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Governor Brown Signs New Laws Affecting California Employers

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This year the California Legislature enacted over a dozen new laws that will have a significant impact on California employers. We summarize below the most significant of these laws affecting private-sector employers. Most of these laws will take effect on January 1, 2016, unless we specify otherwise below.

SB 358: Fair Pay Act

This is one of the toughest equal pay laws in the country. It significantly changes the standard for gender-based wage discrimination claims in California. It expands the existing equal pay provisions of the California Labor Code – which essentially require equal pay for equal work in the same establishment as between members of the opposite sex – to require equal pay for "substantially similar work, when viewed as a composite of skill, effort, and responsibility," whether or not the employees of the opposite sex work in the same establishment.

SB 358 also increases the burden of proof on employers that attribute pay differences to factors other than sex, by requiring them to show that each factor is "applied reasonably" and that the factors relied upon account for the entire wage differential. The Act makes it unlawful to retaliate against employees for disclosing their own wages, discussing the wages of others, asking about another employee's wages, or taking any action to "invoke or assist in any manner" the enforcement of the Act. It imposes a new liquidated (double) damages remedy for violations, and it extends the recordkeeping requirement for wage information from two to three years.

The Fair Pay Act undoubtedly will lead to litigation, as the courts will need to interpret the meaning of "substantially similar work" and the Act's many other new provisions. All employers should begin preparing to meet the requirements of this significant new statute.

We previously prepared a more detailed summary of the Fair Pay Act, which is found at http://www.gbgllp.com/assets/california-fair-pay-act-sb-358.pdf.

AB 1513: Piece-Rate Employees and Related Pay Stub Changes

This law dramatically alters the pay requirements and the pay stub requirements for employers who compensate employees under a "piece-rate" system. It codifies, and expands upon, recent controversial court decisions involving truck drivers, mechanics, and other piece-rate workers, requiring that they be separately paid on an hourly basis for rest periods and other "nonproductive" activities in addition to their piece-rate pay. Specifically, the new statute requires that any employees who are compensated on a piece-rate basis during a pay period must be paid for "rest and recovery periods and other nonproductive time separate from any piece-rate compensation." ("Recovery" periods are cool-down breaks to prevent heat illness for employees working outdoors in hot weather, as allowed under a law that went into effect in January 2014.) "Nonproductive time" is defined as "time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis."

Additionally, as a general rule, the wage statements (pay stubs) of such employees must now separately state, in addition to the nine items specified in the existing pay stub law: (1) the total hours of compensable rest and recovery periods, the rate of compensation, and the gross wages paid for those periods during the pay period; and (2) the total hours of other nonproductive time, the rate of compensation, and the gross wages paid for that time.

Complicating matters further, rest and recovery time must be paid at an hourly rate at the higher of (1) an average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods; or (2) the applicable federal, state or local minimum wage. Employers must pay for the nonproductive time at an hourly rate that is no less than the applicable minimum wage. Employers may determine the amount of nonproductive time either through actual records or the employer's "reasonable estimates," although the employer remains liable for paying the full amount owed in the event its estimate is proven to be too low. Alternatively, an employer will be in compliance with the payment for nonproductive time if it pays piece-rate pay (however it is calculated) plus hourly pay for *all* hours worked at no less than the applicable minimum wage.

The statute contains an unusually complicated set of provisions allowing an employer to avoid *penalty* liability if it makes full backpay restitution due under the statute, plus interest, to its current and former employees by no later than December 15, 2016, covering all periods dating back to July 1, 2012, and/or if the employer takes certain other prescribed steps laid out in the statute.

This new piece-rate law is extraordinarily onerous and complicated. Complying with it will, unfortunately, present a difficult burden for employers of piece-rate employees, and the law undoubtedly will spawn new litigation.

