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For California Employers, New Year Brings New Restrictions—Along With a Few Silver Linings

December 14, 2015

By Christopher W. Olmsted

In 2015, the California legislature undoubtedly took aim at employers with piecemeal legislation covering everything from cheerleaders (who are now employees by statute) to gender-based pay differentials—the latter with what is now the nation's most aggressive "equal pay" law. Nonetheless, some of the legislation provided clarity in the law, and other pieces of legislation are explicitly intended to give employers the chance to fix potential areas of noncompliance without facing civil liability for violations (i.e., the Motor Carrier Employer Amnesty Program and Assembly Bill (AB) 1506's amendment to California's Labor Code Private Attorneys General Act of 2004 (PAGA)). Most of these new laws take effect on January 1, 2016. Additionally, changes in federal laws and regulations are in the offing for 2016, with an anticipated increase in the salary base required to exempt an employee from the minimum wage.

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It is important for employers and businesses to take action now to ensure compliance with these changes in the law. Below we highlight the most important of these changes, their anticipated impacts, and what

employers can do to ensure they are in compliance with rapidly-evolving state laws.

Minimum Wage

California's minimum wage is set to increase to $10 per hour beginning on January 1, 2016. It is expected that the Fair Labor Standards Act's (FLSA) salary basis test will require that employees be paid at an even higher rate to qualify as exempt from the law's overtime provisions. In order to qualify for an exemption under the Fair Labor Standards Act (FLSA), it is anticipated that the new regulation will require employers to pay employees at least $970 per week. According to the U.S. Department of Labor's Fall 2015 Semiannual Regulatory Agenda, which included a statement on the timing for a final overtime rule, the DOL expects to publish the final rule in July of 2016.

Piece Rate Wages

This year, California's legislature enacted and Governor Jerry Brown signed into law AB 1513, which will make it more difficult for employers to pay wages on a piece-rate basis. Under AB 1513, employees must be separately compensated for rest and recovery breaks, as well as all "nonproductive time." The compensation must be no less than minimum wage for these time periods. As a consequence, it is advisable for employers to reconsider paying a piece rate.

DLSE Enforcement Powers

The California legislature wrote the labor commissioner a blank check this year in the form of enhanced powers to enforce judgments against employers. Under Senate Bill (SB) 588, employers must now pay judgments owed to the state's Division of Labor Standards Enforcement (DLSE), or be faced with hefty fines and the threat of a stop-work order from the DLSE. Moreover, wage liability now extends to owners, directors, officers, and managing agents of the entity. It is not clear who qualifies as a "managing agent" under the statute. Such persons, including those who act "on behalf of the employer," who cause violations and fail to pay penalties under the Act may be fined up to $100,000 by the State of California.

Meal Periods for Healthcare Workers

Under AB 327, healthcare workers working over eight hours in a single shift may voluntarily waive either their first or second meal period in writing. This is a good time for all employers to update their written meal break policies and ensure that employees are providing a compliant written waiver for any missed meal periods.

Professional Team Cheerleaders

California-based professional teams now must pay and treat cheerleaders as employees under AB 202.

FEHA Amendment

California is perhaps the state most protective of employees in the nation, with its Fair Employment and Housing Act (FEHA) protecting a wide array of characteristics from veteran status and disability to family status and sexual orientation. AB 987 added to this list by providing that an accommodation request is activity protected under the statute, even if there is no FEHA violation. In other words, if a person makes a disability accommodation request, but they are not disabled, they are still protected. Under FEHA (and the federal Americans with Disabilities Act), it is still important to conduct a fact-intensive inquiry into whether a person can be accommodated or not.

School Activities

SB 579 provides that employers of 25 or more employees must allow employees to take up to 40 hours of time off (personal time, comp time, or sick leave) in order to find, enroll, or re-enroll their children in a school or child care provider program. The leave may also be used to address a school emergency. SB 579 amends California's existing school activities leave law.

Healthy Workplaces, Healthy Families Act of 2014

With the passage of AB 304, California's sick leave law—which already required employers to provide sick leave to employees—employers may now use non-hourly accrual methods as an alternative to the "1 hour for every 30 hours" worked standard as long as employees accrue 24 hours of sick leave by the 120th day of employment. This allocation must be made to new employees by the 120th day of employment. Employers should review and revise their sick leave policies as necessary.

E-Verify Restrictions

California has enacted a restriction on the use of the federal E-Verify database with A.B. 622. U.S. Citizenship and Immigration Services (USCIS), an office of the U.S. Department of Homeland Security, provides electronic access to E-Verify, which can be used to determine whether prospective employees are U.S. citizens or are otherwise authorized to work in the United States. The new California law prohibits the use of this system for a prospective employee who has not yet been offered a job unless the employer is *required* by federal law to use the system. Violations of this provision can result in civil and criminal liability.

