Accordingly, employers should evaluate new and existing independent contractor relationships to make sure each worker is properly classified.

Traditional Labor Issues

Employers Must Now Post a Notice of Employees' Rights under the NLRA

Effective April 30, 2012, employers will be required to post a notice that sets forth a comprehensive list of employee rights under the National Labor Relations Act. These rights include the right to bargain collectively through chosen representatives and to refrain from engaging in unfair labor practices. The notice must be 11 x 17 inches and must be posted in all locations where employee notices are typically posted. Failure to post the required notice constitutes an unfair labor practice. Employers can print this notice from the NLRB's website. Although several lawsuits have been filed in federal court challenging the NLRB's authority to require employers to post such a notice, employers should nevertheless take steps to ensure compliance with this new posting rule pending resolution of those cases.

Pre-Union Election Hearings Limited and Potentially Expedited

The NLRB recently adopted a new rule giving the hearing officer in a pre-election hearing the authority to limit the hearing to only matters relevant to the question of whether the election should be held. The hearing officer also has discretion to determine whether parties may submit post-hearing briefs. Moreover, absent extraordinary circumstances, all appeals to the NLRB may now be filed only after an election has been held, with the NLRB retaining full discretion over whether post-election appeals will be heard. Finally, the new rule eliminates the twenty-five day period currently required between when the NLRB directs an election and when the election is held. This rule means that employers should expect the union election process to be expedited and the time they have to communicate on matters of union representation and collective bargaining to be shortened. The rule becomes effective on April 30, 2012. A lawsuit has already been filed in federal court attacking the NLRB's authority to implement this new rule.

Hiring and Recruitment

Use of Credit Reports in Hiring Decisions Significantly Limited

Employers who use credit reports in employment decisions must re-evaluate the legality of such use in light of newly enacted legislation. AB 22 adds Section 1024.5 to the Labor Code, which significantly limits when employers may use credit reports in employment decisions and also changes the notice that must be given to individuals when credit reports are obtained. Under this new provision, employers may no longer use credit reports in making decisions about job applicants or current employees, unless the employer is a financial institution or other company required by law to conduct credit checks, or the job position falls under the law's specified exceptions. In addition, employers that are permitted to use a credit report under the new law are now required to specify the legal basis authorizing their use of

the credit report in the notice provided to the applicant or employee. Employers who currently utilize applicant or employee credit reports must re-evaluate whether they can continue such use and, if so, revisit their policies, practices, and notice forms to ensure that they comply with these changes in the law.

Discrimination

Discrimination on the Basis of Gender Identity and Gender Expression Now Prohibited

An update to existing anti-discrimination policies may be warranted in light of the new "protected class" established by recently enacted legislation. AB 887 amends California's anti-discrimination laws to explicitly protect against discrimination on the basis of "gender identity" and "gender expression." While current law defines "gender" as encompassing gender identity and gender expression, AB 887 explicitly categorizes "gender identity" and "gender expression" as protected traits. Employers should therefore revise all discrimination policies and training materials to reflect that discrimination on the basis of "gender identity" and "gender expression" is now prohibited. Moreover, employers must review policies and practices that contain differences based on gender and allow employees to dress, behave, or appear consistently with their own gender identity or expression, whether or not it corresponds with their sex.

Protection against Genetic Information Discrimination Expanded

A person's genetic information has been added as another prohibited basis for discrimination under recently enacted legislation. SB 559 amends the Unruh Civil Rights Act and the Fair Employment and Housing Act to prohibit discrimination on the basis of genetic information and to define the phrase, "genetic information." Genetic information will now include: (1) an individual's genetic tests; (2) the genetic tests of family members of the individual; (3) the manifestation of a disease or disorder in family members of the individual; and (4) any requests for, or receipt of, genetic services, or participation in clinical research that includes genetic services by an individual or any family member of the individual. While the Genetic Information Non-Discrimination Act ("GINA") currently exists as a federal analog to SB 559, SB 559 is more far-reaching because it applies to employers with five or more employees. California employers should ensure that their non-discrimination policies include "genetic information" as a protected category and that their policies and practices do not include impermissible inquiries.

If you have any questions regarding this update, please contact the Sidley lawyer with whom you usually work.

The Labor and Employment Practice of Sidley Austin LLP

Our Employment and Labor Practice has decades of experience in litigating virtually all types of employment and traditional labor claims before federal and state courts and agencies, ranging from single-plaintiff cases to complex class actions. We also provide comprehensive counseling to our clients on a wide variety of employment and labor issues.

To receive future copies of this and other Sidley updates via email, please sign up at www.sidley.com/subscribe

BEIJING BRUSSELS CHICAGO DALLAS FRANKFURT GENEVA HONG KONG LONDON LOS ANGELES NEW YORK PALO ALTO SAN FRANCISCO SHANGHAI SINGAPORE SYDNEY TOKYO WASHINGTON, D.C.

www.sidley.com

Sidley Austin LLP, a Delaware limited liability partnership which operates at the firm's offices other than Chicago, New York, Los Angeles, San Francisco, Palo Alto, Dallas, London, Hong Kong, Singapore and Sydney, is affiliated with other partnerships, including Sidley Austin LLP, an Illinois limited liability partnership (Chicago); Sidley Austin (NY) LLP, a Delaware limited liability partnership (New York); Sidley Austin (CA) LLP, a Delaware limited liability partnership (Los Angeles, San Francisco, Palo Alto); Sidley Austin (TX) LLP, a Delaware limited liability partnership (Dallas); Sidley Austin LLP, a separate Delaware limited liability partnership (London); Sidley Austin LLP, a separate Delaware limited liability partnership (Singapore); Sidley Austin, a New York general partnership (Hong Kong); Sidley Austin, a Delaware general partnership of registered foreign lawyers restricted to practicing foreign law (Sydney); and Sidley Austin Nishikawa Foreign Law Joint Enterprise (Tokyo). The affiliated partnerships are referred to herein collectively as Sidley Austin, Sidley, or the firm.

SIDLEY AUSTIN LLP
SIDLEY