AB 1506: Civil Penalties for Pay Stub Violations

Employers now have the opportunity to cure certain technical violations of the pay stub law, Labor Code section 226, and thereby avoid some liability for civil penalties under the Private Attorneys General Act ("PAGA"). Specifically, AB 1506 allows employers to "cure" an alleged failure to show on the pay stub the inclusive dates of the pay period and/or the name and address of the "legal entity that is the employer." Unfortunately, however, the Legislature's cure provision is quite burdensome. To cure a violation, the employer must reissue fully compliant pay stubs to all affected current and former employees for each pay period going back *three years* prior to the date of the complaining employee's written notice to the Labor and Workforce Development Agency. This bill is effective immediately.

We previously prepared a detailed summary of this bill, which is found at http://www.gbgllp.com/assets/paga-cure-amendment.pdf.

SB 579: School Activities and Kin Care Changes

SB 579 modifies two different California leave provisions: school activities leave and "kin care" sick leave. It expands California's law that allows parents to take up to 40 hours off work per year to attend their child's school activities, including children in licensed day care facilities and kindergarten through grade 12. SB 579 redefines "licensed day care facility" to "licensed child care provider." It allows time off work to "find, enroll, or reenroll" a child in a school or with a child care provider. It also expands coverage to include time off not only for planned school activities, but also school or child care "emergencies," which are broadly defined to include situations where the school or child care provider requests that the child be picked up due to behavioral or discipline problems, closure or unexpected unavailability of the school or child care provider, or other such reasons.

SB 579 also expands California's "kin care" sick leave law, Labor Code section 233, which requires employers who have a policy of providing accrued sick leave for *employee* illnesses to make a portion of that sick leave (essentially six months' worth of annual accrual) available for absences to attend to the illness of an employee's spouse, child, parent, or domestic partner. This bill conforms the kin care law to

California's new Paid Sick Leave Law, by permitting kin care leave for the diagnosis, care or treatment of grandparents, grandchildren, and siblings, and allowing the leave to be taken in situations involving domestic violence, sexual assault or stalking.

AB 987: Protected Status of Requests for Accommodation

This bill amends the California Fair Employment and Housing Act ("FEHA") to clarify that making a request for a reasonable accommodation is itself a protected activity under FEHA. Therefore, it is unlawful to discriminate or retaliate against an employee or applicant because that person requested a reasonable accommodation, whether or not the request was granted. This applies to requests for accommodation relating to a physical or mental disability, pregnancy, or religious belief. AB 987 effectively overrules an earlier California Court of Appeal decision which had held that the mere act of making a request for a reasonable accommodation, by itself, is not protected activity under FEHA's anti-retaliation provisions.

AB 1509: No Retaliation Based on Conduct of Family Members

This bill makes it unlawful for an employer to retaliate against an employee under any of the Labor Code's anti-retaliation provisions because the employee is a family member of a person who engaged in, or is perceived to have engaged in, any conduct protected under the Labor Code.

AB 359 and AB 897: Job Protections for Grocery Workers

AB 359 protects grocery workers from being immediately fired because of a change in store ownership. It requires that most employers operating grocery stores over 15,000 square feet in size grant preferential hiring status to the non-managerial employees who were employed by the prior owner after the purchase or transfer of a controlling interest in the establishment. Specifically, the successor employer must hire and retain eligible grocery workers for a 90-day period, refrain from discharging those workers without "cause" during that period, and, at the end of the 90 days, "consider" offering continued employment to those workers if they performed satisfactorily. A separate bill was passed, AB 897, which clarifies that the law's definition of "grocery establishment" does not include a retail store that has ceased operations for six months or more.

This law protecting grocery workers is patterned after the existing successorship provisions applicable to janitorial workers under California's Displaced Janitorial Opportunity Act.

SB 327: Meal Period Waivers in the Health Care Industry

Industrial Welfare Commission Wage Orders 4 and 5 each allow employees in the health care industry to voluntarily waive one of their two meal periods on shifts over eight hours if certain formalities are followed. A recent appellate decision, *Gerard v. Orange Coast Memorial Hospital*, 234 Cal. App. 4th 285 (2015), declared that these health care meal waivers were invalid as to shifts that exceed 12 hours, because they conflict with a provision in the Labor Code, Section 512, that permits second meal waivers only for shifts that last up to 12 hours. The *Gerard* decision was recently accepted for review by the California Supreme Court.

