

NEW CHANGES IN THE LAW AFFECTING PUBLIC EMPLOYERS: JANUARY 1, 2012

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January 1, 2012 will bring a wave of new requirements for California employers. Some will carry substantial penalties (up to \$25,000) for violations. It is important that employers be aware of these changes and adjust their practices accordingly.

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This article provides only the highlights of the new laws affecting employers and should not be interpreted as legal advice. For more specific information as to how these laws may affect your business, please consult an attorney.

NEW EMPLOYMENT CONTRACT REQUIREMENTS

Automatic Renewal of Contracts For High Level Public Employees

All contracts of employment between an employee and a local public agency employer must include a provision which provides that, regardless of the term of the contract, if the contract is terminated, the maximum cash settlement the employee may receive shall be an amount equal to the employee's monthly salary multiplied by the number of months left on the unexpired term of the contract, up to a maximum of 18 months.

Starting on January 1, 2012, an employment contract entered into or renewed for the chief executive officer or the head of a department of a local public agency cannot provide for automatic renewal of the contract if it also provides for an automatic increase in compensation in excess of a cost of living adjustment or a cash settlement amount that exceeds the permitted maximum settlement amounts.

Contract Requirements For Abuse of Office

Any contract entered into or renewed after January 1, 2012, between a local public agency and its officer or employee that provides paid leave for the officer or employee pending an investigation, money for the legal criminal defense of the officer or employee or a cash settlement related to termination of the employment contract, shall require that any money provided be fully reimbursed if the officer or employee is later convicted of a crime involving an abuse of his or her office or position. "Abuse of office or position" means either an abuse of public authority such as waste, fraud or violation of law under color of authority, or a crime against public justice.

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NEW BROWN ACT REQUIREMENTS

In addition to posting an agenda at a location that is freely accessible to members of the public, public agencies must now also post the agenda on the agency's internet website if they have one. The time requirements for posting agendas remains the same.

Local public agencies cannot call a special meeting to discuss the salary, salary schedule, or compensation paid in the form of fringe benefits for its chief executive officer or the head of any of its departments. Public agencies may still call special meetings to discuss the local agency's budget, however.

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CHANGES TO THE MEYER-MILIAS-BROWN ACT

Currently, the Meyer-Milias-Brown Act requires the governing bodies of public agencies to meet and confer in good faith with representatives of recognized unions on wages, hours and other terms and conditions of employment. If they fail to reach agreement, the public agency and the union may mutually agree on the appointment of a mediator and equally share the costs. If the parties reach an impasse, the Act currently permits the public agency to unilaterally implement its last, best and final offer.

Starting on January 1, 2012, the process is much more complicated. After January 1, if the mediator is unable to effect a settlement within 30 days, the union may request that the dispute be submitted to a three-person factfinding panel consisting of one member selected by the employer, one member selected by the union, and a chairperson selected by the Public Employment Relations Board. The factfinding panel would be authorized to investigate, hold hearings and issue subpoenas for documents and witnesses. All political subdivisions of the state are required to comply with the factfinding panel's requests for information. The factfinding panel must make advisory findings of fact and recommended terms of settlement within 30 days. The public agency will then be required to make the findings and recommended terms public and hold a hearing regarding the impasse. Only then may the public agency implement its last, best and final offer.

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NEW LIQUIDATED DAMAGES PROVISION FOR MINIMUM WAGE VIOLATIONS

Starting on January 1, 2012, Labor Code section 1194.2 has been amended to provide that employers who fail to pay their employees minimum wage will be liable not only to pay restitution for the amount of the wages unpaid, but also a sum equal to the amount of wages owed to be paid to the employee as liquidated damages. This will serve to automatically double the amount of damages an employee may recover.

Employers may avoid the imposition of liquidated damages by demonstrating that the failure to pay minimum wage was in good faith or that the employer was not violating the Labor Code.

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NEW REQUIREMENT FOR WRITTEN NOTICE TO HOURLY EMPLOYEES

As of January 1, 2012, new Labor Code section 2810.5, part of the Wage Theft Prevention Act, will require employers to provide each non-exempt employee at the time of hiring with a written notice, in the language the employer normally uses to communicate with that employee, that specifies the following:

- the employee's rate of pay, including any overtime rates;
- the basis – whether hourly, salary, commission, or otherwise, of the employee's wages;
- any allowances claimed as part of the minimum wage such as meal or lodging allowances; the regular payday designated by the employer;
- the employer's name and all dba's;
- the employer's physical and mailing addresses;
- the employer's telephone number; the name, address, and telephone number of the employer's workers compensation insurance carrier;
- and any other information the Labor Commissioner deems material and necessary.

