

Labor Laws

What Employers
and Their
Advisers Need
to Know for 2011

By Mark E. Terman, Esq.

With the election of Jerry Brown as governor, California will have the same political party in majority control of the Legislature and the governor's office. When that alignment last occurred with Gov. Gray Davis in office, it seemed like employer regulation increased every 10 minutes. Despite the state budget and the economy commanding much of the Legislature's attention in 2010, employers continue to draw legislative scrutiny with 604 of the bills introduced in the 2009–10 legislative session mentioning "employer." However, relatively few made it past the governor's desk this year.

For example, Gov. Schwarzenegger this year vetoed the following bills, among others, passed by the Legislature:

- **AB 482:** Would have increased exposure to liability for hiring decisions by restricting the ability of employers to base employment decisions on the evaluation of all legally available information, including consumer credit reports.
- **AB 2187:** In addition to existing civil monetary penalties, the bill could have criminalized an employer's failure to pay all wages to an employee who was discharged or who quit within 90 days of the date of the wages becoming due.
- **SB 1121:** This bill may have placed California farms at a competitive disadvantage by removing overtime exemption for agricultural employees.

Odds are high that these bills will be reintroduced and passed in similar form in the next legislative session for the governor-elect's signature.

Looking ahead, many employers can only hope that the voters' apparent mandate to Sacramento to pass balanced state budgets, strengthen California's economy, reduce the state's unemployment rate and not raise taxes may help avoid any deluge of new employer regulation. An overview of new state and federal laws affecting private (non-governmental) employers follows.

Independent Contractor Scrutiny

With federal and state governments facing massive deficits, it should not be a surprise that incorrect independent contractor classification is seen as a vein of gold to mine for tax revenue.

The federal government's 2011 budget includes "\$25 million and 100 additional enforcement personnel for the Labor Department, in conjunction with Treasury, to identify and penalize employers who improperly misclassify employees as independent contractors." (www.calcpa.org/factsheet).

According to White House officials, those enforcement efforts seek to increase Treasury receipts by more than \$7 billion over 10 years.

California is one of at least 29 states that has entered into information-sharing arrangements with the IRS in the area of contractor classification. In time, incorrect contractor classification will probably be detected and challenged with more frequency. Among the

concerns for an employer who engages independent contractors is that the classification, if valid, can avoid much employment and tax regulation. Yet that contractor classification itself can be a magnet for litigation by multiple government agencies and workers.

It would be wise for employers to evaluate the propriety and risks of contractor classification with their professional advisers before they may be forced to by others.

Prop. 19 Up in Smoke

California voters rejected California Proposition 19, which would have legalized marijuana use in California and created a legal quagmire for employers.

California law permits medicinal marijuana use prescribed by a physician. However, the California Supreme Court has held that employers may lawfully ban all marijuana use, and being under the influence of marijuana, at work. Federal law makes marijuana possession and use illegal altogether, but it has not thus far pursued medicinal users.



Because Prop. 19 had anti-discrimination provisions and required employers to determine that employee marijuana use “actually impaired” job performance before taking disciplinary measures, many employers groups feared the proposition would have created a new protected class of workers, compromised workplace safety and increase litigation.

Is it Getting Hot Out There?

Effective Nov. 4, 2010, the California Labor Commissioner issued new heat illness regulations, enforceable by CAL-OSHA, that apply to all outdoor places of employment, especially where the temperature exceeds 85 degrees Fahrenheit. Employees must be provided with shade sufficient to accommodate 25 percent of the workforce at one time, cool down periods of no less than five minutes in the shade upon request, as well as one quart of potable drinking water per hour worked.

“High heat” procedures (where the temperature reaches at least 95 degrees Fahrenheit) apply only to agriculture, construction, landscaping, oil and gas extraction, and transportation or delivery of agricultural products, construction materials or other heavy materials *except for* employment that consists of operating an air-conditioned vehicle and does not include loading or unloading.

High heat procedures include effective communication between employees at the worksite and a supervisor; observing employees at the worksite for signs or symptoms of heat illness, reminding employees to drink water and closely supervising new employees who need to acclimatize to working in high heat. The new regs can be found at www.calcpa.org/HIP.

Is it Time for Lunch Yet?