Meanwhile, however, SB 327 was signed by the Governor, expressly overruling the *Gerard* decision and declaring that the health care meal waiver provisions in Wage Orders 4 and 5 are valid and enforceable. SB 327 was made effective immediately and is "declarative of existing law," which means that health care employers will be able to cite it in connection with any pending meal break litigation.

AB 970: Labor Commissioner Enforcement of Local Ordinances and Expense Reimbursement Claims

This law makes it a violation of the California Labor Code for an employer to violate any *local* minimum wage or overtime ordinance passed by a city or other local body. It gives the California Division of Labor Standards Enforcement ("DLSE") the authority to investigate, hold hearings, and issue citations and penalties not only for violations of the California Labor Code, but also for violations of local ordinances regulating minimum wages and overtime. This is significant given the recent proliferation of local ordinances regulating minimum wages and other wage-and-hour conditions throughout California.

AB 970 also clarifies that the DLSE has the authority to handle complaints not only about unpaid wages, but also about unreimbursed expenses under California's strict expense reimbursement provision, Labor Code section 2802. Employees who wish to raise complaints about unreimbursed expenses may file complaints with the DLSE, which will investigate and hold hearings under its "*Berman*" hearing procedures.

SB 588: Strengthened Enforcement of Labor Laws and Individual Liability

This law contains a whole panoply of new provisions designed to strengthen the enforcement of judgments, awards and penalties against employers arising from the nonpayment of wages. It creates new penalty provisions enforceable by the Labor Commissioner; allows the Labor Commissioner to levy on real or personal property of an employer that has not satisfied a judgment for unpaid wages; requires new bonds to be filed by non-compliant employers; and allows the Labor Commissioner to issue a stop-work order, requiring the employer to cease operations, under certain circumstances.

Notably, the law also adds a new civil penalty provision, Labor Code section 558.1, which provides that not only the employing entity, but also any natural person who is an owner, officer, director, or managing agent of the employer, may be individually liable as the "employer" for any violation of a Labor Code or Wage Order provision regulating minimum wages, hours and days of work. This includes, but is not limited to, the Labor Code's provisions on final pay at termination, wage statements, meal and rest break premiums, minimum wage, overtime, and expense reimbursement.

AB 622: Restrictions on Use of E-Verify

This bill adds several new restrictions on how and when California employers may use the federal E-Verify system to verify that new employees are authorized to work in the United States. Among other things, employers will be prohibited from using E-Verify to check the status of an existing employee or an applicant who has not been offered a job, unless this is required by federal law or is a condition of receiving federal funds. Employers also must furnish employees with copies of any notifications received from the Social Security Administration or Department of Homeland Security containing any information specific to the employee's E-verify case. Employers who violate the law are liable for a civil penalty of $10,000 for each violation.

SB 501: Wage Garnishment

Existing law specifies a maximum amount that an employer may withhold from an employee's earnings pursuant to a garnishment order of a court. This bill reduces the maximum amount that can be withheld. Under the amended statute, the amount of weekly disposable earnings subject to levy under an earnings withholding order may not exceed the lesser of (1) 25% of the individual's disposable earnings for that week, or (2) 50% (rather than the current 100%) of the amount by which the individual's disposable earnings for the week exceed 40 times the applicable state or local minimum wage, whichever minimum wage is higher. This change will become operative on July 1, 2016.

AB 304: Paid Sick Leave Amendments

Several months ago, the Legislature amended last year's Paid Sick Leave ("PSL") Law, which went into effect on January 1, 2015, but became fully operative on July 1, 2015. We previously distributed information about the PSL Law and the AB 304 amendments. Most notably, the amendments relaxed the prior requirement that employers use a complicated 90-day lookback calculation for paying PSL to employees who receive commissions or other "fluctuating" pay; gave employers the flexibility to adopt a different PSL accrual method than the statutory accrual method in certain circumstances; clarified the payday disclosure requirement for employers that provide unlimited paid sick leave; specified that employers need not keep records of the underlying purposes for which an employee uses PSL; and clarified that employees must work in California for at least 30 days for the same employer (not just for *any* employer) to be eligible for PSL. These amendments took effect immediately.