If that information ever changes, employers must provide the employee with a new written notice within 7 calendar days unless the information is otherwise specified on a timely wage statement. The Labor Commissioner is preparing a template for employer's to use that complies with the new statutory requirements. This requirement does not apply to most public employees as well as some employees covered by valid collective bargaining agreement that meet the statutory requirements.

Although the notice requirement relates only to new hires, employers may want to issue a notice to all of their existing employees to ensure that they comply with the statute. Public employers are advised to consult with an attorney to determine whether this requirement applies to them.

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NEW PENALTIES FOR MISCLASSIFICATION OF INDEPENDENT CONTRACTORS

For any employer who uses independent contractors, now is the time to be sure that these individuals truly qualify as independent contractors. Many employers mistakenly believe an individual can voluntarily agree to be treated as an independent contractor. Such is not the case and new Labor Code Section 226.8 makes it unlawful for employers to knowingly misclassify an individual as an independent contractor in order to avoid employee status and imposes monetary penalties of up to \$25,000 for each violation. Any licensed contractor who violates this law will be subject to disciplinary action by the Contractors' State License Board. It is not clear from the language of this statute if it is intended to apply to public entity employers.

If it is determined that an employer has violated this law, the employer will also be required to prominently display for one year on their website or at their physical location that the employer has committed a serious violation of the law, that the employer has changed its business practices to avoid committing further violations of the law, that anyone who believes they are being misclassified as an independent contractor rather than an employee should contact the Labor and Workforce Development Agency and that the notice is being posted pursuant to a state order. It is also important to note that the administrative and civil penalties can be enforced against any successor corporation, owner or business

entity to the employer that has one or more of the same principals or officers or is engaged in the same or a similar business.

Under new Labor Code Section 2753, individuals who knowingly advise employers to misclassify an employee as an independent contractor to avoid employee status shall be jointly and severally liable with the employer. The only exceptions to this are for individuals who provide such advice to their own employer and attorneys. Thus, outside human resource consultants, accountants and others who give advice on this area may be exposed to substantial liability.

This new law is particularly difficult to comply with because there is no bright line test to determine whether an individual legally qualifies as an independent contractor. It is, in fact, a somewhat complicated area as the IRS looks at different factors to determine whether an individual qualifies as an independent contractor than the State of California does. Below are several links to state and federal websites that can help you determine whether your independent contractor truly qualifies. If you have any doubts about classification or whether this law applies to you, it is recommended that you consult with an attorney.

<http://www.irs.gov/businesses/small/article/0,,id=99921,00.html>

http://www.edd.ca.gov/pdf_pub_ctr/de38.pdf

<http://www.taxes.ca.gov/iCorE.bus.shtml>

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NEW RESTRICTIONS ON CREDIT CHECKS OF EMPLOYEES

Employers can no longer perform credit checks on employees or applicants for employment purposes unless the employee's position falls into one of eight categories set forth by new Labor Code Section 1024.5. In addition to specified law enforcement related positions, employers can now only obtain credit checks on employees or applicants who fall into one of the following categories:

- Limited managerial position as specifically defined by statute;
- A position for which the information in the report is legally required;
- A position that involves regular access to all the following types of information for any one person:
 - Bank or credit card account information
 - Social security number
 - Date of birth
- A position in which the employee would be:
 - A named signatory on the employer's bank or credit card account
 - Authorized to transfer money on the employer's behalf
 - Authorized to enter into financial transactions on the employer's behalf
- A position that involves access to confidential or proprietary information
- A position that involves regular access to more than \$10,000 in cash.

Even if the employee or applicant falls into one of these categories, the employer must provide the applicant or employee with a written notice that a credit check will be performed before conducting the credit check. The notice must also specify the specific statutory basis under Labor Code Section 1024.5(a) for use of the report. Finally, the notice has to inform the individual of the source of the report and should contain a box the person may check off to receive a copy of the report. If the individual requests a copy of the report, the employer must request the copy when it requests its own. Further the copy has to be

provided to the employee/applicant at the same time the employer receives it and it has to be provided free of charge. Like the new statute on misclassification of independent contractors, this new law does not make it clear whether it applies to public entity employers. For determination of whether you should comply with this law, you should consult an attorney.

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STRONGER PROTECTIONS FOR EMPLOYEES ON MEDICAL LEAVES

New statutes have clarified that it is an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, an employee's right to take protected medical leave under the California Family Rights Act or protected leave under the Pregnancy Disability Law. Importantly, the law, which previously required employers to pay for the employer's portion of group health insurance coverage for employees on protected leave for up to twelve weeks, now requires the employer to pay its portion to maintain the employee's coverage for the entire length of both types of leave. Conceivably, this could require employers to provide coverage for an employee for up to seven consecutive months of leave. Please note that if the employer is a state agency, the collective bargaining agreement, if any, shall govern whether the female employee is entitled to continued health coverage.

