PERSPECTIVES

SCHERER SMITH & KENNY LLP
THE STRENGTH OF PARTNERSHIP

140 Geary Street, Seventh Floor ▪ San Francisco, CA 94108-4635
Phone: (415) 433-1099 ▪ Fax: (415) 433-9434 ▪ www.sfcounsel.com

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Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.

Minimum Wage Employer Alert

As of January 1st, 2012, the San Francisco minimum wage is **$10.24 per hour** (up from $9.92 per hour for 2011) - - the first city in the United States to have a minimum wage over $10.00 per hour. In contrast, California's minimum wage is $8.00 per hour and was last raised in 2008.

As a reminder, all California employers must pay minimum wage to all employees who are not specifically exempt from the minimum wage under applicable law. All California employers must also display an approved California minimum wage poster in a prominent place to inform employees about the minimum wage and their worker's rights under California labor law.

Please contact Denis Kenny at dsk@sfcounsel.com for more information.

- Written by Denis S. Kenny

Should You Move to the "Cloud"?

Cloud computing is everywhere today. Some of our clients use the "cloud" in running their businesses, either to store information or use applications, while other of our clients are creating companies in which the "cloud" actually is their business. You read about the "cloud" almost daily, and Amazon, Apple and other industry leaders are taking the lead in touting the benefits of it.

What is cloud computing? Simply put, it is the delivery of software as a service over the Internet, (instead of delivering the software product to install on your own hard drive), or it is the use of shared resources (hardware and software) to allow the storage of information. For example, rather than accessing software on your own server at work, you might use software that resides on someone else's server located in Texas. You might also store data in the "cloud" which means it is located on someone else's server, usually located in a different state (or country).

The benefits of this approach are that you, as the end user, do not have to own or manage the hardware or software on site, or for that matter even know how it works. You are essentially renting or leasing the software, rather than owning it. This lowers your capital investment, provides you with access to upgrades sooner and (potentially) for less money, spreads your cost out over time, lowers training time, reduces personnel time involved with the installation and purchase of new software and hardware, and allows you to usually test it before purchasing it.

From the data side, using the "cloud" allows you reduce the hardware you need to store the data, it provides you a (usually) secure off-site location to store the data, and your initial capital investment is less since you need not have to buy the hardware.

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Denis Kenny

2012. Wow. It's hard to believe another year has passed. But change is good, right? I certainly hope so for you and your loved ones. Optimism appears to be in the air as signs of economic improvement and vibrancy, especially in California and the social media mecca of the Greater Bay Area are increasingly evident. As I write this article, manufacturing, housing and unemployment trends are slowly improving. Unfortunately, with the good, comes the bad. And, California

Of course, with all these benefits come risks associated with using software located elsewhere or storing your sensitive data off-site.

For example:

- There may be a breach in security or problems with digital rights management;
- Gaining access to the software or the stored data may prove to be unreliable;
- Connecting to and using the software or the data storage service over the Internet may be disrupted or prove to be unreliable;
- You do not have control over the software or hardware, so you cannot control when, or if, you get upgrades;
- You are locked into a vendor and it may be difficult to move your data or business elsewhere;
- The integrity of your data may be compromised or lost;
- You may inadvertently violate a confidentiality agreement regarding data you are holding or controlling;
- You may fail to comply with data retention obligations with respect to litigation; and
- Recovering your data or software may prove to be more difficult than expected.

Once you have weighed these risks against the benefits of using the "cloud" for your business, some of the issues to consider, other than its cost, before choosing a provider or signing an agreement are:

- Where will your data be located physically and what are the security protocols followed by the provider (servers locked in a room or individually caged, who has access etc.)?
- What law will govern and where will any disputes be resolved (especially if they are located outside the United States)?
- Depending on where the data will be located, what governments might have access to it (China for example)?
- What happens if the vendor goes bankrupt or shuts down?
- How do you terminate the relationship and move your data and what are the costs involved?
- Will you be indemnified if there is a problem?
- What are the vendor's confidentiality and privacy policies?
- Who will own the software or data?
- Does the vendor have insurance and if so, how much and what does it cover?
- Is it possible to escrow the software so that if you need access to it if they are in bankruptcy or having troubles your business is not frozen out?
- What are the service levels and response times you can expect?

These are just some of the issues to consider when making a decision.

The best ways to address these risks and the above concerns is through doing your research on the vendor, building in redundant systems or backups of data, having a good contract, and using an audit company to verify what you have been promised by the vendor.

If you have any questions please contact Brandon Smith at bds@sfcounsel.com.

