



Legislative Developments in 2012

Prepared By:

Labor and Employment Group

With each new calendar year come new obligations for employers and, sometimes, necessary changes in existing practices. For a change, there are few new federal legislative requirements taking effect for employers this year. This Alert highlights certain federal law developments that may impact employer policies and procedures, as well as certain state law developments in California, Georgia and Illinois affecting employers in 2012.

Federal Law

Plan/Prevent/Protect (P-3):

The Department of Labor (“DOL”) announced in 2010 a new strategy for the enforcement of workplace laws and regulations known as Plan/Prevent/Protect (commonly referred to as P-3). P-3 shifts the burden of responsibility for ensuring compliance with workplace law in the enforcement of the Americans with Disabilities Act, Rehabilitation Act, Fair Labor Standards Act, Family Medical Leave Act, Occupational Safety & Health Act, and other federal law from DOL investigators to employers. The DOL believes that its past enforcement framework fostered a “catch me if you can” mentality that prompted some employers to correct workplace violations only when cited by the DOL. In contrast, the DOL’s new enforcement strategy takes a proactive approach to compliance. Employers are required to not only remain fully compliant but also to actively prove their compliance.

The DOL’s proposed enforcement strategy requires the Occupational Safety and Health Administration, Office of Federal Contract Compliance Programs (“OFCCP”), Wage and Hour Division (“WHD”) and other agencies to propose regulatory schemes requiring employers to comply with the applicable employment laws. Employers will then have to take three steps to ensure compliance with the applicable workplace laws:

- **Plan** – Employers will have to create a plan for identifying and addressing risks of legal violations and risks to employee safety;
- **Prevent** – Employers will have to fully implement the plan in a manner that prevents legal violations; and
- **Protect** – Employers will be required to ensure that the plan’s objectives are met on a regular basis.

Employers that fail to follow these steps will be considered out of compliance with the new enforcement strategy and, presumably, subject to remedial action. The DOL has yet to adopt regulations that will provide employers with guidance on how to remain compliant or on what the remedial action might be. However, employers should be mindful that an enforcement change is on the horizon.

EEOC Definition of “Reasonable Factors Other Than Age”:

On November 16, 2011, the Equal Employment Opportunity Commission (“EEOC”) voted to send a draft final rule clarifying the “reasonable factors other than age” (“RFOA”) defense under the Age Discrimination in Employment Act (“ADEA”) to the Office of Management and Budget for approval. The rule seeks to align the EEOC regulations with the Supreme Court’s decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005), which held that an employment practice that disparately impacts older workers is discriminatory unless the practice is justified by a reasonable factor other than age. The Court did not elaborate on the meaning of RFOA. Accordingly, the EEOC undertook to clarify the meaning of RFOA in ADEA disparate impact claims. The EEOC’s proposed final rule emphasizes the need for an individualized analysis of whether an employment practice is based on RFOA. The language of the draft final rule is not yet available, but the final rule will likely limit an employer’s ability to rely on the RFOA defense in ADEA disparate impact cases. If the draft final rule is accepted by the Office of Management and Budget, the EEOC could adopt the final rule early in 2012.

Tax Credits for Hiring Veterans:

On November 21, 2011, President Obama signed into law two tax credits rewarding employers that hire veterans. Under the Returning Heroes Tax Credit, employers that hire veterans can receive a tax credit of up to \$5,600 for hiring veterans. The Wounded Warrior Tax Credit provides employers that hire veterans who have service-related disabilities and have been unemployed for over six months with a credit of up to 40% of the first \$24,000 in wages paid to each qualifying veteran. The tax credits are currently in effect and apply to veterans who are hired after the law was enacted.

NLRB Procedural Change:

Pursuant to an amendment to the National Labor Relations Board (“NLRB” or “Board”) rules that took effect December 14, 2011, the NLRB’s chief administrative law judge may now decide motions and requests in unfair labor practice and representation cases whenever the Board fails to attain a three-member quorum. Previously, the rules only permitted adjudication of cases when three or more members of the Board were present. The procedural change was adopted to allow for the resolution of disputes during periods where the necessary number of Board members fell below three. Under the new rule, when fewer than three Board members are present, the chief administrative law judge is able to rule on motions for default judgment, summary judgment, or dismissal in unfair labor practice cases.

NLRB Workplace Postings:

In the face of substantial opposition, the NLRB has again postponed the implementation of its new posting requirement mandating that private sector employers post, in a conspicuous location where other notices concerning employee personnel rules are posted, a notice informing employees of their rights under the National Labor Relations Act. Though currently slated to take effect April 30, 2012, the effective date of the rule is subject to change. A lawsuit seeking to enjoin implementation of the rule is pending in the District of Columbia, alleging that the proposed rule is unlawful and unenforceable. As a result of the lawsuit, the NLRB has already postponed implementation of the rule several times.