AB 569 amends California Labor Code Sec. 512 to exempt construction workers, commercial drivers, certain security officers and employees of electrical and gas corporations or local publicly owned electric utilities from California’s meal period requirements if those employees are covered by a valid collective bargaining agreement containing specified terms—including meal period—overtime and arbitration provisions.

Donors Leave

SB 1304 provides new leave of absence rights to organ and bone marrow donors. Organ donors may take up to 30 days leave for that purpose and bone marrow donors may take up to five days leave for that purpose. The leaves are with full pay and benefits, except that the employer may require the organ donor to use up to two weeks accrued vacation/sick time and the bone marrow donor to use up to five days vacation/sick time unless doing so would violate a collective bargaining agreement.

Upon return from leave, these donors are entitled to the same or equivalent jobs. These leave rights are independent of any rights under the Family and Medical Leave Act and the California Family Rights Act.



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COBRA Subsidy Sunset

The American Recovery and Reinvestment Act of 2009, commonly known as the federal economic stimulus bill, required that employers pay 65 percent of nine months’ group health care insurance plan premiums of COBRA eligible employees involuntarily terminated from employment between Sept. 1, 2008, and Dec. 31, 2009. Several subsequent federal laws had the combined effect of extending both the subsidy period from nine months to 15 months, and the last date an involuntary termination would trigger the subsidy period from Dec. 31, 2009, to May 31, 2010.

Employers may recover the 65 percent premium paid by taking a credit on quarterly federal employment tax returns. Certain high-income individuals must repay all or part of the premium subsidy through an increase in their income tax liability for the year. At this point, involuntary terminations after May 31, 2010, do not qualify for subsidy and all subsidy payments will stop no later than Aug. 31, 2011.

U.S. Department of Labor COBRA guidance can be found at www.calcpa.org/COBRA. Subsidy eligibility ends earlier if the individuals are eligible for coverage under another group medical insurance plan or Medicare, or the normal period for COBRA eligibility ends.

EDD Returns; W-2 Reporting of Health Benefits

Effective Jan. 1, 2011, employers must file quarterly—rather than annually—returns [forms: *Contribution Return and Report of Wages* (DE 9) and *Contribution Return and Report of Wages* (DE 9C)] with the California Employment Development Department regarding employee wages, contributions, taxes withheld and the like. New EDD forms and instructions can be found at www.calcpa.org/EDDforms.

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The IRS announced (www.calcpa.org/draftW2) Oct. 12 that it will defer a new requirement for employers to report the cost of coverage—for informational and not taxable purposes—under an employer-sponsored group health plan, making that reporting by employers optional in 2011. The Treasury and the IRS stated that this postponement is necessary to provide employers the time they need to make changes to their payroll systems or procedures in preparation for compliance with the new reporting requirement.

Do you Know GINA?

The Equal Employment Opportunity Commission published final regulations (www.calcpa.org/GINA) Nov. 9 interpreting the employment-related provisions of the federal Genetic Information Nondiscrimination Act (GINA) that became effective in late 2009.

GINA prohibits employers from discriminating in employment decisions based on genetic information and also restricts employers’ acquisition and disclosure of genetic information. Genetic information includes information about genetic tests of applicants, employees or their family members and family medical history.

Employer access to genetic information is not so far-fetched. For example, if an employee seeks FMLA/CFRA leave to care for a parent with heart disease, the employer must keep that information in

confidential files separate from the personnel files and cannot lawfully make a decision not to promote the employee because the job would be stressful to some with a family history of heart disease. The new regulations include practical GINA guidance that employers should follow in obtaining health-related information about employees and their family members.

Social Media is Serious Business

Social media tools have become a part of many employers' strategies to enhance their business. While employers should implement and follow social media policies to narrow employee business representations to others, rules are emerging from regulators.

For example, The Financial Industry Regulatory Authority (FINRA) issued in January "Guidance on Blogs and Social Networking Websites—Communications and Recordkeeping." The Federal Trade Commission issued guidance on online deceptive endorsements and advertising, effective Dec. 1, 2009, which requires, among other things, that the writer on social media disclose any material connection with the endorsee so it is clear that the writer is not a neutral endorser. In addition, the FTC will seek to hold the employer legally responsible if it failed to prevent its employee from posting, even if the employer did not know or condone the activity. The FINRA and FTC guidelines can be found at www.calcpa.org/10-06 and www.calcpa.org/FTCact.