-Written by Brandon Smith

New Penalties for the Misclassification of Independent Contractors in California

California recently enacted Senate Bill 459. Derisively termed the "Job Killers Act" by its detractors, this new statute (codified as Labor Code Section 226.8 and effective as of January 1, 2012) imposes severe penalties on any "person or employer" who willfully misclassifies workers as "independent contractors" (rather than "employees") and further makes it unlawful to charge a fee or to make deductions from such workers' pay for any reason.

Some of the most notable implications of SB 459 include (1) personal liability for individuals responsible for classification decisions; and (2) exponentially-increased fines and penalties carrying potential exposure of several hundred thousand dollars depending on the number of workers and length(s) of tenure involved. Specifically, and in addition to potential damages and attorneys' fees associated with individual and class action lawsuits, fines can range from $5,000 to $15,000 per violation, and can rise to $25,000 for repeat violations, for misclassification alone. Akin to the draconian "scarlet letter" penalty, offenders will also be required to post a notice on their website of the statutory violation (s).

employers may be very leery of the changes in store for them in 2012 as the stakes have severely escalated in the ever-changing landscape of wage and hour employment laws.

Although I am the firm's labor and employment/litigation partner, and it's my turn to author these Partner Notes, I did not intend to monopolize the subject matter of this edition of Perspectives; I swear. But the reality is that 2012 brings with it an onslaught of new California employment legislation which can't be ignored. So, we've written about two of the most notable new laws, one of which has earned the moniker, the "Job Killer Act" (SB 459) and the other of which is titled "The Wage Theft Prevention Act" (AB 469). These laws heighten the already critical need for California businesses to closely monitor their day-to-day operations to ensure compliance with the complex and dynamic nuances of California employment laws.

Despite signs of economic improvement, progress is slow and state and federal agencies continue to look for every possible way to collect funds to address long-depleted coffers and dire budget crises. Payroll and unemployment taxes (and attendant penalties and fines) present two of the most obvious and readily-available sources of funds sought to be tapped by government agencies such as the IRS, the Department of Labor, and California's Franchise Tax Board, Division of Labor Standards Enforcement and Employment Development Department.

Regardless of the proponents' reasons for these two new

Although SB 459 contains the express requirement that any misclassification be "willful," the statute broadly defines "willful" as "voluntarily and knowingly misclassifying that an individual is an independent contractor." Given the infancy of this law, it is unclear how the Labor and Workforce Development Agency and the California courts will interpret the meaning of "willful" in this context. However, based on court and agency decisions addressing the "willful" standard in other analogous wage and hour laws (where, again, the laws are uniformly applied to favor the protection of California's workers), the standard will likely be liberally construed toward finding liability and the attendant assessment of fines and penalties against hiring parties. The current economic climate pervaded by state and federal government budget problems and the resulting push for ways to generate revenue, makes broad enforcement even more likely.

It is important to note that SB 459 does not affect the existing employee/independent contractor legal distinction. The new law also provides no guidance for employers seeking to properly make classification decisions. Consequently, employers must continue to rely on the existing, highly fact-intensive, multi-factor tests utilized by various state and federal agencies (including the California Employment Development Department and the federal Internal Revenue Service) and applied by the courts with often conflicting results.

SB 459 highlights the importance of spending the time and money necessary at the outset of all hiring decisions and throughout a worker's tenure to ensure that classification decisions are viable and sound. Scherer Smith & Kenny LLP remains available to assist you in these and any other employment-related matters.

Please contact Denis Kenny at dsk@sfcounsel.com for more information.

- Written by Denis S. Kenny

Employers Beware of New California Legislation

On October 9, 2011, Governor Jerry Brown signed into law AB 469, entitled the "Wage Theft Prevention Act of 2011". Supported by numerous labor groups – including the California Labor Federation, the AFL-CIO, and the California Rural Legal Assistance Foundation – this new law imposes more intensive requirements on employers, regarding wage information that must be disclosed to "non-exempt" employees. Further, it significantly stiffens penalties for employers who "willfully" fail to pay court-ordered wages. AB 469 became effective on January 1, 2012, and is part of a growing nationwide trend of "anti-wage theft" initiatives passed in other states, including New York, Illinois, Wisconsin, and Washington.

Overview

Although AB 469 makes a number of changes to California law, it imposes two critical requirements for California employers. First, under amendments to section 2810.5 of the Labor Code, it mandates that an employer provide to each employee, at the time of hiring, several pieces of information. This information relates to the payment of wages, such as basic job terms, the rate of pay, the regular payday, and the employer's address and phone number. The employer must further notify an employee within seven days in writing of any changes to this information. Previously, California allowed wage information to be simply posted in a location accessible to all employees and did not require individual presentation of such information to each employee at the time of hire.