NLRB Election Procedure Change:

As we reported to you on December 23, 2011, the NLRB announced a final rule amending the Board’s rules and regulations governing Board-conducted elections. The Board hopes that the rule change will increase the Board’s efficiency by reducing “unnecessary litigation and delays.” The rule shortens the election hearing process and grants the Board the authority to refuse an appeal of a post-election dispute. Specifically, the rule imposes the following changes:

- Hearing officers have the authority at pre-election hearings to limit evidence.

- Post-hearing briefs may be filed at the discretion of the hearing officer rather than as a matter of right.
- Absent extraordinary circumstances, a Regional Director's pre-election rulings will no longer be reviewable prior to the election, but will be reviewable post-election if the issues are not rendered moot by the results of the election.
- NLRB review of post-election disputes will be in the Board's discretion.
- The recommendation in the NLRB's current statement of procedure that a Regional Director should not schedule an election sooner than 25 days after the direction of election will be eliminated.

The final rule is scheduled to take effect on April 30, 2012. A lawsuit has already been filed by the U.S. Chamber of Commerce to enjoin the Board from implementing the rule. The U.S. Chamber of Commerce argues that the rule violates the National Labor Relations Act, exceeds the Board's statutory authority, and is contrary to the First and Fifth Amendments.

California

During the first year of his second gubernatorial tour of duty, California Governor Jerry Brown signed a number of major bills impacting California employers and employees.

Wage Theft Protection Act of 2011:

Commencing on January 1, 2012, California employers are required to provide most newly hired non-exempt employees with a written notice of certain wage payment and other information concerning their employment. The notice must be given at the time of hire and at any time the employee's pay changes. The requirement does not apply to exempt employees and employees covered by most collective bargaining agreements.

The required notice must include the following information:

The employee's rate(s) of pay (including applicable overtime rates) and how the employee will be paid (salary, hourly, commission);

- Any allowances claimed as part of the minimum wage, including meal or lodging allowances;

- The employer's regular payday, subject to the Labor Code;
- The employer's name, including any "doing business as" names;
- Telephone number and physical address of the employer's main office and mailing address (if different); and
- Contact information for the employer's workers' compensation insurance carrier.

If there is a change to any of the above stated items during the employee's employment, the employer must notify the employee in writing within seven calendar days of the date of the change unless the change is reflected on a timely wage statement or another writing.

The California Labor Commissioner has furnished a template for these new notice requirements, which is available at <http://www.dir.ca.gov/dlse>.

Restriction on Use of Credit Reports for Employment Purposes:

With the enactment of California Assembly Bill 22 ("AB 22") California has joined a handful of other states in restricting an employer's use of consumer credit reports in hiring and other personnel decisions. The bill, which amends the California Labor Code and its Consumer Credit Reporting Agencies Act (CCRAA), takes effect on January 1, 2012.

The new restrictions are set out in Labor Code Section 1024.5. These restrictions apply to both public and private sector employers, with the exception of financial institutions. Employers are permitted to use consumer credit reports in evaluating an individual's fitness for employment, only if the individual is applying for or works (or will work) in the following:

- A managerial position;
- A position in the State Department of Justice;
- A sworn peace officer or law enforcement position;
- A position for which the employer is required by law to consider credit history information;
- A position that affords regular access to bank or credit card account information, Social Security numbers, or dates of birth, provided, however, that the access to this information does not merely involve routine solicitation and processing of credit card applications in a retail establishment;

- A position where the individual is or will be a named signatory on the bank or credit card account of the employer and/or authorized to transfer money or authorized to enter into financial contracts on the employer's behalf;
- A position that affords access to confidential or proprietary information; or
- A position that affords regular access during the workday to the employer's, a customer's or a client's cash totaling at least \$10,000.

Labor Code Section 1024.5 does not set forth an independent remedy for violations of these restrictions. However, the provisions of Section 1024.5 are likely enforceable through an action brought under the California Private Attorneys General Act of 2004, including the civil penalties that may be recovered under that statute.

Related amendments to California's CCRAA impose new notice requirements on employers who use consumer credit reports for employment purposes, including hiring and promotion decisions. Before ordering a consumer credit report concerning a job applicant or employee, the employer must notify the individual in writing of the basis under Labor Code Section 1024.5 for using the consumer credit report. For example, where the use of the report is authorized because the individual will be a signatory to the employer's credit card account, that justification must be disclosed in the CCRAA notice furnished to the individual. Aggrieved individuals may seek recovery of damages and attorney's fees pursuant to California Civil Code Section 1785.31, in addition to punitive damages up to \$5,000 for willful violations. For employers who use consumer credit reporting agencies to conduct criminal background checks and/or reference checks from previous employers, the new amendments require the employer to include the reporting agency's Web site along with other information about the agency required under existing law.

Misclassification of Independent Contractors:

Two new provisions of the California Labor Code, effective January 1, 2012, prohibit the willful misclassification of individuals as independent contractors, and impose strict statutory sanctions for violations. The new law defines a "willful misclassification" as "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor."

