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Labor & Employment | Alert

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2015 California Employment Law Legislative Update

At Greenberg Traurig, we live our motto “built for change” and apply it for the benefit of the businesses we serve. Our California Labor and Employment Practice appreciates that although California presents opportunity, it also presents an often unique set of employment risk propositions, and these risks are often just one set among a constellation of others that require management.

We also believe that while employers need to manage that risk, neither a stream of the “sky is falling” communications regarding every court rumination, nor a list of developments so comprehensive that the significant and the idiosyncratic blur together is the correct approach.

We address the developments by issue and add some thoughts on why we think it may matter to your company.

The Statewide Minimum Wage and Minimum Salary for Exempt Status are Going Up.
Although not the product of new legislation, on Jan, 1, 2016, the statewide minimum wage increases to $10 per hour. Because the salary threshold for exempt status must be at least twice the full-time equivalent of the minimum wage, exempt employees will need to make at least $3,466.67 per month or $41,600 per year. Apart from issues of compliance, as the minimum wage continues to increase, the salary cost of preserving the exemption for that lowest level supervisor also increases. At some point that begs the question as to how important the exemption is in context.

Comparable Worth Revisited (SB 358)
The concept of equal pay for equal work has been embedded in the law for decades. That is only part of what this legislation addresses. The adjusted law does a number of things and in the process shifts the burden of proof to the employer to justify its pay practices.

California law will now prohibit an employer from paying any of its employees at wage rates less than those paid to employees of the opposite sex for "substantially similar work," when viewed as a composite of skill, effort, and responsibility, as specified. Under the prior equal pay for equal work statute, the basis for comparison was within the same establishment. The establishment limitation, in effect, expressly negated overall cost of living and market conditions. Thus, for example, compensation in California's Central Valley did not fairly compare to compensation in Downtown San Francisco. The new law drops the establishment limitation thereby making state wide comparison easier.

Under the new law the employer must affirmatively demonstrate that a wage differential is based upon one or more specified factors, including a seniority system; a merit system; a system that measures earnings by quantity or quality of production; or a bona fide factor other than sex, such as education, training, or experience. This factor applies only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. "Business necessity" means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense is unavailable if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

As for the burden of proof, the employer must demonstrate that each factor relied upon is applied reasonably, and that the one or more factors relied upon account for the entire differential. Records must also be retained for three years rather than two years. There are other anti-retaliation provisions and enhanced prohibitions on limiting employee discussions of compensation.

These new requirements change the landscape as to identical jobs. Thus, for example, if there were pay differentials across a statewide pool of store assistant managers and a gender concentration developed, the employer may need to defend why that differential exists. That is one challenge.

Another is the "substantially similar work" concept. The first step there is to understand that this is a conclusion not a standard or a definition. For example, in a resort environment do those serving food in the breakfast area/coffee shop perform substantially similar work as the servers in the French restaurant who may cook at the table? In a post PPACA environment, are general practice physicians, nurse practitioners, and physician's assistants performing substantially similar work? For many employers this legislation, although intellectually complicated, may not be all that significant.

For larger employers, it will be important to resist the rush to follow the siren song of the consultants. Among the lessons learned from the earlier round of comparable worth cases years ago is that unless the employer is very thoughtful about the process, the measures taken to assess the existence of an issue can end up creating liability. There is a difference between an empirical analysis of whether two positions entail "substantially similar work" and having to live with the findings of one's own consultant. This is an area where early careful legal analysis on how to approach the questions may be money better spent than commissioning a study first and engaging counsel later on how best to deal with the results.

Immigration Management California Style

Continuing the trend from recent years, California has added some new wrinkles.

- Labor Code §2814 (A.B. 622). Employers are prohibited from using the e-Verify system to check employment authorization status of an existing employee or of an applicant before an offer of employment is extended. California employers will face a $1,000 per incident penalty for violating these rules;
- Civil Code §3339.5 (A.B. 560). The immigration status of a minor child seeking recovery under any California law is irrelevant to the issue of liability or remedy except for prospective employment related injunctive relief. Discovery or other inquiry in a civil action or proceeding relating to a minor child's immigration status shall not be permitted except where the minor child's claims place the minor child's immigration status directly in contention or the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law.

- Civil Code Section 51 (S.B. 600). This legislation extends the protections of the Unruh Civil Rights Act to persons regardless of citizenship, primary language, or immigration status. These protections do not require the provision of services or documents in a language other than English, beyond that which is otherwise required by law.

Among the reasons that this matters is that portions are likely counterintuitive to many. An interstate employer has a number of challenges to consider. For example, an Arizona employer is very strongly encouraged to use E-verify and a California employer is strongly discouraged. Harmonizing policies in that environment requires focus.

Wage & Hour

We would love to report that significant efforts to make California a more employer friendly place to create job growth were successful. While there was one modest reform to the California Private Attorney General Act (PAGA), new laws that were enacted created further employer obligations.

