NEW LAWS FOR 2016

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PROFESSIONALS

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PRACTICE AREAS

Employment

Thousands of laws are introduced each year at the state and federal level. While only a fraction of these become law, tracking the most important laws can be a daunting task. But never fear, we have taken on that task for you! Here is our list of the most important, or at least the most interesting, laws that were passed in 2015.

The Healthy Workplaces, Healthy Families Act of 2014 Clarified: Assembly Bill 304 was enacted on an emergency basis shortly after California's paid sick leave law, known as the Healthy Workplaces, Healthy Families Act of 2014, became effective on July 1, 2015. There were good reasons for the amendment: the paid sick leave law was confusing and difficult to implement. Effective immediately, AB 304 seeks to clarify some aspects of the sick leave law and provides employers with greater options regarding implementation. Specifically, AB 304 permits employers to use a sick leave accrual rate other than the one hour for every 30 hours worked rate provided in the law as originally enacted, as long as sick leave accrues regularly and the employee will accrue 24 hours by the 120th calendar day of employment. If the paid leave is not accrued at the beginning of each 12 month period, the carry over requirements apply, so that up to six days or 48 hours must carry over to the next year.

AB 304 also permits employers to continue using policies that existed prior to January 1, 2015 if at least one day or eight hours of sick leave or paid time off is earned within three months of employment, and employees are eligible to earn at least three days or 24 hours within nine months of employment. However, any modification to the accrual rate that existed prior to January 1, 2015 must meet the statutory requirements of one hour of paid leave for every 30 hours worked or the employer must provide the full amount of leave at the beginning of each year of employment, calendar year or 12 month period. In addition, if a class of employee is not covered by the existing policy, a new policy must be adopted for the class that meets the statutory rules for new policies.

AB 304 simplifies sick leave calculations, especially for employees with fluctuating pay rates or commissions, by providing that for all non-exempt employees sick leave can be calculated in one of two ways: either in the same

manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek or; by dividing the employee's total wages, not including overtime pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment. AB 304 also simplifies sick pay calculation for exempt employees as well, by providing that employers may use the same rate used for other forms of paid leave.

To further assist employers, the California Department of Labor Standards Enforcement (DLSE) recently issued an opinion letter interpreting the paid sick leave law requirement that no carry-over of accrued but unused time to the next year is required if the employee is provided a minimum of three days or 24 hours at the beginning of the employment year, calendar year or 12 month period. Specifically, the DLSE determined that the employer must provide the greater of 24 hours or three days. This means that an employee regularly working six hour days would be entitled to four days of six hours each, although this is more than 3 days of leave, while an employee regularly working 10 hour days is entitled to three days of 10 hours each, or 30 hours of sick leave, although this is more than 24 hours of leave. Similarly, if an employer places a cap on accrual of six days or 48 hours, the likely interpretation would be that the cap for a 10 hour shift employee would be 60 hours, and the cap for a six hour shift employee would be 48 hours. Employers should note, however, that while DLSE opinion letters are persuasive, they are not binding on courts of law.

SB 600: Senate Bill 600 expands the protections of the Unruh Civil Rights Act, a law designed to protect consumers. The Unruh Civil Rights Act already provides that all persons within the jurisdiction of this state are entitled to full and equal accommodations in all business establishments regardless of their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation. SB 600 extends these protections by prohibiting discrimination by businesses based on citizenship, primary language or immigration status. Although the law applies to consumers rather than employees, it is suggested that employers train employees not to discriminate against customers on the basis of any protected status. The law becomes effective on January 1, 2016.

AB 987: Effective January 1, 2016, Assembly Bill 987 prohibits an employer from retaliating or otherwise discriminating against a person for requesting accommodation of his or her disability or religious beliefs, regardless of whether the accommodation request was granted. This legislation was in response to the California Court of Appeal decision in Rope v. Auto-Chlor System of Washington, Inc., in which the court held that a request for reasonable accommodation was not a protected activity under the California Fair Employment and Housing Act, and therefore a claim of retaliation against an employer could not be made if an employer terminated an employee for requesting an accommodation. The legislature indicated that this opinion was in direct conflict with longstanding state and federal laws which do protect an employee's right to request a reasonable accommodation and sought to amend FEHA to clarify that employees are protected from retaliation and discrimination for requesting a reasonable accommodation based on a disability or religious belief, regardless of whether the request is granted.