Second, AB 469 imposes specific and significant civil and criminal penalties on employers who "willfully fail" to pay wages owed to discharged or former employees under orders issued by either California courts or the California Labor Commissioner. Under this new provision, employers may face fines of between $1,000 and $10,000 and up to six months imprisonment for failure to pay ordered or adjudged wages of less than $1,000. For ordered or adjudged wages of over $1,000, employers face fines of up to $20,000 and imprisonment of not more than one year. Under AB 469, employers are given 90 days after the issuance of a final order or judgment to make such payments before criminal liability may be imposed. This contrasts with prior law, which empowered the Labor Commissioner to utilize criminal and civil penalties generally, but did not set forth the types of specific penalties or misdemeanors outlined in AB 469.

Exceptions

As stated above, AB 469 does not apply to "exempt" employees. In addition, AB 469 does not apply either to employees of the state or any of its political subdivisions, or employees covered by a collective bargaining agreement

laws, they both conveniently provide precisely the revenue-generating opportunities deemed essential by California's agencies.

The good news about these laws is that they will not impact businesses that recognize the benefits of spending the time and money on the front-end necessary to avoid back-end problems, such as lawsuits and agency audits. I am happy to say that most of you who read this article and have been working with our firm fit within the category of the pragmatic and understand that you must incur these front-end costs (including ongoing internal audits of your worker classification and timekeeping/payroll practices) in order to reap the benefits of doing business in California. And, as you look out your window at the (hopefully) sunny, blue sky, and walk out the door in a light jacket 9 months out of the year to have your choice of world class recreational activities, all within just a few hours' drive (try snow skiing, water skiing and golfing on the same day, if you're really adventurous), just remember, we Californians really have it good. We just have to pay a little bit extra for our lifestyle.

Happy New Year to all and here's to better times ahead.

through which “premium” wages and overtime rates have already been negotiated.

Practical Implications

1. Hiring Documentation

AB 469’s serious civil and criminal liability and penalties heighten the already significant importance of properly classifying each of your employees as exempt or non-exempt before you hire, and continuing ongoing compliance audits throughout the employment tenure. The bases for properly classifying an employee as exempt are limited and very fact-specific. Consequently, the exemption analysis is outside the scope of this article. Suffice to say, simply labeling an employee as exempt and paying that employee a salary does not come close to providing a viable basis for exempting an employee from the benefits of AB 469 or any of the panoply of other employment laws applicable to non-exempt employees. Notably, the laws applicable to non-exempt employees include, by way of example only, state and federal “wage and hour” laws, entitling employees to overtime, meal and rest period premiums, and other benefits. One of the key aspects of AB 469 is for employers to conduct an appropriate and periodic audit of exempt classification practices to ensure that exemptions are, indeed, accurately and correctly applied. Scherer Smith & Kenny remains available to assist you with these and any other employment-related matters.

At a minimum, employers should now have in place a system through which the necessary documentation regarding the payment of wages is given to each newly hired employee at the time that employee begins work. This information must include the aforementioned specifics of how and when wages are paid, along with the employer’s name, address, and any other doing-business-as designations, and the contact information for its workers’ compensation insurance carrier. The California Department of Labor Standards Enforcement (DLSE) has published a PDF through which this information may be provided, which is available at the following link: http://www.Dir.ca.gov/dlse/LC_2810.5_Notice.pdf. Employers are free to create a form template of their own, but it must include all of the information that is on the DLSE’s template. To ensure full and effective disclosure compliance, employers should include such documentation within “new-hire” packets and keep a copy of each formed signed by their employee(s).

2. Compliance with Wage Payment Orders

AB 469 now subjects employers to specific criminal liability for “willfully” failing to pay wages owed to employees. The legislature included reference to the California Penal Code Section defining this standard of culpability, which in turn states “willfully” means “impl[ying] simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.” Although AB 469, as with any new law, will surely be subject to judicial interpretation, this issue of “intent” will likely be broadly construed in favor of meeting the “willful” standard. Consequently, employers should take extreme care in how they approach the payment of disputed wages to employees and be aware of the dire effects of ignoring orders for wage payment(s) issued by California courts or the Labor Commissioner.

Conclusion

AB 469 ups the ante for the already sizeable liability exposure facing employers doing business in California. It imposes stringent informational disclosure requirements associated with the hiring and retention of every employee and sets forth severe penalties for the failure to pay court-ordered wages, including jail time for offending employers. Employers should therefore review current policies with a careful eye toward compliance with these new requirements.

For more information on AB 469 or for any questions regarding its mandates, please contact Denis Kenny at

dsk@sfcounsel.com or Ryan Stahl at rws@sfcounsel.com.

-Written by Ryan Stahl

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