California Employment Law Update—What's Coming in 2016

December 17, 2015

Increase in the Minimum Wage—Not So Simple With the California Multiplier Effect

On January 1, 2016, California's minimum wage will increase to $10 per hour from the existing minimum wage of $9 per hour. As a result, numerous other pay practices will be affected by the increase:

Overtime Rate

The minimum wage rate change affects overtime. Effective January 1, 2016, employees who work for minimum wage and perform work that qualifies for overtime must be paid $15 per hour for time-and-a-half, or $20 per hour for double-time.

This is an increase from the pre-January rates of $13.50 per hour (time-and-a-half) or $18 per hour (double-time).

Exempt/Nonexempt

The increase also affects classification of employees as exempt versus nonexempt.

To qualify for the "white collar" exemption from overtime (the commonly used administrative, executive or professional exemptions), an employee generally must earn a minimum monthly salary of no less than two times the state minimum wage for full-time employment, in addition to meeting all other legal requirements for the exemption.

Effective January 1, 2016, the minimum salary requirements for these exemptions will increase to $3,466.67 per month (or $41,600 annually) from $3,120 per month (or $37,440 annually).

Certain commissioned inside sales employees may be eligible for an overtime exemption, if the employee earns more than one-and-a-half times the minimum wage each workweek, and more than half of the employee's compensation represents commission earnings. (Outside salespeople do not need to meet the minimum salary requirements.)

Piece-Rate Employees

The minimum wage increase also affects piece-rate employees. Piece-rate workers must receive at least minimum wage for each hour worked. Legislation effective January 1, 2016, requires payment of rest and recovery periods or other nonproductive time at specified hourly rates.

Exempt Computer Software Professionals

New Minimum Compensation for Exempt Computer Software Professionals (Labor Code § 515.5). For computer software professionals to be considered exempt, they must (among other things) be paid a minimum of $41.85 per hour or $87,185.14 per year.

What to do?

- Display a poster that includes the current official Minimum Wage Order (MW-2016).
- Update any necessary payroll documentation.

- Review exempt classifications to make sure that the employees will still meet the minimum salary requirements on January 1, 2016.
- Revise itemized wage statements in a timely manner when wages are paid and ensure the statements accurately reflect the wage increase.
- Provide employees affected by the minimum wage increase with an appropriate wage notice showing the change in the rate of pay, if required.
- Review any piece-rate compensation systems to ensure compliance with the new minimum wage standard and new legislation.
- Confirm that those employees who are required to provide and maintain their own hand tools and equipment earn at least two times the minimum wage (which will equal $20 per hour effective January 1, 2016).
- Remember that local ordinances may affect your minimum wage obligations. For example, San Francisco currently requires a minimum wage of $12.25 per hour and San José currently requires a minimum wage of $10.30 per hour. Note, however, that exempt/nonexempt classification is based on the state minimum wage, not local ordinances.

California's Fair Pay Act

California's equal pay statute, first enacted in 1949, was significantly modified to lower the burden of proof for plaintiff's claims, to greatly increase the burden of proof for an employer's defenses, and to allow employees to ask other employees about the amount of their wages for the purpose of ascertaining whether there may be a factual basis for an equal pay claim.

Where existing law requires that men and women working at the same location receive equal pay for equal work, the new law requires that they receive equal pay for substantially similar work even if they work in different locations. In addition, if there are disparities, the burden is on the employer to show that the entire disparity is justified by such factors as education, training and experience. Systems that base compensation on seniority, merit and production are also acceptable.

The law contains anti-retaliation provisions and provides a private right of action to enforce its provisions.

The law creates a new cause of action, eases the burden on employees to establish a prima facie case, and makes it more difficult for an employer to demonstrate that wage differences are justified.

What to do?

Employers should:

- Audit their salary structure and recordkeeping practices and policies to ensure compliance with the law.
- Make sure that job descriptions contain details that reflect legitimate reasons for any pay differentials.
- Review pay policies and practices across all locations to determine whether any wage differentials exist among "substantially similar jobs."
- Train managers not to restrict (or give the appearance of restricting) employees from discussing wages.
- Ensure that there is no prohibition against the discussion of wages in company documents (e.g., Employee Handbooks), and that these documents contain appropriate anti-retaliation provisions.
- Ensure that they are maintaining records of employee wages and wage rates, job classifications, and other terms and conditions of employment going back three years.
- Given the new requirements, employers should also identify and consider which documents justify pay scale decisions and will assist in providing one or more of the defenses provided by the statute.
- If wage differentials exist among substantially similar jobs, make sure you have a justification to support the differential that (1) is not based on sex or any other protected category; (2) relates to the job at issue; and (3) serves a substantial business purpose.