AB 202: Employee Status of Cheerleaders

This law requires that California-based professional sports teams classify its cheerleaders as "employees" rather than independent contractors for purposes of all state laws that govern employment, including the Labor Code, Fair Employment & Housing Act, and Unemployment Insurance Code. This applies to minor and major league baseball, basketball, football, ice hockey, and soccer teams. This law comes on the heels of a highly-publicized lawsuit in which cheerleaders for the Oakland Raiders alleged that they received little or no pay for many of their required duties and no reimbursement for their expenses.

Although this law obviously affects very few California employers, it is noteworthy in that it appears be the first time, to our knowledge, in which the State Legislature has imposed a mandate that private-sector employers in a particular industry must adopt a particular business model by classifying all of their workers as "employees," regardless of the degree of control those employers do or do not exercise over the persons performing the work.

Employment Laws Vetoed by Governor Brown

Governor Brown also vetoed several notable bills that the Legislature presented to him.

AB 465 would have had the greatest impact on employers of all the bills under consideration, because it would have effectively outlawed the use of mandatory arbitration agreements in cases involving wage-and-hour claims. It would have prohibited employers from conditioning employment offers on the waiver of any right protected by the Labor Code. It would have required that any waiver of Labor Code protections be knowing, voluntary, and in writing, and it would have deemed any waiver of Labor Code rights conditioned on employment to be "involuntary, unconscionable, against public policy, and unenforceable." It also would have prohibited retaliation against any person who refused to waive any of the protections contained in the Labor Code.

Other notable vetoes include:

AB 1017, which would have prohibited employers from seeking information about a job applicant's salary history, including compensation and benefits;

AB 676, which would generally have prohibited employers from inquiring about a job applicant's current employment (or unemployment) status, or stating in a job announcement that persons who are unemployed are ineligible for the job;

SB 406, which would have expanded the protections of the California Family Rights Act by, among other things, allowing CFRA leave to care for an adult child, parent-in-law, grandparent, grandchild, or sibling who has a serious health condition; and

AB 1354, which would have required all employers with 100 or more employees that have contracts with the State to submit a written "nondiscrimination program" to the Department of Fair Employment and Housing and to submit periodic compliance reports designed to ensure equal employment opportunities for employees and applicants.

Interesting Bills that Died in the Legislature

The following bills never made it to the Governor's desk:

AB 67 would have required employers to pay double time for any hours worked by non-exempt employees on Thanksgiving Day.

AB 1470 would have made it much easier for employers to classify employees as exempt from overtime if the employees earn more than $100,000 per year. This was patterned after the "highly-compensated employee" provision in the Fair Labor Standards Act.

AB 1038 would have allowed individual non-exempt employees to opt for a "4/10" work schedule (four 10-hour days each week) if the employer approves, without receiving overtime for the 9th and 10th hours on the 10-hour days, thus bypassing the alternative workweek election process.

AB 1383 would have allowed private employers to grant preferential treatment to military veterans in hiring and other employment decisions without thereby being found to violate the Fair Employment & Housing Act or other state and local employment laws.

AB 357 would have required certain retail employers to notify employees of their work schedules at least two weeks in advance and to provide extra pay to employees for being on-call or being called into work on short notice. This was patterned after San Francisco's "Retail Workers Bill of Rights" Ordinance, enacted last year.

AB 908 would have expanded the Paid Family Leave provisions available for family care and child bonding, by allowing eight weeks of partial wage replacement instead of six weeks and eliminating the seven-day waiting period, among other things.

SB 3 would have increased the State minimum wage to $11 per hour on January 1, 2016 (instead of $10) and to $13 by January 1, 2017. Beginning in 2019, the minimum wage would have automatically increased each year based on the Consumer Price Index.

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Employers in California should be taking the necessary steps to comply with the new laws that have been enacted. Please contact us if you have questions about any of the new provisions.