New California Employment Laws For 2012

We have previously written about many of the new employment laws that took effect earlier this year. As a reminder, here’s a list of the most significant ones:

- **AB 22** - Restricts use of consumer credit reports.
- **SB 459** - Imposes new penalties for misclassifying employees as independent contractors.
- **AB 887** – Prohibits discrimination based on gender identity and gender expression.
- **AB 469** – Requires employers to give newly hired non-exempt, non-union employees a notice with information regarding wages and pay practices; also known as the “Wage Theft Protection Act.”
- **SB 559** – Prohibits discrimination based on genetic information.
- **SB 117** – Requires businesses with contracts with the state of California for more than $100,000 to provide equal benefits for an employee’s same-sex spouse or registered domestic partner.
- **SB 299** – Requires employers to maintain group health benefits for employees on pregnancy disability leave.
- **AB 1146** - Requires hospitals to maintain safe patient handling policies and train staff on safe lifting techniques.

Additionally, the wage requirements for computer professionals and physicians to qualify as exempt under California law increased, effective January 1, 2012. Computer professionals must earn either $38.89/hr, $6,752.19/mo, or $81,026.25/yr. Licensed physicians must earn at least $70.86/hr. If you would like more information about any of these issues, please let us know.

Employment Issues Keep On Truckin’

- **Truck drivers may be exempt from federal and California overtime requirements.** California and federal law have distinct and separate overtime regulations. Notably, however, truck drivers exempt from the overtime requirements pursuant to the Motor Carrier Exemption of the Fair Labor Standards Act (FLSA) are also exempt from California’s overtime requirements. In order to be exempt from the federal law requirements of the Fair Labor Standards Act (FLSA) under the Motor Carrier Exemption, employees must fall under the authority of the United States Department of Transportation (DOT). Generally, this applies to employees who are employed by a motor carrier (defined as a provider of transportation for compensation) involved in interstate commerce, and who are not covered by the small vehicle exception.

California law, on the other hand, only applies to truck drivers whose activities are governed by either DOT’s regulations, or State of California regulations. Under the applicable DOT regulations, a vehicle is covered if it weighs at least 10,000 pounds, and either the goods being transported or the carrier crosses state lines. Under California regulations, the vehicle must be one of the following: (1) vehicles with three axles and weighing at least 10,000 pounds; (2) truck tractors; (3) buses, farm labor vehicles or paratransit vehicles; (4) combinations of vehicles that exceed 40 feet when coupled together; (5) trucks transporting hazardous materials; (6) any commercial vehicle weighing over 26,000 pounds; (7) or any commercial vehicle towing a vehicle weighing more than 10,000 pounds (except trailer coaches or camp and utility trailers).

- **In-state truck drivers may have to comply with DOT random drug testing requirement.** Under Vehicle Code Section 34520, certain drivers of “Commercial Motor Vehicles” must comply with federal DOT regulations - including the requirement to participate in random drug testing. “Commercial Motor Vehicle” means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the vehicle:
  1. Has gross weight rating of more than 26,000 pounds, including a towed unit with gross weight of 10,000 pounds; or
  2. Has gross vehicle weight rating of more than 25,000 pounds; or
  3. Is designed to transport 16 or more passengers, including the drivers; or
  4. Is of any size and is used to transport hazardous materials.

If an employer’s vehicles fall within one of the four categories identified above, then the Vehicle Code Section applies and the employer must start conducting random drug testing as required by
California Update

One of the hot topics these days is proper classification of workers as employees or independent contractors. Getting it wrong can result in audits, penalties, individual lawsuits and potentially class action litigation. In the face of such daunting exposure and possible liability, it is more important than ever to reassess your particular situation and get it right.

In an unusual move, the IRS has thrown a proverbial bone to employers through the Voluntary Classification Settlement Program. Under that program, qualified employers wishing to reclassify workers previously identified as independent contractors as employees, can do so with a dramatically reduced liability exposure.

Proper classification is primarily centered around your relationship with the individual being paid. Although the IRS uses a 20-point test, behavioral control and financial control are generally the biggest factors used to consider the correct classification. The more control exercised by the employer, the more likely the individual is an employee.

For further information on this topic, please see our blog at: http://californiaemploymentlaw.foxrothschild.com/2011/06/articles/wage-and-hour/suitable-seating-faq/
California Update

California Courts Remain Hostile To Arbitration Agreements Post-AT&T Mobility v. Concepcion

Last year, the U.S. Supreme Court held in AT&T Mobility v. Concepcion (Concepcion) that a class action waiver in an arbitration agreement is enforceable. The court explained that the Federal Arbitration Act (FAA) prohibits states from imposing unique hurdles for the enforcement of arbitration agreements that are not required of any other type of contract. Though Concepcion concerned an arbitration agreement in the consumer context, many would argue that the decision places in doubt the whole body of California case law relating to the enforceability of arbitration agreements, especially those in the employment context. Despite this popular reading of Concepcion, California courts generally have responded to the decision in one of two ways: (1) Concepcion is completely ignored, or (2) Concepcion is deemed irrelevant in cases not involving a consumer arbitration agreement’s class action waiver.