- Review and update training of any individuals who make compensation decisions and remind them of the appropriate job-related factors on which pay may be based.

Limits Placed on Employer's Use of E-Verify

Employers are required to verify that the workers they hire are authorized to work here. This law adds Labor Code section 2814 and takes effect January 1, 2016. It will prohibit employers from using E-Verify to check the status of existing employees or employees who have not received an offer. Unless required by federal law or as a condition of receiving federal funds, employers can only check the status of applicants who have received an offer but have yet to start work.

Also, if an employer using the E-Verify system receives notice from Homeland Security or the Social Security Administration that the employee does not match what is in the federal database (the “No-match letter”), the employer must notify the employee of that fact as soon as practicable.

The penalty for each violation of the new statute, Labor Code § 2814, is a hefty $10,000 fine. Another legal hurdle for California employers to clear with excessive penalties for noncompliance.

What to do?

Employers still need to verify the status of workers they hire and E-Verify provides a convenient mechanism to do so. But unless required by federal law or as a condition of receiving federal funds, employers can only check the status of applicants who have received an offer but have yet to start work. In addition, the employer needs to notify the worker promptly if the E-Verify system doesn't confirm that an individual is authorized to work in the U.S.

Expansion of Individual Liability for Wage Violations

Benignly named “A Fair Day's Pay Act,” this new law is intended to help employees collect judgments because their employers change their names or hide their assets. But the bill allows the Labor Commissioner to conduct hearings to determine whether a "person acting on behalf of an employer" should be held personally liable for an employer's violations. The Labor Commissioner would also be able to levy those individuals' accounts or property to enforce a judgment and seek payment from successor employers under criteria that are extremely vague.

The new law also provides that a new business will be considered the "same employer" for purposes of liability if (1) the employees of the successor employer are engaged in "substantially the same work in substantially the same working conditions under substantially the same supervisors," or (2) the new entity "has substantially the same production process or operations, produces substantially the same products or offers substantially the same services, and has substantially the same body of customers."

What to do?

Hold your breath—this law may turn out to be a blessing for good corporate citizens and a nightmare for "fly by nights" who go in and out of business and try and leave joint employers and guarantors holding the bag.

It's All in the Family—Relatives of Whistleblower are Granted Protections

Effective January 1, 2016, this law prohibits employers from retaliating against an employee who is a family member of an employee who made a protected complaint. The law extends the protections to an employee who is a family member of a person who engaged in, or was perceived to engage in, the protected conduct or made a complaint protected by the law.

What to do?

Under this law, if a married couple is working for the same employer, and the husband complains of discrimination, that's not a legal basis to take action against the wife. Be extra careful when employing relatives. Keep them separate—at least in the workplace.

Amendment of the Labor Code's Private Attorneys General Act of 2004 (PAGA)

The Labor Code requires employers to provide certain specific information on the pay statements it provides to its employees with their wages, such as their gross and net wages, total hours worked and deductions PAGA does not currently provide a cure period with respect to an employer's failure to include any of this required information on the pay statements of its employees.

The law has been amended to provide an employer with a limited right to cure a violation of failing to provide its employees with a wage statement containing the inclusive dates of the pay period and the name and address of the legal entity that is the employer. A violation is considered to be cured upon a showing that the employer has provided a fully compliant, itemized wage statement to each aggrieved employee.

What to do?

Pay attention. Correct errors immediately when brought to your attention. This is an opportunity.

And 2015 Laws…Keep in Mind

California Sick Leave

Beginning July 1, 2015, California employers were required to begin providing paid sick leave benefits to their eligible employees.

A key question: Do I need a written paid sick leave policy that I hand out to employees? The answer is "yes."

A written policy allows you to specifically describe and clearly communicate your company's approach to providing the mandatory benefit. But more important, the Labor Commissioner has specifically stated that if an employer provides any additional terms such as caps on maximum use, the employer must inform employees of those additional terms.

- Without a written policy, your company will be stuck using the statutory mandated accrual rate of one hour of sick pay for every 30 hours worked. This can result in a full-time employee potentially accruing more than 69 hours of paid sick leave per year and being allowed to carry that over to the next year, and so on. This is nearly nine days per year if the employee works a 40-hour workweek.

For more information, please contact Laura P. Worsinger, senior counsel at Dykema Gossett LLP in Los Angeles, at (213) 457-1744 or lworsinger@Dykema.com, or your Dykema relationship attorney.

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Practice Areas

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