The Fair Pay Act: It was little commented upon as it worked its way through the legislature, being just one of thousands of laws proposed each year. But make no mistake about it, Senate Bill 358, The Fair Pay Act, is an important new law for California employees and employers. Prompted by the continuing wage gap between

men and women, SB 358 is designed to improve a California law that has existed since 1949. Prior to the enactment of SB 358, employees claiming that they received unequal pay based on their gender had to demonstrate that they weren't paid at the same rate as someone of the opposite sex at the same establishment for equal work. The Fair Pay Act eliminates the reference to the same establishment, so that the business enterprise as a whole will be examined, and changes the standard from equal work to substantially similar work, taking into account skill, effort and responsibility, performed under similar working conditions. If an employee can show that he or she is paid less than someone of the opposite sex doing substantially similar work, then the employer has the burden to demonstrate that the wage difference is based on a seniority system, a merit system, a system that measures earnings by quality or quantity of production, or a bona fide factor other than sex, such as education, training or experience. A bona-fide factor other than sex can only be applied if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is related to the position in question, and is consistent with business necessity. "Business necessity" is defined as an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. An alternative business practice that would serve the same purpose without producing the wage differential would render the defense inapplicable.

SB 358 also prohibits an employer from discriminating or retaliating against employees for discussing or disclosing their own wages, discussing the wages of others, or inquiring about the wages of others. Employees are permitted to file claims in court or with the Division of Labor Standards Enforcement to recover unpaid wages, an equal amount as liquidated damages, interest and attorneys' fees and costs. Additional relief can include reinstatement and any appropriate equitable relief. The Fair Pay Act becomes effective on January 1, 2016.

The Wage Theft Bill: Senate Bill 588, referred to as the wage theft bill, significantly expands individual liability for wage and hour violations, by authorizing the Labor Commissioner to hold a hearing to recover civil penalties for wage and hour violations against not only the employer, but also a person acting on behalf of an employer, which includes an owner, director, officer, or managing agent of the employer. These persons may now be held liable for violating or causing a violation of any provision regulating minimum wages or hours and days of work in any Wage Order or the Labor Code. SB 588 also makes it easier for the Labor Commissioner to collect unpaid wages on behalf of workers, by granting power to issue levies and liens against the employer's property and to issue stop orders requiring businesses to cease operating until payment obligations are satisfied.

The new law also includes some unusual provisions which require that any individual or business entity that contracts for services in the property services or long-term care industries to be jointly and severally liable for any unpaid wages where the individual or business entity has been provided notice, by any party, of any proceeding or investigation by the Labor Commissioner in which the employer is found liable for unpaid wages. The requirements do not impose liability on individual residences or home-based businesses. "Property services" is defined as janitorial, security guard, valet parking, landscaping or gardening services. SB 588 becomes effective on January 1, 2016.

AB 1513: Effective January 1, 2016, Assembly Bill 1513 establishes Labor Code Section 226.2, which requires that employers paying piece-rate compensation must pay employees for rest and recovery periods and other nonproductive time separately from any piece-rate compensation, and that wage statements reflect these payments. The hourly rate paid for rest and recovery periods must be the greater of the applicable minimum wage, or the employee's average hourly wage for all time worked excluding rest and recovery periods or overtime, and the rate paid for other non-productive time must be at least the applicable minimum wage. Employers are provided a limited safe harbor for certain claims filed on or after March 1, 2014 for uncompensated rest and recovery periods or other nonproductive time, provided payments are made in accordance with the new requirements by December 15, 2016.

AB 1513 also requires that employee wage statements include the total hours of paid rest and recovery periods, the rate paid for these periods and gross wages paid during the pay period, and the total of all other nonproductive time, the rate of compensation for that time, and gross wages paid for the pay period.

SB 579: Senate Bill 579 expands Labor Code section 230.8, providing additional circumstances under which employers with 25 or more employees must provide school or child care activities leave. Beginning January 1, 2016, employees may take leave of up to 40 hours per year, not to exceed eight hours per month, to find, enroll and re-enroll a child in school or with a licensed child care provider, and to handle certain child care emergencies and school emergencies that prohibit the child from attending or require that the child be picked up from school. The leave will extend to a parent, guardian, stepparent, foster parent, grandparent, and to an employee who stands in loco parentis to a child. Employers are permitted to require the employee to provide documentation from the school or the child care provider regarding the child-related activity.

SB 579 also amends Labor Code Section 233, known as the kin care law, to permit employees to use kin care for the purposes set forth in California's Healthy Workplaces, Healthy Families Act of 2014, also known as the paid sick leave law, and to give "family member" the same meaning as provided in the sick leave law.