Here are some highlights of California’s post-Concepcion employment arbitration decisions:

Brown v. Ralphs Grocery Company (Oct. 18, 2011): Plaintiffs brought a class action under the California Labor Code’s Private Attorneys General Act (PAGA) alleging wage and hour labor violations. The employer moved to compel individual arbitration of the dispute pursuant to an arbitration provision, which included a class action waiver and a waiver of PAGA representative actions. The Court of Appeal, held that Concepcion “does not apply to representative actions under the PAGA,” and the arbitration agreement was unenforceable under California law. On October 18, 2011, the California Supreme Court denied defendant’s petition for review. Defendant has filed a petitioned for review with the U.S. Supreme Court.

Wisdom v. AccentCare, Inc. (Jan. 3, 2012): The Court of Appeal for the Third Appellate District refused to enforce an employment arbitration agreement, finding it was procedurally unconscionable because, among other things, the agreement stated that the arbitration would be governed by the rules of the American Arbitration Association, but did not attach those rules. The court also determined that the agreement was substantively unconscionable because its language did not sufficiently indicate that the employer also promised to arbitrate its potential claims against the employee, resulting in a lack of mutuality.

Mayers v. Volt Management Corp. (Feb. 2, 2012): A Court of Appeal held that an employment arbitration agreement was unenforceable because it was procedurally and substantively unconscionable. The court held that agreement was deficient because the employer did not provide the employee with the applicable rules under which the arbitration would proceed, or identify the specific set of rules that would apply. Further, the agreement provided for an award of attorney’s fees to the prevailing party, which is contrary to statutory remedies available under California Fair Employment and Housing Act (“FEHA”). The employer has asked the California Supreme Court to review this decision.

New ADA Access Regulations Will Affect Work Areas

Employers have an obligation under Title I of the Americans with Disabilities Act of 1990 (ADA), as well as under California’s Fair Employment and Housing Act, to make reasonable accommodations for qualified employees with disabilities. Now, employers may have an additional obligation under Title III of the ADA to make certain “employee work areas” accessible.

Title III of the ADA concerns non-discrimination at places of public accommodations and commercial facilities, and includes building and construction standards to ensure that places of public accommodation are accessible for patrons with disabilities (“accessibility standards”). The regulations governing Title III’s accessibility standards were revised in 2010 and became effective on March 15, 2012. The revisions have significant effect on
spotlight on san francisco employment laws

• increase in minimum wage: san francisco has established a minimum wage higher than that required by state or federal law. effective january 1, 2012, the san francisco minimum hourly wage is $10.24. this rate applies to all employees who work more than 2 hours per week within the boundaries of san francisco, including part-time and temporary employees. employers must display in each workplace a poster in six languages describing the minimum wage. employers must also give a minimum wage notice to every employee at the time of hire, which contains the employer's name, address and telephone number.

• commuter benefits ordinance annual compliance form due april 30, 2012: effective january 19, 2009, the san francisco commuter benefits ordinance (“sfcbo”) requires san francisco employers with 20 or more employees to provide commuter benefits to employees who work an average of at least 10 hours per workweek within the geographic boundaries of san francisco. the sfcbo applies to all employers with 20 or more employees who do business within san francisco and are required to obtain a business registration certificate. the sfcbo also applies to employers who are based outside of san francisco, but have employees working in the city, if the employer is still required to obtain a business registration certificate. all san francisco employers, whether or not they need to comply with the sfcbo, must submit an annual compliance form. for more information and to complete your annual compliance form (due april 30, 2012) visit commuterbenefits.org.

• amendments to san francisco health care security ordinance (“hcsos”): the health care security ordinance (“hcsos”) is a san francisco law that creates an employer spending requirement enforced by the san francisco office of labor standards enforcement. the employer spending requirement requires employers to spend a minimum amount of money on health care expenditures for their covered employees. beginning january 1, 2012, san francisco employers must comply with several new requirements:
  1. increased expenditure rate: effective january 1, 2012, the minimum health care expenditure for small employers (20 to 99 employees) is $1.46/hour. for large employers (100 or more employees), the expenditure rate is $2.20/hour.

  2. new poster: the new official office of labor standards enforcement (“olse”) notice must be posted in a conspicuous place at every workplace or job site where a covered employee works. the notice must be posted in english, spanish and chinese. it must also be posted in any other language spoken by at least five percent of the employees at the workplace or job site. the required poster is available on the olse’s website.

  3. annual report due april 30, 2012: covered employers must submit an annual reporting form (arf) by april 30, 2012, which provides data on health care expenditures made in the previous year. instructions on how to file the arf will be mailed to covered employers and will be available on the hcsos website in march 2012.