Hire and Get a Break

Enacted March 18, 2010, the federal Hiring Incentives to Restore Employment Act provides two kinds of tax breaks to employers that hire certain previously unemployed workers ("qualified employees"):

- A payroll tax exemption that exempts the employer's 6.2 percent share of Social Security tax on wages paid to qualifying employees, effective for wages paid from March 19, 2010–Dec. 31, 2010.
- For each worker retained for at least 52 consecutive weeks, businesses may claim an additional general business tax credit on 2011 income tax returns of up to \$1,000 per worker. IRS HIRE Act guidance can be found at www.calcpa.org/HIREact.

No, It's Not That Kind of Loco

The U.S. Department of Labor announced a clarification June 22 to the definition of "son and daughter" under the FMLA that includes an employee who assumes the role of caring *in loco parentis* (in place of the parent) for a child. That employee receives parental rights to family leave regardless of the legal or biological relationship.

The DOL's examples include an aunt who cares for a young niece and nephew when their single parent has been called to active military duty or a grandfather who assumes responsibility for his sick grandchild when his own child is unable to care for the child. Also, an employee who intends to share parenting responsibilities with his or her same-sex partner will be able to seek FMLA leave to bond with their child.

New Whistleblower Rights

The Dodd-Frank Wall Street Reform and Consumer Protection Act became law July 21 to address causes of the recent financial markets chaos. Among its provisions are new whistleblower protections that include the creation of SEC and Commodities Futures Trading Commission (CFTC) whistleblower programs, a significant expansion of whistleblower protections under SOX and a new whistleblower cause of action for employees who perform work related to consumer financial products or services.

For example, incentives for whistleblowers that provide the SEC or CFTC with original information about violations of securities or commodities laws may be awarded a share of between 10 percent and 30 percent of monetary sanctions ultimately imposed by the commissions that exceed \$1 million. As another significant example, an employee claiming retaliation in employment under Dodd-Frank may now bring an action directly in federal district court, compared to the SOX procedure where a complainant is first required to file an administrative complaint with the Department of Labor.

Expanded E-Verify

Employers risk substantial fines and criminal action if they knowingly employ workers who do not have the legal right to work in the United States. Employers must also obtain and keep a completed U.S. Citizenship and Immigration Services Form I-9 forms, with copies of required papers, to verify employment eligibility of all new hires. In addition, E-Verify is an online employment verification system operated jointly by the Department of Homeland Security (DHS) and the Social Security Administration (SSA).

The E-Verify website (www.calcpa.org/e-verify) was recently updated and simplified for users. Participating employers can quickly check the employment eligibility of new hires online by comparing information from an employee's Form I-9 against SSA and DHS data. Any employer can participate, though most employers with federal contracts or subcontracts that contain the FAR E-Verify clause are required to use E-Verify to determine the employment eligibility of employees performing direct, substantial work under those federal contracts and new hires organization wide—regardless of whether they are working on a federal contract.


Employers who find that a worker's identifying information does not match the E-Verify information should not hastily fire the affected workers. There may be honest mistakes in the employee's or the government's information that can be cleared up with the advice of counsel or a human resources professional.

On the Wall

Workplace posters, notices and pamphlet requirements usually change annually. For example, Oct. 8, 2010, was the deadline to post new workers' compensation notices. March 15, 2010, was the deadline for agricultural employers to post a notice of employee rights under the federal non-immigrant temporary worker "H-2A program." Most government agencies will look for poster compliance if on site to inspect or investigate for another reason and there are substantial monetary penalties for failure to display some posters.

The California Chamber of Commerce and other vendors can annually provide a complete set of the required federal and state posters and notices at a relatively nominal cost. The H2-A poster, and information about required California posters can be found at www.calcpa.org/h-2a and www.dir.ca.gov/wpnodb.html respectively.

Where Do We Go From Here?

In light of the above, employers should review and update employee handbooks and personnel practices, and train supervisors, with the advice of experienced employment counsel or human resources professionals. 

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