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YEAR-END REVIEW: NEW CALIFORNIA EMPLOYMENT LAWS AND OTHER CHANGES ARRIVING IN 2017

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This year, as usual, the California Legislature enacted many new laws that will have a significant impact on California employers. We summarize below the key laws affecting private-sector employers. Most of these laws will take effect on January 1, 2017, unless we specify otherwise.

AB 1676/SB 1063: ***Fair Pay Act Regulates Pay Disparities Based on Race and Ethnicity and Restricts Reliance on Prior Salary***

These bills expand California's landmark, gender-based Fair Pay Act, found at Labor Code section 1197.5, which was signed in 2015. The Fair Pay Act expanded existing equal pay provisions of the California Labor Code 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. It also increased 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 new amendments to the Fair Pay Act expand its protections by generally prohibiting employers from paying employees at wages less than the rates paid to employees of *another race or ethnicity* for substantially similar work. The new law also expressly provides that an employer's reliance on an employee's prior salary will not, by itself, justify a difference in compensation between employees of different genders, races, or ethnicities. Thus, the amended law both increases the bases upon which employees may claim an unlawful pay disparity and narrows an employer's defenses to such claims, especially where an employer relies on job candidates' salary history to determine compensation.

SB 836: Increased LWDA Involvement in PAGA Claims

This bill, which went into effect immediately when the Governor signed it in late June 2016, increases the involvement of the California Labor and Workforce Development Agency ("LWDA") in claims filed under the Private Attorneys General Act ("PAGA"), the law that gives employees the right to sue their employers on the LWDA's behalf for certain Labor Code violations after notifying and providing the LWDA an opportunity to investigate. Under the new PAGA provisions:

- PAGA plaintiffs must wait 65 days instead of 33 days to commence a civil action after sending notice of their complaint to the LWDA;

- The LWDA has 65 days instead of 33 days to notify the plaintiff and employer of its intent to investigate a claim;

- The LWDA may extend the 120-day investigation period by up to 60 calendar days when it determines that the additional time is necessary;

- PAGA plaintiffs must pay a filing fee of $75 at the time they provide notice to the LWDA;

- The required PAGA notices must now be submitted to the LWDA online rather than by certified mail, although they must be served by certified mail on the employer;

- Within 10 days after filing a PAGA case in court, PAGA plaintiffs must provide the LWDA with file-stamped copies of the court complaint;

- The parties must provide the LWDA with any proposed PAGA settlements being submitted to the court for the court's approval, and copies of any court orders or judgments approving or denying a PAGA settlement; and

- The superior court must review and approve any settlement of a civil action that contains a PAGA claim.

These requirements generally apply only to LWDA notices and/or court complaints filed on or after July 1, 2016.

AB 2535: Amendment to Pay Stub "Hours Worked" Requirement

This bill, which went into effect immediately when the Governor signed it in late July 2016, amends California's pay stub law (Labor Code section 226) to expand the categories of exempt employees for whom "total hours worked" need *not* be shown on the pay stubs. In particular, the law clarifies that employers need not report total hours worked on pay stubs of employees who are exempt from minimum wage and overtime requirements under applicable California law and are executive, administrative, or professional employees; outside salespersons; or computer software professionals who meet the salary requirements of Labor Code section 515.5.

Labor Code section 226 previously excused employers from having to show total hours worked only for exempt employees whose compensation is "solely based on a salary." This created confusion as to whether pay stubs must reflect total hours worked for individuals who are exempt from overtime but not paid entirely by salary, such as outside salespersons or persons who are paid bonuses or commissions in addition to salary. The new law removes that confusion.

AB 1843: Juvenile Criminal History of Applicants for Employment

This bill amends the Labor Code to prohibit employers from: (1) asking job applicants for information about any criminal history that occurred while the applicant was subject to the jurisdiction of juvenile court; (2) seeking such information from other sources; or (3) using any such information as a factor in determining any condition of employment, including hiring, promotion, termination, or participation in training programs. Health facilities are partially exempted; they may seek information from applicants about juvenile court adjudications involving certain specified criminal offenses if they occurred within the five years preceding the application for employment, as long as the offense history has not been sealed by the juvenile court.

SB 1241: Choice of Venue and Governing Law for Resolving Disputes with Employees

This bill prohibits employers from requiring employees who primarily reside and work in California to agree, as a condition of employment, to a provision in an agreement that would: (1) require them to

adjudicate a claim in another state if that claim arose in California; or (2) deprive them of the substantive protection of California law with respect to a controversy arising in California. The bill, which adds section 925 to the California Labor Code, covers contracts entered into, modified, or extended on or after January 1, 2017. "Adjudication" includes court litigation as well as arbitration. Agreements that violate these prohibitions are voidable at the request of the employee. Therefore, employers headquartered outside California will no longer be permitted to require that California-based employees travel to another state to adjudicate a dispute or to designate the law of another state as the law that will govern the dispute. However, the new statute will not apply to a contract with an employee who was in fact individually represented by legal counsel in negotiating the terms of the contract.