  4. new penalties provision: there are three new penalty provisions in the amendments.
a. First, OLSE is now required to impose administrative penalties upon covered employers who fail to make the required health care expenditures on behalf of their employees within five business days of the quarterly due date (which is 30 days after the conclusion of each quarter). The maximum penalty for this type of violation is now $100 for each employee for each quarter that the required expenditures were not made within five business days of the quarterly due dates. This maximum penalty amount will increase each year for inflation.

b. Second, the penalty for failing to maintain or retain accurate and adequate records has increased to $500 per quarter that the violation occurs.

c. Third, the penalty for failing to submit the annual reporting information to the OLSE has also increased to $500 for each quarter that the violation occurs.

5. **New Requirements for Health Care Reimbursement Accounts:** Beginning January 1, 2012, employers using health care reimbursement accounts to satisfy the HCSO are subject to several new requirements:

a. **Funds Must Be Available for 24 Months:** Employers must keep contributions available for at least 24 months after the date of the contribution. Previously, workers would lose access to money that went unused by the end of the year.

b. **2011 Balance Rollover:** The amended ordinance also requires that employers “roll over” any December 31, 2011 account balance to January 1, 2012 in order to ensure that participants start 2012 with an account balance.

c. **Detailed Contribution Summaries:** Employers are also required to provide written summaries of reimbursement account contributions (“Contribution Summaries”) to covered employees within 15 days of the date of the contribution. The Contribution Summary must include (1) the name, address, and telephone number of any third party to whom the contribution was made; (2) the date and amount of the contribution; (3) the date and amount of any other debits or credits to the account since the most recent Contribution Summary provided to the employee; (4) the balance in the account, and (5) any applicable expiration dates for the funds in the account.

d. **Separation Notice:** Employees must also receive within three days of their termination a written notice containing (1) the name, address, and telephone number of any third party to whom the contribution was made; (2) the date and amount of the contribution; (3) the date and amount of any other debits or credits to the account since the most recent written summary provided to you; (4) the balance in the account; and (5) any applicable expiration dates for the funds in the account.

e. **Funds Accessible for at Least 90 Days After Termination:** Any balance in the account at the time of the separation must be preserved and made available for at least 90 days from the date of the separation. Also, any funds already earned but not yet contributed to the account at the time of the separation should be contributed on the next contribution date (i.e., no later than 30 days after the end of the quarter) and must be made available for the employee’s use for 90 days after the date of that post-separation contribution.

**Don’t Forget San Francisco’s Paid Sick Leave Ordinance.** San Francisco requires employers to provide all employees who work within the boundaries of the city one hour of sick leave for every 30 hours worked, with a 72-hour cap (40 hours for employers with fewer than 10 employees). Here are some important rules to remember:

1. Non-exempt employees must accrue paid sick leave on all hours worked, even overtime hours.

2. For exempt employees, paid sick leave accrues based on a 40-hour workweek absent evidence that the employee’s regular work week is less than 40 hours (in which case paid sick leave accrues based upon that regular workweek).

3. Benefits provided on an hourly basis must also be provided when employees are using paid sick leave hours.

4. Accrued paid sick leave does not expire; it carries over from year-to-year.

5. Employers may require reasonable notification for use of paid sick leave, but cannot require employees to find replacement workers to cover the hours they are absent from work.

6. Employers may also require a doctor’s note or other verification after an employees’ use of paid sick leave for more than three consecutive work days. Employers that suspect abuse of sick leave may also require a doctor’s note or other verification.

7. Employers are required to post a notice published by the San Francisco Office of Labor Standards Enforcement advising employees of this benefit.

- **Some San Francisco Laws Apply to City Contractors:**

1. **Prevailing Wage.** Workers on government-funded construction projects must be paid prevailing wages. In California, the Department of Industrial Relations sets the prevailing wage rate for each craft. San Francisco has adopted these rates for city-funded projects. The current prevailing wage rates are available on the Internet at [http://www.dir.ca.gov/DLSR/PWD](http://www.dir.ca.gov/DLSR/PWD).

2. **Minimum Compensation Ordinance (MCO).** The MCO, which became effective October 8, 2000, generally requires city contractors that provide services and tenants at the San Francisco Airport to provide to their covered employees: (1) no less than the MCO hourly wage in effect; (2) 12 paid days off per year (or cash equivalent); (3) 10 days off without pay...
per year. For 2012, the MCO wage rate has been increased to $12.06/hour. Non-profit wage rate remains $11.03/hour. These wage rates affect contracts that are entered or amended on or after October 14, 2007.

3. **Health Care Accountability Ordinance (HCAO).** Effective July 1, 2001, the HCAO generally requires city contractors and certain tenants to offer health plan benefits to their covered employees, to make payments to the city for use by the Department of Public Health, or, under limited circumstances, to make payments directly to their covered employees. Effective July 1, 2011, the fee option for contractors/tenants is $3.50 per hour, capped at $140.00 per work week. Note: Each July 1 the fee option will be adjusted for inflation.