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Calif.'s New Pro-Employee Laws Call For Employer Caution

By **Erin Coe**

Law360, San Diego (January 09, 2013, 9:58 PM ET) -- A host of new employee-friendly laws took effect in California at the start of 2013 that are forcing companies to take a fresh look at their social media policies, ensure workers' pay checks are accurate and put commission agreements in writing, attorneys say.

Golden State businesses are now also required to update their accommodations for employees with religious dress and grooming needs, and they are barred from including overtime pay in fixed salary arrangements for nonexempt workers, lawyers say.

"These laws are more protective of employees, and employers need to review their policies and practices to minimize any risk as well as to determine whether they need to adjust anything to comply with these laws," said Karen Clemes, of counsel at Ballard Spahr LLP.

Every year brings new employment laws and regulations unique to California, creating new headaches for companies to comply with and keep their businesses running smoothly, according to Morgan Lewis & Bockius LLP partner Melinda Riechert.

"California, more than any other state, creates special rules for employees in California, but it's difficult for global companies and businesses with operations throughout the U.S. to keep up with all the rules for California employees and decide whether they should also apply them to employees outside the state," she said.

Here are some of the new laws in California that change the employment landscape:

Social Media Login Info Now Off-Limits

Gov. Jerry Brown signed A.B. 1844 into law in September, barring companies from forcing employees and prospective workers in California to disclose their usernames and passwords for their Facebook, Twitter and other social media accounts.

The measure, authored by Assemblywoman Nora Campos, D-San Jose, also blocks employers from discharging, disciplining or threatening to retaliate against employees or job applicants for not complying with requests to disclose the information.

However, companies can still ask workers to divulge their personal social media information as part of an investigation into alleged worker misconduct or legal violations, and the scope of that exception may become a focus in court fights, according to Clemes.

“It remains to be seen what’s going to be considered a workplace investigation that would permit an employer to ask employees to divulge their social media information,” she said. “How serious does it have to be to invoke the exception?”

The law also permits employers to ask for workers’ social media passwords on employer-owned equipment and accounts, but that ownership issue could become complex and also lead to disputes, Clemes said.

“If a company issues employees a cellphone and they use it for personal use as well as business use, I think there might be some gray areas there,” she said.

Workers Can Get Damages for Pay Stub Errors

S.B. 1255 allows for California employees to be entitled to penalties if an employer fails to provide a wage statement or fails to provide a paycheck with accurate and complete information, a measure that could spur more class actions in the state, according to Kelly Scott, head of Ervin Cohen & Jessup LLP’s employment law department.

Under Labor Code section 226, employers need to make sure a wage statement includes nine items, including gross wages earned, total hours worked, all deductions and the address of the main office of the employer.

Prior to S.B. 1255, employees challenging inaccurate pay stubs had to show how they were harmed by an incorrect paycheck. But the new law, which was authored by Sen. Roderick Wright, D-Los Angeles, and gained approval from the governor in September, deems employees automatically injured if the required information is incorrect or missing, according to Scott.

“If an employer’s address is wrong, the law says there’s an injury and an employee can get statutory penalties and attorneys’ fees,” he said. “That’s going to drive not only regular suits, but [also] class actions.”

Commission Deals Must Be Put in Writing

A.B. 1396 requires California workers to receive and sign written commission agreements that detail how commissions are calculated and paid out to employees, but implementing this law into practice could be difficult for companies, according to Riechert.

The law, which passed back in 2011 and was authored by the Assembly Committee on Labor and Employment, also directs employers to keep an old commission plan in effect until there is a new one in place, but that rule does not reflect how businesses tend to operate, she said. Companies generally want to start a new plan in the beginning of every year, even if the terms of the plan still need to be completed.

“Companies like to close one year and focus on a new year, but sometimes there is a lag between the two,” she said. “It takes time to figure out what the priorities are for the coming year.”

Allowing for an old plan to continue to stay in effect in the same year as a new plan could make employee payments more complex she said.

Employers generally are not very sophisticated about the case law regarding commissions, and they are going to need to consult with counsel to make sure their written contract is not defective and used as ammunition later in litigation, according to Scott. Employers may try to follow the bullet points of the statute, but without the help of counsel, they could walk into other problems if they fail to use the right language or spell out how commissions are earned, he said.

“The law gives employers instructions to brush their teeth, but not how to brush their teeth or what to do to properly take care of their teeth,” he said.

Religious Dress Warrants Accommodations

A.B. 1964 specifies that religious clothing and hairstyles are protected religious observances under California’s Fair Employment and Housing Act and clarifies that segregating workers from the public is not a reasonable accommodation of their religious beliefs, a measure that could drive more religious discrimination suits against employers, according to Scott.

The law, which was introduced by Assemblywoman Mariko Yamada, D-Davis, and signed by the governor in September, underscores a key difference between California and federal law, according to Scott.

Employers can defend against an employee’s request to grow a beard, wear a headscarf or don other items for religious purposes by showing a proposed accommodation would pose an undue hardship, which under California law is a significant difficulty or expense — a much higher standard than the federal requirement of showing a more than de minimis cost or burden.

“The law clarifies that the definition that already exists elsewhere in FEHA for a significant difficulty or expense applies to religious dressing and grooming practices,” Scott said. “Savvy employers were already living with this standard, but anytime you have a new law, it is going to draw more attention to that area, and we could see more claims by plaintiffs lawyers and employees focused on these types of violations.”

Airlines, retail stores and many other employers that have uniform and grooming standards for employees who deal with the public will need to be sensitive to requests for accommodating grooming and dress needs for religious purposes, according to Riechert.

“An employer needs to address a religious dress or grooming request similar to the way it would for a disability request,” she said. “The employer needs to ask itself whether it can accommodate the request, whether it’s an undue hardship, and whether it can enable employees to do what they are requesting but that also meets its needs.”

Limits on Fixed-Salary Agreements

Under A.B. 2103, companies will no longer be able to include overtime hours in fixed-salary agreements with nonexempt workers, a change that mainly affects small and absentee employers, according to Scott.

The law, proposed by Assemblyman Tom Ammiano, D-San Francisco, and approved by the governor in September, reverses a February 2011 decision by a California appeals court that sided with employer Dolores Press Inc. in finding that California's Labor Code allows employers and nonexempt employees to enter contracts setting fixed salaries, including regular and overtime pay.

A.B. 2103 restricts a fixed salary payment to a nonexempt employee to include only regular hours, not overtime hours, even if the employee signed a private employment deal covering all wages.

The decision in the Arechiga v. Dolores Press case allowed for explicit mutual wage agreements to simplify and standardize pay for nonexempt workers, Scott said.

“A lot of small and absentee employers as well as a lot of domestic and household workers benefited from this arrangement because employees could expect a certain amount [of wages] and it was good for employers, especially if they weren’t there to monitor employees' overtime work,” he said. “But the new amendment to the law means these agreements aren’t going to work anymore. Employers can’t have a fixed contract with overtime wages.”

The rash of new employment laws in California starting this year makes it easy for employers to make mistakes that could lead to legal troubles, but there is hope, according to Scott.

“The way for companies to avoid mistakes is by hiring and maintaining a relationship with good human resources people and outside counsel, and by continually educating themselves,” he said. “Subscribe to newsletters and go to seminars to try to stay on top of these issues.”

--Editing by Elizabeth Bowen and Richard McVay.