KOUMAS LAW GROUP

Legal Update

January 2012

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GOVERNOR APPROVES NEW EMPLOYMENT LAWS

This past year has seen some critical changes in employment law which affect California businesses. Several employment related bills were signed into law, including Assembly Bill 299, which requires employers to provide up to four months of continued medical benefits for employees taking pregnancy disability leave (PDL). The governor also approved bills that expressly prohibit discrimination based on genetic information, gender identity, and gender expression, require employers to provide specific wage information to new hires, and require written commission agreements, subject employers to penalties for willfully misclassifying employees as independent contractors, and severely restrict a prospective employer's use of credit reports to screen applicants.

Employers Must Provide Medical Benefits During PDL

Under Senate Bill 299, the California Fair Employment and Housing Act (FEHA) has been amended and employers with five or more employees (full or part-time) will now be required to provide up to four months of PDL for employees who are disabled by pregnancy, childbirth, or related medical conditions. Under prior law, while an employee is on PDL, she is entitled to participate in health plans and other benefits to the same extent as and under the same conditions that would apply to any other unpaid disability leave.

Under the Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA), which apply to employers with 50 or more employees, covered employers must maintain the employee's health coverage for up to *12 workweeks* from the date leave first begins under PDL and the FMLA. Thus, under prior law, many California employers limited health care coverage for employees dis-

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abled by pregnancy or childbirth to 12 workweeks, and some smaller employers (less than 50 employees) did not continue to pay for any health care coverage during PDL.

Effective January 1, 2012, an employer with five or more employees must maintain and pay for coverage under its group health plans for the duration of the PDL — up to *four months* — at the same level and under the same conditions coverage would have been provided if the employee had continued in employment continuously for the duration of the leave. Thus, if an employer normally pays the full premium for health care coverage, that employer must continue to do so for up to four months of PDL.

However, if the employee normally pays a portion of the premium, an employer may require her to continue making her normal contributions during the PDL. Of course, an employer may voluntarily choose to provide *additional* health care continuation coverage beyond four months. For state agencies, the collective bargaining agreement will continue to govern the employee's receipt of health care coverage during PDL.

Under the new law, an employer may recover from the employee the health care premiums it paid if the employee fails to return from leave after its expiration, provided the failure to return is not due to (a) the employee taking CFRA leave, (b) a continuing disability, or (c) other circumstances beyond the employee's control. All employers are urged to update current written policies and to immediately implement the practice of continuing health care coverage to employees taking PDL to ensure compliance with the new law.

Mandated Disclosures Of Wage Information For New Hires

An employer must post notices of specified wage and hour information in a conspicuous location where employees can view it. *Effective January 1, 2012*, Assembly Bill 469, dubbed the "Wage Theft Prevention Act of 2011," adds Section 2810.5 to the Labor Code and requires employers to furnish to non-exempt employees *at the time of hiring*, a notice that specifies all of the following:

1. the rates of pay and the basis for those rates, whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, as applicable;
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 legal name of the employer, including any "doing business as" names it uses;
5. the physical address of the employer's main office or principal place of business and a mailing address if different;
6. the employer's telephone number;

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7. the name, address, and telephone number of the employer's workers' compensation insurance carrier; and

8. any other information the labor commissioner deems significant and necessary.

Employers will also be required to notify all employees in writing of any changes to the information set forth in the notice within seven calendar days of the effective date of any changes *unless* all the changes are reflected on a timely wage statement. Additionally, Assembly Bill 469 directs the labor commissioner to prepare a template that complies with these requirements and make it available to employers.

This new law does not apply to:

1. employees directly employed by the state or any political subdivision;

2. employees who are exempt from the payment of overtime wages by statute or the wage orders of the Industrial Welfare Commission; or

3. employees who are covered by a valid collective bargaining agreement if the agreement expressly provides for the employees' wages, hours of work, and working conditions and provides premium wage rates for all overtime hours worked and a regular hourly rate of pay of not less than 30 percent more than the state minimum wage . Employers are encouraged to immediately obtain the template and complete it to be ready to comply with this new notice obligation for any new hires.

Mandatory Written Commission Agreements

Effective January 1, 2013, under Assembly Bill 1396, whenever an employee's method of payment involves commissions, the employer *must* provide a written agreement that sets forth the method by which the commissions will be computed and paid. The employer must provide a signed copy of the contract to the employee and obtain a signed acknowledgment of receipt for it. If a commission agreement expires during an employee's tenure and the employee continues to work under its terms, the terms are presumed to remain in effect until the agreement is replaced by another contract or the employment relationship terminates. Therefore, employers paying any employees by commission have the next 12 months to draft appropriate written agreements and distribute them to applicable employees in exchange for acknowledgments of receipt. It is also a good idea for employees to revisit any currently used agreements to ensure they are meeting the company's operational needs.

No Gender Identity or Gender Expression Discrimination

Governor Brown also approved a bill that added *genetic information* as a prohibited basis of discrimination. On October 9, the governor signed another bill (SB

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887) that amends the Fair Employment and Housing Act to expressly identify other protected characteristics.