AB 1506: Effective upon signing, Assembly Bill 1506 amends the Private Attorneys General Act of 2004, commonly known as "PAGA", in a manner that should benefit employers and employees alike and reduce lengthy litigation. Among other things, PAGA permits employees to bring civil actions for violations of California Labor Code section 226(a)(6) and (8), which require an employer to provide its employees with specified information regarding their wages, including the inclusive dates of the period for which the employee is paid and the name and address of the legal entity that is the employer.

However, under AB 1506, an employer may now cure any violation of paragraph (6) or (8) by showing that the employer has provided a fully compliant, itemized wage statement to each aggrieved employee for each pay period for the three-year period prior to the date of the written notice of the alleged violation(s). Per AB 1506, the employer must cure any violation within 33 calendar days of the notice, and may not avail himself or herself of the cure provisions more than once in a 12-month period for the same violation(s) contained in the notice, regardless of the location of the worksite.

In the event that the aggrieved employee disputes that the alleged violation has been cured, the aggrieved employee must provide written notice of the dispute to the employer and the Labor and Workforce Development Agency. Within 17 calendar days of the dispute notice, the LWDA shall review the actions of the employer to cure the alleged violation(s), and provide its decision to the aggrieved employee and the employer. The LWDA may also grant the employer three additional days to cure the alleged violation(s). If the LWDA determines that the alleged violation(s) has not been cured or if the LWDA fails to provide a timely decision, the aggrieved employee may proceed with a civil action under PAGA.

In short, this amendment enables an employer to expeditiously exit the employment litigation highway, while quickly remedying an employee's harm. Sensible, right? We hope that the California Legislature considers similar amendments in the future.

AB 622: Assembly Bill 622, which takes effect on January 1, 2016, adds section 2814 to the California Labor Code. Section 2814 prohibits employers from using E-Verify to check the employment authorization status of an existing employee or an applicant who has not been offered employment, except as required by federal law or as a condition of receiving federal funds. Furthermore, upon using the E-Verify system, if the employer receives a tentative non-confirmation issued by the Social Security Administration or the United States Department of Homeland Security which indicates the information entered into E-Verify did not match federal records, the employer shall comply with the required employee notification procedures governing the use of the E-Verify system. An employer who violates section 2814 is liable for a civil penalty up to $10,000 for each violation, in addition to other remedies available.

AB 970: By amending sections 558, 1197, and 1197.1 of the California Labor Code, Assembly Bill 970 authorizes the Labor Commissioner to investigate and, at the request of local government, enforce local laws regarding overtime hours or minimum wage provisions. The Labor Commissioner may issue citations and penalties for violations, except when local government has already issued a citation for the same violation. In addition, AB 970 amends section 2802 of the California Labor Code by authorizing the Labor Commissioner to issue citations and penalties to employers for violating the expense reimbursement requirement of section 2802. AB 970 takes effect on January 1, 2016.

AB 1509: Assembly Bill 1509 amends sections 98.6, 1102.5, and 6310 of the California Labor Code by extending certain retaliatory protections afforded to employees to their family members who work for the same employer. Under existing law, employers are prohibited from discharging an employee or taking an adverse action against an employee or applicant for employment because the employee or applicant has engaged in protected conduct, such as filing a written complaint with a government agency based on employment conditions. Effective January 1, 2016, such retaliatory protections will include the employee's or applicant's family members. AB 1509 also amends section 2810.3 of the California Labor Code, a law that prohibits the shifting of legal responsibility for certain Labor Code requirements from employers to labor contractors, to exclude client employers that are not a household goods carrier due solely to the employer's use of a third-party household goods carrier permitted by the Public Utilities Commission.

SB 501: Senate Bill 501 changes the amount of an employee's weekly earnings that would be exempt from a wage garnishment order in California. Currently the amount subject to garnishment cannot exceed the lesser of 25% of the employee's disposable earnings and the amount by which the individual's disposable earnings for the week exceed 40 times the state minimum wage in effect at the time the earnings are payable. Beginning on July 1, 2016, the maximum amount subject to garnishment will change to the lesser of 25% of the employee's disposable earnings for the week or 50% of the amount by which the employee's disposable earnings for the week exceed 40 times the state minimum hourly wage in effect at the time the earnings are payable. If the employee works in a location where the local minimum wage exceeds the state minimum wage, the local minimum wage in effect at the time the earnings are payable will be used for this calculation.

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