



California Employment Alert

Burnham Brown Employment Law Group

New California Employment Laws Affecting Businesses in 2012.

Statutory Changes

- **Notice of Pay Details. (Labor Code §2810.5).** California employers are now required to provide hourly employees notice, at the time of hire, setting forth: 1) the employee's pay rate, 2) meal/lodging allowance, if any, 3) the employer's payday, 4) the employer's name and any "doing business as" names used by the company, 5) the employer's full contact information, 6) the employer's worker's compensation insurer's full contact information, and 7) other information the Labor Commissioner deems "material and necessary." These requirements can likely be satisfied with a formal offer letter to a new employee, which sets forth the information required by the new law.
- **Employers Required to Continue Health Insurance for Employees on Pregnancy Disability Leave (PDL).** California's Government Code §12945 will now require that employers who employ 5 or more employees to maintain and pay for coverage under a group health plan for employees that take PDL. This applies to the full four months of pregnancy disability leave. If the employee chooses not to return from the leave for certain reasons, employers may recover the insurance premiums from the employee.
- **Limitation on Employer Ability to Obtain Employee Credit Reports.** Beginning January 1, 2012, employers are prohibited from obtaining employee credit reports for certain exempt positions. Previously, employers could obtain credit reports as long as employers followed certain state and federal mandated procedures. The law changes current practices and narrows the pool of employees from which employers can obtain credit reports. Certain financial institutions and employees covered under the managerial exemption are exempt from this prohibition on credit checks.
- **"Gender" Redefined.** The Fair Employment and Housing Act (FEHA) will be amended to define "gender" to include both gender identity and "gender expression." Employers are required to allow an employee to appear or dress consistent with the way that employee views his or her gender ("gender identity") or gender expression regardless of whether that appearance or behavior is consistent with the employee's sex at birth. Going forward, employers should be careful to ensure that employees who identify or express as female, for example, are treated the same as employees who were born female.
- **NLRB Poster Requirements.** Beginning April 30, 2012, most private employers will be required to post a notice advising employees of their labor rights. If 20% of an employer's workforce speaks a language other than English, a notice in that other language must also be posted. Failure to post may be treated as an unfair labor practice. Private employers should visit the NLRB's website to obtain the actual poster. (<https://www.nlr.gov/poster>)

- **Written Contracts Required for Employees Paid Commissions.** California Labor Code §2751 will now require written contracts for all employees paid commissions. Previously, this was only required for businesses located outside California. These contracts must state the method by which the commissions are computed and paid and must be signed by the employer. The employer must also obtain a signed receipt of the contract from each employee. If the contract expires and the employee keeps working, the terms of the contract remain in effect until it is superseded or the employment relationship ends.
- **Tougher Penalties for Misclassifying Independent Contractors.** Any person who willfully misclassifies an employee as an independent contractor may be fined between \$5,000 and \$15,000 *per violation*, with repeat violations penalized at \$10,000 to \$25,000. Violations may be assessed on a *per employee pay period* basis. Any organization found to misclassify employees as independent contractors will be required to post a notice on its website that it has committed a serious violation and give workers information about filing claims. The severity of these penalties should not be underestimated and underscores the importance of recognizing an employment relationship when one exists.
- **Coverage of California Domestic Partners Under Health Insurance Plans.** California law now expressly requires out-of-state companies who employ any employees in California to provide health insurance plans that treat domestic partners the same as spouses.
- **Prohibition on Interference with Family and Pregnancy Leave.** Amendments to California Government Code sections 12945 and 12945.2 now prohibit interfering with or in any way restraining an employee's right to leave under the California Family Rights Act (CFRA) and Pregnancy Disability Leave (PDL).
- **Genetic Discrimination Now Prohibited Under California Law.** FEHA will now specifically prohibit discrimination based on genetics, including the manifestation of a disease or disorder in an individual's family. While this amendment mirrors the federal Genetic Information Nondiscrimination Act (GINA), it applies to smaller employers (5 or less employees versus 15 or less employees) and permits recovery of the full range of FEHA damages, versus the more limited recovery available under federal law. California employers with 5-15 employees should be particularly aware of this new avenue for discrimination claims, which was not available in 2011.
- **E-verify Use.** Employers are still allowed to voluntarily use E-verify but AB 1236 prohibits California state agencies or local governments from passing mandates that require employers to use E-verify.
- **Amendments and Clarifications to Bone Marrow & Organ Donation Leave.** California's Labor Code §1510 is amended to explain that an employee is entitled to up to 30 days of paid leave to donate an organ, or up to five days to donate bone marrow, annually. The days of leave are business days, not calendar days and the one year period is measured from the date the employee's leave commences. Paid time off, sick leave and vacation will continue to accrue during leave.
- **Increased Penalties for Minimum Wage Violations and Liquidated Damages.** California's Labor Code sections 98 and 1194.2 are revised to allow the Labor Commissioner to award twice the amount of unpaid minimum wages, along with interest when an employer fails to pay an employee minimum wage. California Labor Code §98 will also be amended to authorize an employee to recover liquidated damages in a labor commissioner hearing for failure to pay minimum wage. This is yet another reason why employers should be particularly careful not to engage in minimum wage violations.

- **Employees Now Entitled to Attorney's Fees for Enforcing Court Judgment for Unpaid Wages.** California Labor Code §1194.3 now permits employees to recover costs and attorneys fees incurred in enforcing a court judgment for unpaid wages.
- **Military Service Member Anti-Harassment.** Effective November 21, 2012, HR 674 provides that employers are prohibited from discriminating against current or former service members (including reservists and veterans) in the terms and conditions of their employment. As this amendment clarifies existing law, it applies retroactively.

On the Horizon

- **Meal and Rest Periods.** In Brinker Restaurant Corp. v. Superior Court, the California Supreme Court is presently considering whether California law requires employers to simply permit employees to take meal and rest breaks, or if employers must ensure those breaks are actually taken. The Court is expected to hand down its decision in mid-April 2012. We are hopeful the Court adopts the "permit" standard, as the "ensure" standard imposes a much greater burden on California employers.

Burnham Brown's Employment Law Group is available to assist you in navigating California's employment laws and can help you develop a plan for compliance. Our employment attorneys can be reached at 510-444-6800 or through our website at www.burnhambrown.com.