The FEHA prohibits discrimination based on "sex," which includes "gender" as defined in a Penal Code section that, in turn, defines the term to include gender identity and gender-related appearance and behavior. Senate Bill 887 amends the FEHA to explicitly enumerate "*gender identity*" and "*gender expression*" as protected categories. *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

Penalties For Independent Contractor Misclassification

Effective January 1, 2012, under Senate Bill 459 it will be unlawful for any person or employer to willfully misclassify an individual as an independent contractor. *Willful misclassification* means avoiding employee status for an individual by voluntarily and knowingly misclassifying him as an independent contractor. This new law also makes it unlawful for an employer to charge an individual who has been willfully misclassified as an independent contractor a fee or to make any deductions from compensation for any purpose — including for goods, materials, space rental, services, government licenses, repairs, equipment maintenance, or fines arising from the individual's employment — if any of those fees or deductions would have violated the law had the individual not been misclassified.

Starting in 2012, if the California Labor and Workforce Development Agency or a court determines that a person or employer has violated this new law, the person or employer *will be subject to a civil penalty* of $5,000 to $15,000 for <u>each</u> violation, in addition to any other penalties or fines permitted by law. If the agency or a court determines that a person or employer is engaging in a pattern or practice of these violations, the civil penalty will be $10,000 to $25,000 for each violation.

Furthermore, *any person* who, for money or something else of value, knowingly advises an employer to treat a worker as an independent contractor to avoid employee status *will be jointly and severally liable* with the employer if the worker is found to be misclassified. This provision does <u>not</u> apply to an employee who provides advice to his employer or attorneys who provide legal advice to businesses. Therefore, it is strongly recommended that every employer perform a self audit with respect to anyone it currently classifies as an independent contractor to avoid or reduce exposure to these new stiff penalties.

Employers' Right To Conduct Credit Checks On Applicants Severely Restricted

Under prior state law, an employer could request a credit report for employment purposes provided the employer satisfied specified notice and disclosure obligations. *Effective January 1, 2012*,

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Assembly Bill 22 prohibits employers, with the exception of certain financial institutions, from obtaining a consumer credit report for employment purposes unless the position is one of the following:

1. managerial;
2. in the California Department of Justice;
3. a sworn peace officer or other law enforcement position;
4. a position for which the law requires the information contained in the report to be disclosed or obtained;
5. one that involves regular access to specified personal information for any purpose other than the routine solicitation and processing of credit card applications in a retail establishment;
6. one in which the person is or would be a named signatory on the employer's bank or credit card account or authorized to transfer money or enter into financial contracts on its behalf;
7. one that involves access to confidential or proprietary information; or
8. one that involves regular access to $10,000 or more in cash.

An employer must provide a written notice to the applicant or employee that specifies which of the above exceptions applies when requesting authorization to obtain the report..

No Interference With PDL or CFRA Rights

Senate Bills 299 and 592 clarify that it is unlawful to interfere with, restrain, or deny the exercise or the attempt to exercise an employee's rights under the PDL law or the CFRA, respectively. Employers should avoid discouraging employees from taking PDL or CFRA leave, "suggesting" that an employee delay PDL or CFRA leave to accommodate business needs, granting shorter extensions of leave than requested, or otherwise denying or interfering with eligible employees' requests to take PDL or CFRA leave.

THE DFEH OFFERS FREE WEBINARS FOR SEXUAL HARASSMENT TRAINING

The California Department of Fair Employment and Housing (DFEH) announced that the State has saved $280,000 and trained more than 7,000 of its employees since June by providing webinar-based no-cost mandatory sexual harassment prevention training.

California law requires all employers with 50 or more employees—including the State—to provide two hours of classroom or other interactive sexual harassment prevention training to supervisors in California every two years. Since Assembly Bill 1825 became effective January 1, 2005, numerous private vendors have made sexual harassment prevention training courses available to employers for a

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fee.

Over the past six months, the Department has partnered with the State Personnel Board and the Department of Personnel Administration to offer these free monthly interactive webinars as part of the State's requirement to provide sexual harassment prevention training to its supervisors and managers.

In January 2012, the Department will begin offering its webinars statewide to *private employers* for a modest fee, and continue to offer cost-free training to all state employees. During these continuing tough economic times, employers are encouraged to take advantage of this free benefit.

NLRB POSTPONES NOTICE-POSTING REQUIREMENT

The National Labor Relations Board has agreed to postpone the effective date of its employee rights notice-posting rule at the request of the federal court in Washington, DC hearing a legal challenge regarding the rule. The Board's ruling states that it has determined that postponing the effective date of the rule would facilitate the resolution of the legal challenges that have been filed with respect to the rule. **The new implementation date is** April 30, 2012.

FUTURE PRESENTATIONS

Surviving the Economic Times:
50 Tips For Avoiding Employment Lawsuits

Date March 15, 2012 **Time:** 11:30a.m. to 1:00p.m.

Location: 5575 Ruffin Road, Suite 250, San Diego, CA 92123

Sponsored By: San Diego County Medical Society (SDCMS)

Periodic compliance of procedures is an essential preventative tool, especially in the current economic climate where many companies face daily challenges to remain in business. One lawsuit could decide that fate and close the doors. We will discuss practical tips for before, during and after employment.

For registration information, contact Serena Sauerheber with SDCMS, directly at (858) 300-2779. Mention you are a client of KLG for attendance purposes.

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