Labor Code Section 226.8, as amended, imposes significant new civil penalties ranging from a minimum of \$5,000 to \$15,000 (increasing up to \$25,000 where there is an established pattern or practice) for "each violation" of the prohibition against willful misclassification. Section 226.8 also requires offenders to post a mandatory notice disclosing the violation on their Web site (or in an area accessible to all employees) for one year. Licensed contractors are also subject to disciplinary action by the Contractors' State License Board, which is required to initiate such action within 30 days of receiving an order establishing a willful misclassification. The law also provides for joint and several liability for a consultant that incorrectly advises an employer to treat an employee as an independent contractor.

Unfortunately, while this new law raises the stakes in connection with worker misclassification, it does not furnish any new or additional guidance for employers, who must continue to consider multiple standards for determining when an individual may properly be classified as "independent contractor" – standards which may vary depending upon the regulatory context.

Payroll Records:

Labor Code Section 1174, as amended, extends the time an employer is required to maintain payroll records from two years to three years. The amended statute also prohibits an employer from preventing an employee from maintaining a personal record of the employee's hours worked.

Gender Identity and Expression:

This new law amends the Fair Employment and Housing Act (as well as various other laws) to define gender as including both gender identity and gender expression. Gender expression refers to a person's gender-related appearance and behavior, whether or not stereotypically associated with the person's assigned sex at birth. The law makes it clear that discrimination on the basis of gender identity and "gender expression" is prohibited. Among other things, it will require employers to allow an employee to appear or dress consistently with the employee's gender expression.

Benefits During Pregnancy-Related Leaves:

Under prior law, California employers were required only to maintain health benefits for an employee while on a pregnancy disability leave ("PDL") to the same extent health benefits were maintained for employees on other medical or disability-related leaves. As a result of amendments to California's Fair Employment and Housing Act ("FEHA"), which go into effect January 1, 2012, employers are now required to furnish employees on PDL the same level of insurance benefits during their pregnancy-related leave as they were provided prior to taking the leave. Related amendments to California's insurance laws require that health insurance policies must provide coverage for maternity services for all insureds covered under the policy.

Under the federal Family and Medical Leave Act ("FMLA") certain employers are already required to furnish eligible employees who take FMLA leave with insurance benefits at pre-leave levels. The new FEHA amendments will have the effect of extending similar requirements to employees who are not eligible for FMLA leave, or who work for small employers (less than 50 employees) who are not subject to the FMLA.

Georgia

Illegal Immigration Reform and Enforcement Act:

The E-Verify requirement of Georgia's Illegal Immigration Reform and Enforcement Act of 2011 (HB87) took effect on January 1, 2012. Employers with more than 500 employees will be required to participate in E-Verify to check employment eligibility of new hires effective January 1, 2012. Employers with 100-499 employees will be required to use E-Verify as of July 1, 2012, and those with more than 10 employees are required to use E-verify by July 1, 2013. Employers with 10 or fewer employees are exempt. Employers must provide evidence to municipalities that they are participating in the E-Verify system before they can obtain or renew business licenses.

Illinois

Changes to Illinois Human Rights Act:

Recent amendments to the Illinois Human Rights Act ("IHRA"), which prohibits disability-based employment discrimination, broaden the IHRA's definition of "disability" to include any mental, psychological or developmental disability (including autism spectrum disorders). The amendments also state that the Department of Human Rights can hold a fact-finding conference, unless within 365 days after the charge is filed:

- The director has determined that there is substantial evidence that the alleged civil rights violation was committed;
- The charge is dismissed for lack of jurisdiction; or
- The parties agree in writing to waive the fact-finding conference.

Under the amendments, a party's failure to attend the conference, without good cause, will result in dismissal or default. The amendments became effective on January 1, 2012.

Changes to the Equal Pay Act:

Pursuant to an amendment of the Equal Pay Act (the "Act") that became effective on January 1, 2012, Illinois employers may be subject to a civil penalty of up to \$5,000 for violating provisions of the Act that prohibit interfering with, restraining, or denying the exercise of rights provided by the Act. Employers are also prohibited from discharging or discriminating against an individual because the individual has filed a charge or participated in protected activity. The amount of the penalty for each violation will depend on the size of the employer and the seriousness of the violation.

Increased Minimum Wage Penalties:

Effective January 1, 2012, amendments to the Prevailing Wage Act (the "Act") have increased the penalties for contractors, subcontractors and public works employees who fail to comply with minimum wage requirements. The Act requires contractors and subcontractors to file a certified payroll by the tenth day of the each month that the employer is engaged in construction on a public works project. Contractors and

subcontractors that willfully fail to file a certified payroll or that willfully file a false certified payroll are guilty of a Class A misdemeanor. Likewise, public works employees who willfully violate the Act by failing to maintain or produce records as required by the Act are guilty of a Class A misdemeanor. Contractors and subcontractors that are found guilty of violating the Act are subject to automatic and immediate debarment and are prohibited from participating in any public works project for four years.

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