



California Legislation Update

LEGISLATIVE BRIEF

November 22, 2011

As 2012 approaches, Health Care Reform remains center stage. However, California employers also must pay attention to changes in state and local laws/regulations.

Key Changes

1. **Pregnancy Leave ([SB 299](#) and related statutes)** This law expands the Pregnancy Disability Leave law in California to require employers to maintain the same level of insurance benefits during the pregnancy leave as were available to the pregnant employee prior to taking pregnancy leave. (Effective January 1, 2012).

Note: we will discuss this change shortly in much greater detail in a separate legislative update.

2. **“Discretionary Clauses” in Life, Health, and Disability Policies ([SB 621](#)).** Insurers frequently retain sole discretion to determine whether an insured is entitled to benefits in situations where benefits are conditioned upon whether or not a person is totally disabled. For example, a doctor may certify an individual to be totally disabled; however, the insurer can override the doctor’s decision asserting its rights to do so under its “sole discretion” provision leaving the insured no ability to challenge the insurer’s decision. SB 621 eliminates the use of discretionary clauses, giving the insured the ability to challenge the insurer’s decision. (Effective January 1, 2012).
3. **Healthy San Francisco.** In 2011, the San Francisco Board of Supervisors has debated over the ability of an employer to meet its benefits obligation using a Medical Expense Reimbursement Plan where unused benefits are forfeited at the end of the plan year. Although the Mayor (Lee) vetoed the last proposal (which would have required employers to make benefits generally non-forfeitable) the Board of Supervisors has revamped the resolution (two years to collect benefits). We expect the Mayor may not veto this new version. We will keep you posted on the issue.

Other State Legislation

- **Autism ([SB 946](#))**. SB 946 amends California's mental health parity law by requiring health plans and health insurance policies to cover behavioral health therapy for pervasive developmental disorder, more commonly known as autism. SB 946 also requires plans and insurers to maintain adequate networks of autism service providers and establishes an Autism Advisory Task Force in the Department of Managed Health Care. (Effective July 1, 2012).
- **Dependent Children Life Insurance ([SB 220](#))**. For purposes of life insurance coverage, current law limits the age of eligible dependents to all unmarried children from birth through age 20, or age 24 if the dependent child is in school. This bill expands coverage for dependent children under a group life insurance policy by requiring coverage be continued until age 26, regardless of the child's marital status or whether the child is attending an educational institution. (Effective January 1, 2012).
- **Genetic Information ([SB 559](#))**. SB 559 adopts the genetic discrimination protection found in the Genetic Information and Nondiscrimination Act (GINA) and expands on the federal law by prohibiting discrimination based on genetic information in the areas housing, business services, emergency medical services, licensing qualifications, life insurance coverage, mortgage lending, and participation in state-funded or state-administered programs. (Effective January 1, 2012).
- **Guaranteeing Maternity Services ([AB 210](#) and [SB 222](#))**. Under current law, healthcare service plans such as HMOs regulated by the Department of Managed Health Care are required to provide maternity services, but health insurers, regulated by the Department of Insurance are not. These two bills eliminate this loophole by requiring health plans sold in the individual and small group markets provide coverage for maternity services for all insureds. (Effective July 1, 2012).
- **Hospital Billing Transparency ([SB 751](#))**. SB 751 prohibits a contract by or on behalf of a plan or insurer and a licensed hospital, from containing a provision that restricts the ability of the plan or insurer to furnish information to end users concerning the cost range of procedures or the quality of services performed by the hospital or facility. (Effective January 1, 2012).
- **Organ Donation ([SB 272](#))**. This law requires that leave granted by employers for bone marrow or organ donation to be calculated in business days rather than calendar days. The one-year period is measured from the date the employee's leave begins and consists of 12 consecutive months. SB 272 also provides that the leave is not a break in the employee's continuous service for the purpose of his or her right to paid time off and employers may condition the initial receipt of leave upon the employee's use of a specified number of earned but unused days for paid time off. (Effective January 1, 2012).
- **Independent contractors ([SB 459](#))**. Adds section 226.8 to the California Labor Code to prohibit willful misclassification of workers as independent contractors rather than employees, and allows the California Labor and Workforce Development Agency (LWDA) to take enforcement actions including assessment of civil damages. Fines of \$5,000-\$15,000 may be imposed for each violation, increased to \$10,000 - \$25,000 if LWDA or a court determines that the employer engaged in a pattern or practice of these violations. It's not clear if "each violation" means each individual who is misclassified or means each group of individuals who are misclassified. "Willful misclassification" means voluntarily and knowingly avoiding employee status by misclassifying an employee as an independent contractor. An employer who is found to have violated the law must prominently post on its Internet website (or at its physical location if it does not have a website) for at least 1 year, a notice stating that the LWDA or a Court has found that it "has committed a serious violation of the law by engaging in the willful misclassification of employees."

Also adds new Labor Code 2753, which provides that an individual is jointly and severally liable with the employer if the individual, "for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status." This provision does not apply to a person who advises his/her own employer or to attorneys who give legal advice in the course of practicing law.