Wage Garnishment

Under SB 501, employers can now expect to see a change in wage garnishment orders. Specifically, the lower of 25 percent of disposable income or 50 percent of the amount by which earnings exceed a 40 hour minimum wage week may now be deducted from paychecks. SB 501 will not go into effect until July 1, 2016.

Fair Pay Act

California's Fair Pay Act, SB 358, has been called the toughest act of its kind in the nation. Under the terms of the 2015 amendment, employers are liable for pay differentials between men and women for jobs which require the same or substantially similar work. This law is different than its predecessors in at least two important respects. First, the law removes any geographic limitations from the statute, allowing employees and plaintiff's attorneys to compare jobs from, for instance, San Francisco, to jobs in markets which may be less competitive. As a consequence, differentials in pay based on cost of living, for example, must be clearly articulated. Second, the statute gives employees the right to discuss wages with each other and protects employees from adverse treatment on that basis.

To ensure compliance with the Fair Pay Act, employers will need to conduct self-audits, including the standardization of job descriptions so that they can be compared. The law requires equal pay for substantially similar work. Moreover, any legitimate factors, other than sex, that justify pay differences between employees should be thoroughly documented and quantified to the extent possible. Specifically, the law provides that pay differentials must be based on "bona fide factors other than sex." The more formalized an employer's pay decisions, with established metrics for business necessity, the less likely it is that pay differences will be found to be attributable to discriminatory factors.

CFRA

Regulations implementing the California Family Rights Act (CFRA) were amended and became effective July 1, 2015. While California law generally follows the guidance of the FMLA for leave issues, the new regulations make several distinctions. First, covered employers include business successors in interest. Second, joint employers include those sharing joint control over work or working conditions, those operating under work-sharing agreements, and those exercising common control. Third, a fixed job- or worksite is not required. If an employee is assigned to a worksite used for 50 employees or more within a 75 mile radius, then CFRA will apply. Fourth, the requirement that an employee must have completed 12 months of service can be met while an employee is on leave—although except for employees who are also military personnel, a break in service greater than seven years will reset the 12-month threshold for coverage.

CFRA Leave Administration

In addition to the above, employers now have five business days to respond to leave requests. Employees exempted from the reinstatement requirement include key employees, now defined as salaried employees who are among the highest-paid 10 percent of the employer's employees during the year. Employers may also now demonstrate fraudulent use of leave as an affirmative defense to job restoration and the maintenance of an employee's health insurance.

Other Restrictions Vetoed; Some Helpful Measures Passed Too

With the above said, the results were not all bad for employers in 2016. First, the California legislature enacted curative/amnesty legislation allowing employers to fix certain violations of the law without civil penalty. Second, the governor vetoed several pieces of employment legislation that would have imposed additional restrictions on employers.

Two new laws provide employers with the opportunity to cure or at least prevent liability for certain statutory violations:

Motor Carrier Employer Amnesty Program. First, AB 621 provides that truck operating companies may be immune from statutory and civil liability for misclassifying employees as independent contractors if the company conducts a voluntary self-audit and reclassifies the workers. Employers may take advantage of this program beginning on January 1, 2016. To participate, the employer must not have any pending suit alleging misclassification filed against it on or before December 31, 2015. As soon as an application is submitted to the DLSE regarding a voluntary self-audit, misclassification suits may not be brought. The amnesty program lasts for one calendar year, until January 1, 2017.

PAGA Amendment. Second, AB 1506 amends PAGA to allow employers to correct or "cure" paycheck stubs that include incorrect pay period dates or the incorrect legal name of the employer. This opportunity to cure arises once every 12 months. Curing a violation is the basis for dismissal of any PAGA lawsuit brought for the alleged wage statement violations.

Vetoed Legislation and Arbitration

Finally, California's governor vetoed certain changes in the law that would have burdened employers. AB 1017 would have prohibited employers from asking about an employee's prior pay. AB 645 would have banned employment arbitration. In vetoing the latter, Governor Brown suggested that such bans would violate recent Supreme Court precedent on the enforceability of arbitration agreements. While there is no guarantee that other more limited versions of this statute will not reach the governor's desk, California courts have nonetheless been more hesitant than other courts to enforce some arbitration agreements. Employers that are not already using arbitration agreements should seek advice about the desirability of using such agreements with their workforce, and agreements should be reviewed to ensure that they will be enforced in the event an employee threatens litigation.

For an in-depth look at this year's most significant state law changes and a look forward at what is to come in 2016, join us for our upcoming webinar, "California Employment Law Update: A Recap of the Past Year and A Look Ahead to 2016," featuring Keith A. Watts (shareholder, Orange County) and Christopher W. Olmsted (shareholder, San Diego). The webinar, which will take place on Tuesday, December 15, 2015 at 11 a.m. Pacific, will cover recent laws impacting California workplaces, including paid sick leave, disability accommodations, minimum wage increases, school activities leave, wage garnishment, and more; important California case law developments on topics such as compensable time, whistleblowing protections, disability

accommodation, age discrimination, and arbitration; and litigation and regulatory trends to watch in the coming year. Click here to register.

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