- **PAGA (**A.B. 1506). This statute amends PAGA and in particular Labor Code §2699(d). The provision which became effective immediately, provides that a paystub violation under paragraph (6) (begin and end date of the pay period) or (8) (name and address of the employer) can be considered cured upon a 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 notice to the employer and the California Labor and Workforce Development Agency other intent to pursue the claim.
- **Piece Rate Compensation** (A.B. 1513). The legislature did not ban piece rate compensation. However, getting it right may require something akin to Schrodinger's Wave Equation to calculate it and yet another disclosure on the Labor Code §226 payday statement. In essence, piece rate employers must pay the worker for rest periods and other non-productive time separately from and in addition to the piece rate. To calculate the hourly rate for the rest period, the employer takes the total compensation for the work week and divides that by total hours after removing the time and compensation for the rest period itself from the equation. Other non-productive time must be paid at a rate no less than the minimum wage. Then, the payday statement must have additional fields for total compensable rest period time, the rate of compensation for those periods, and the gross wages for these rest periods during the pay periods. If the employer does not pay a wage rate on top of the piece rate then similar disclosures would be required with respect to the other non-productive time.
- **Labor Commissioner Authority to Enforce Local Wage Laws** (A.B. 970). For communities that have a living wage ordinance, including Oakland, San Francisco, and Los Angeles, if the locality does not take enforcement action, the State Labor Commissioner may enforce the local ordinance.
- **Enhanced Labor Commissioner Enforcement Powers** (S. B. 588). Basically, the Labor Commissioner may use any remedy available to a judgment creditor to collect unpaid wages. If the wages remain unpaid 30 days after entry of judgment, under new Labor Code §238 a stop order can be issued shutting down the business. Liability for failure to observe the stop order is criminal and applies to the owner, director, officer, or managing agent of the employer. The new law also provides that:
    - Labor Commissioner hearings will be expanded to include penalties and liquidated damages and thus contesting an adverse administrative outcome will entail a large appellate bond;
    - Employers (including successors with similar ownership) who neither appeal nor pay a wage judgment must obtain a sizable bond ($150,000 if the amount owed is more than $10,000) to continue doing business in the state or face stiff penalties ranging from a minimum of $2,500 to $100,000. Continued operation without the bond can result in a stop order issued by the Labor Commissioner who also will have a variety of lien rights;
    - If the employer with the outstanding unpaid wage judgment is in the long term care industry, the Department of Public Health or State Department of Social Services is empowered to refuse to renew any required licenses; and
    - Any business in the property services (janitorial, security, valet parking, landscaping, and gardening services) or long term care industry that contracts out portions of those services to other employers is jointly and severally liable for any unpaid wages.

- **New Personal Liability for Wage Violations.** New Labor Code§558.1 provides that any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation. Among the consequences is that because of the statutes listed, a non-willful misclassification of exempt or independent contract status may imbue decision makers with personal liability.
- **Joint and Several Liability for Subcontracted Operations (AB 1897).**
  As part of national efforts to blur liability distinctions between contracting parties, California has added Labor Code 2810.3. In general it provides that a "client employer" shall not shift to a "labor contractor" any Cal-OSHA duties or liabilities under the with respect to "workers" supplied by the labor contractor. For this purpose a client employer is any business that is provided workers to perform labor within its usual course of business. A labor contractor is the provider of the labor. Worker really means non-overtime exempt workers. There are of course exceptions. Client employers do not include: employers with a total headcount less than 25 employees including the contracted labor, a business that contracted for fewer than five workers, or any governmental entity. Labor contractors do not include nonprofit community based organizations providing services to the workers placed, organized labor, motion picture payroll services, Professional Employer Organizations, or employee leasing enterprises (subject to some limitations). Also exempt are motor carriers contracting with other motor carriers to transport property, cable, satellite TV, and telephone companies subcontracting installation and repair provided that the installers and repair people have their own business name on the uniform and vehicle.

The moral here is that the California legislature is increasing the employer risk. Notwithstanding the PAGA adjustment, it is important to periodically review wage and hour practices for California compliance.

Potpourri

Other employment related legislation that may be of some interest is set forth below.

- **Grocery Store Acquisitions** (A.B. 359 and 897)
  A narrow piece of legislation that provides that the purchaser of a grocery store must retain the seller's employees for 90 days following completion of the transaction. There is an exception if the store has been closed for six months.
- **Fair Employment and Housing Act** (A.B. 987)
  Employees making a request for disability or religious accommodation are now protected from retaliation under the Fair Employment and Housing Act (A.B. 987). This reverses a prior court case finding a mere request for accommodation was not protected.
- **Professional Sport Cheerleader Protection** (A.B.202). Following some interesting lawsuits involving the Oakland Raiders and others, Major and Minor League Football, Basketball, Baseball, Ice Hockey, and Soccer teams must treat cheerleaders as employees.
- **Kin Care Amendments** (S. B. 579). Nominally, the legislation was to align the Kin Care statute with the paid sick leave statute and it does just that. Along the way the leave was expanded to include pretty much all child care emergencies and expands coverage to step-parents, foster parents, and those in loco parentis.

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