- **Same-sex spouses (SB 757)**. Requires group health insurance policies and group HMO contracts covering California residents to provide the same coverage for registered domestic partners of employees as for spouses of employees, and prohibits them from discriminating in coverage between spouses or domestic partners of a different sex and spouses or domestic partners of the same sex. Current California law specifies that such policies are subject to California insurance law regardless of the situs of the contract or master group policyholder, but includes an exception for policies issued outside of California to employers whose principal place of business and majority of employees are located outside of California. SB 757 provides that its *provisions apply even if a policy is issued outside of California* to an employer whose principal place of business and majority of employees are located outside of California.
- **Credit reports (AB 22)**. Prohibits employers from obtaining consumer credit reports to evaluate applicants or employees. *Exceptions*: Employers may use credit reports if the employee will have regular access to money (at least \$10,000 per workday), assets or confidential information; if the employee will be in a managerial position (as defined in Wage Order 4 of the Industrial Welfare Commission); or if the employer is the state Department of Justice or a law enforcement agency. California employers should use caution if using agencies outside of California for background checks, as they might not yet be aware of this new limitation in California law.
- **Wage Theft Protection Act (AB 469)**. Every employer (even if headquartered outside of California) must give written notice to all employees *hired in California on or after January 1, 2012*, and such notice must include the following 8 items:
 1. Rate of pay and basis on which it is paid (e.g., per hour or day)
 2. Identify all allowances claimed as part of the minimum wage
 3. Regular pay date
 4. Legal name of the employer, including any DBA
 5. Physical address of employer's main location (and mailing address, if different)
 6. Employer's phone number
 7. Workers' compensation carrier name, address, and phone number
 8. Any other information the Labor Commissioner requires. Additionally, if any information changes in the future, the employer must notify employees within seven days. The California Labor Commissioner (DLSE) will provide a template, but has not yet (as of November 21, 2011). The DLSE website says it intends to post the template on [this webpage](#) by mid-December 2011.

Exceptions: The following three categories of employers are not required to comply:

1. State and local government entities
2. Employers exempt from the overtime rules
3. Employers with employees subject to a collective bargaining agreement that meets certain requirements.

AB 469 also imposes new misdemeanor penalties on employers who fail to comply with the above requirements and others under the Labor Code.

- **Gender identity (AB 887)**. Amends the definition of "sex" as one of the prohibited bases of discrimination under the California FEHA and Unruh Civil Rights Act to provide that sex includes gender identity and gender expression. This affects numerous types of nondiscrimination (e.g., housing, education), and for employment it means that employers must allow employees to appear or dress in a manner consistent with their "gender expression" - defined as a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.
- **Employment Acceleration Act (AB 1236)**. Prohibits the State, Counties or special districts from requiring employers to use E-verify, *except* as required by federal law or as a condition of receiving federal funds. They cannot require use of E-verify as a condition of applying for or maintaining a business license, or contracting with state or local government or a special district. It is still legal to use E-verify—the law does not prohibit employers from using it, but employers cannot be *required* to use it.

Federal Tax Conformity and PPACA Compliance

- **Additional Tax Conformity (AB 242)**. Effective January 1, 2012, this bill conforms California law with specific tax provisions of Patient Protection and Affordable Care Act (PPACA):
 - a) Provides that, for taxable years beginning on or after January 1, 2013, qualified small employers can offer simple cafeteria plans to employees without violating the cafeteria plan nondiscrimination rules (IRC §125(j));
 - b) Allows small employers to offer exchange-participating health plans through cafeteria plans effective in 2014 (IRC §125(f));
 - c) Excludes from income certain qualified health care benefits provided after March 30, 2010, to a member of an Indian tribe, the member's spouse, or the member's dependents (IRC §139D); and,
 - d) Excludes from income, for taxable years beginning on or after January 1, 2010, certain payments received by an individual taxpayer under the National Health Service Corps loan repayment or forgiveness programs. (IRC §108(f)(4)).
- **Department of Managed Health Care: Improving Consumer Assistance (AB 922)**. AB 922 attempts to improve the Office of Patient Advocate's (OPA) ability to assist California health care consumers by providing a central, enhanced center to handle consumer questions and complaints. The bill also transfers the Office of Patient Advocate, and the Department of Managed Health Care (DMHC), to the Health and Human Services Agency. (Effective January 1, 2013 for DMHC and July 1, 2012 for OPA).

- **Dependent Coverage ([AB 36](#))**. As previously discussed in our Memorandum 2011-3, AB 36 provides both administrative and tax relief to California employers and their employees by the adoption of the federal rules regarding the tax treatment of adult dependents under age 27 electing group health care coverage pursuant to the PPACA. (Effective retroactive to March 30, 2010).
- **Health Benefit Exchange: Standardized Application and Renewal ([AB 1296](#))**. AB 1296 requires the California Health and Human Services Agency establish a standardized single application form and related renewal procedures, including the electronic verification process as required by PPACA, for Medi-Cal, the Healthy Families Program, the Exchange, and county programs. (Commencing January 14, 2014).
- **Ratio of Expenditures to Premium Revenues ([SB 51](#))**. SB 51 allows state regulators to enforce the Medical Loss Ratio provision contained in PPACA that requires insurers in the large group market to spend 85% of premium dollars on health care. Insurers in the small group and individual markets will be required to spend 80% of health care dollars on actually providing health care rather than for administration or profit. (Effective January 1, 2012).

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