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GENDER IDENTITY, GENDER EXPRESSION AND GENETIC INFORMATION ARE NOW PROTECTED CATEGORIES

AB 887 redefines the term "gender" to now also include a person's gender identity and gender expression. Gender expression is a person's gender-related appearance and behavior, regardless whether or not stereotypically associated with the person's assigned sex at birth. This law will affect a change in the application of a wide scope of laws including hate crimes, education and employment. Specifically, the new law will require an employer to allow an employee to appear or dress consistently with the employee's gender identity or gender expression, even if it is not the gender the employee had at birth.

Additionally, state law has now caught up to federal law and prohibits discrimination in employment and in the provision of services on the basis of genetic information.

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PUBLIC WORKS/PREVAILING WAGE LAW CHANGES

There are several changes to the laws that affect public works for which prevailing wage must be paid. First, under new Labor Code Section 1720.6, the definition of what constitutes a "public work" has been expanded to include any construction, alteration, demolition, installation or repair work done under private contract if the work is performed in connection with the construction or maintenance of renewable energy generating capacity or energy efficiency improvements and the work is performed on the property of the state or one of its political subdivisions if either more than 50% of the energy generated will be purchased by the state or one of its political subdivisions or the energy efficiency improvements are primarily intended to reduce energy costs that would otherwise be incurred by the state or one of its political subdivisions.

Additionally, the penalties for failing to pay prevailing wage have been substantially increased. Daily penalties against contractors and subcontractors that are currently limited to \$50 will be increased to a new limit of \$200. New laws will also increase periods of debarment for willful violations and will provide for debarment for failure to timely provide certified payroll records upon request.

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GENERAL ACUTE CARE HOSPITALS MUST ADOPT SAFE PATIENT HANDLING POLICIES

As of January 1, 2012, the Hospital Patient and Health Care Worker Injury Protection Act adds new Labor Code Section 6403.5 which will require general acute care hospitals, other than those within the Department of Corrections and Rehabilitation or the State Department of Developmental Services, to adopt and maintain a patient protection and health care worker back and musculoskeletal injury prevention plan. The plan shall include a safe patient handling policy component reflected in professional occupational safety guidelines for the protection of patients and healthcare workers in health care facilities.

Hospitals subject to this provision shall maintain a safe patient handling policy at all times for all patient units and, in each general acute hospital, shall provide trained lift teams or other support staff trained in safe lifting techniques. A "safe patient handling policy" is a policy that requires replacement of manual lifting and transferring of patients with powered patient transfer devices, lift devices, and lift teams as appropriate for the specific patient and consistent with the employer's safety policies and the applicable medical judgment. Such hospitals are also required to provide training to staff that includes the appropriate use of lifting devices and equipment and the five areas of body exposure. Finally, employees who refuse to lift, reposition or transfer a patient due to concerns about patient or worker safety or the lack of trained lift team personnel or equipment cannot be disciplined by the hospital because of that refusal.

The plan can be incorporated into subject hospitals' existing Injury and Illness Prevention Plan or it can be prepared as a separate document. Please contact your legal counsel to assist you in preparing a plan in compliance with this legal requirement.

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NON-GOVERNMENTAL EMPLOYERS CANNOT BE REQUIRED TO USE E-VERIFY

Although not a change to existing law, it is now established that the state, county, city and county, and special districts are prohibited from requiring employers other than one of those governmental entities to use an electronic employment verification systems except when otherwise required by federal law or as a condition of receiving federal funds.

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INSURANCE COVERAGE MAY NOT DISCRIMINATE AGAINST SAME SEX SPOUSES OR PARTNERS

Every group health insurance policy marketed, issued or delivered to a California resident must now provide equal coverage to domestic partners as is provided for spouses. Further, the policy must provide equal coverage to domestic partners and spouses of the same sex as they provide to domestic partners and spouses of the opposite sex. The law provides an exception for policies issued outside of California to an employer whose principal place of business and majority of employees are located outside of California.

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COMMISSION CONTRACTS MUST BE IN WRITING BY JANUARY 1, 2013

By January 1, 2013, whenever an employer enters into an employment contract with an employee and the employee is to be compensated either partly or wholly by commission, the contract must be in writing and must set forth the method by which commissions will be computed and paid. The employer will be required to provide a signed copy of the contract to the employee and must obtain a signed receipt for the contract from the employee.

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Wendy Tucker's practice focuses on employment counseling and litigation for all employers, large and small, with an emphasis on public agencies, charter school and health care entities. She provides a broad range of nuts and bolts counseling services, including assisting in the hiring process, training, reviewing employee handbooks, reviewing policies, assisting with employee discipline, conducting investigations and participating in the termination process. Reach her at 619.525.3845 or wendy.tucker@procopio.com.