SB 1234: Employers Must Enroll Employees in Retirement Savings Plan

This bill will require covered California employers with five or more employees to enroll employees in a state-run retirement program called the California Secure Choice Retirement Savings Program (the "Plan") if those employees are not already covered under an employer-sponsored retirement program. The Plan will be administered by the California Secure Choice Retirement Savings Investment Board. The law authorizes the Investment Board to open the Plan as early as January 1, 2017. After the Plan opens, covered employers who do not already provide retirement benefits will be required to set up a payroll deposit retirement savings arrangement through which employees will remit payroll deduction contributions to the Plan. The deadline for covered employers to set up this arrangement depends upon the employer's size: (1) 12 months after the Plan opens (i.e., by January 1, 2018, assuming a January 1, 2017 Plan opening) for employers with 100 or more eligible employees; (2) 24 months after the Plan opens (i.e., by January 1, 2019, assuming a January 1, 2017 Plan opening) for employers with 50 or more eligible employees; and (3) 36 months after the Plan opens (i.e., by January 1, 2020, assuming a January 1, 2017 Plan opening) for all other eligible employers.

AB 1732: Single-user Restrooms will be "All-Gender" Facilities

This bill requires that, by March 1, 2017, all single-user toilet facilities – those designated for use by no more than one occupant at a time or for family or assisted use – be identified with appropriate signage as "all-gender toilet facilities." The bill applies to single-user toilet facilities in business establishments, places of public accommodation, and state or local government agencies.

AB 2844: Certification of Compliance by State Contractors

Although existing law prohibits state agencies from entering into certain contracts unless the contractor complies with all appropriate state laws concerning wages and nondiscrimination standards, this bill will require contractors to certify *under penalty of perjury* that: (1) they are in compliance with the anti-discrimination provisions of the Unruh Civil Rights Act (California Civil Code section 51) and the California Fair Employment and Housing Act ("FEHA") (California Government Code section 12960, *et seq*.); and (2) any policy the contractors have against any sovereign nation or peoples, including but not limited to the nation and people of Israel, is not used to discriminate in violation of the Unruh Act or FEHA. However, any policy of a contractor that is reasonably necessary to comply with federal or state sanctions or laws affecting sovereign nations or their nationals will not be construed as unlawful discrimination in violation of the Unruh Act or FEHA. This certification requirement applies generally to any person that submits a bid or proposal for a new or renewal contract with a state agency in the amount of $100,000 or more.

This bill was designed, in part, to address potentially-discriminatory actions taken against individuals of the Jewish faith by entities that boycott or protest the State of Israel.

AB 2337: New Notice Requirements Regarding Domestic Violence, Sexual Assault, or Stalking

This bill directs employers to provide employees with written notice of the Labor Code's protections for employees who are victims of domestic violence, sexual assault, or stalking, including their right to take time off work for specified purposes and to be free of discrimination for doing so. The notice will need to go to all newly-hired employees and to other employees upon request. The Labor Commissioner will develop a form of notice on or before July 1, 2017, that employers may use. Employers are not required to comply with the notice requirement until the Labor Commissioner posts the sample notice on its website.

SB 1001*: *Immigration-Related Practices

This bill makes it unlawful for an employer to ask employees at time of hire for more or different documents than are required under federal law as part of the I-9 process, or to refuse to honor documents that reasonably appear on their face to be genuine. The bill further prohibits employers from refusing to honor documents or work authorization based upon the specific status or term of status that accompanies the authorization to work. Likewise, employers may not reinvestigate or reverify an incumbent employee's authorization to work using an unfair immigration-related practice. Complaints alleging violation of these requirements will be investigated by the California Division of Labor Standards Enforcement. Violations may result in a penalty up to $10,000 as well as equitable relief. Many of these new California requirements are similar to restrictions that already exist under federal law.

AB 908: Paid Family Leave

This bill will increase the Paid Family Leave ("PFL") benefits that the State of California will pay to employees who take time off work for child bonding or to care for a family member with a serious health condition. Currently, PFL benefits represent only 55% of an employee's weekly earnings, up to a monetary cap. The new benefits, which will take effect on January 1, 2018, will raise the payments to 60% or 70% of an employee's weekly wages, depending on the employee's pay level, subject to a weekly cap that will be adjusted each year. The new law will also eliminate the current seven-day waiting period before benefits take effect. PFL benefits continue for up to six weeks and are funded through employee payroll deductions.

AB 7: Smoking in the Workplace

This bill expands the prohibition on smoking in the workplace by eliminating certain exemptions to the existing law. Specifically, the bill now prohibits smoking in hotel lobbies, bars, taverns, banquet rooms, warehouse facilities, and employee break rooms. The bill also prohibits smoking in owner-operated businesses.

SB 1342: Cities and Counties Can Issue Subpoenas to Enforce Employment Ordinances

This bill extends to local enforcement agencies the subpoena power already granted to State of California enforcement agencies in investigating and enforcing local wage laws and ordinances. Judges of the applicable superior court will have the power to order compliance with a subpoena issued by a local enforcement body. This will add teeth to local enforcement agencies in enforcing the many employment-related ordinances that cities and counties have enacted in recent years.

AB 1066: New Overtime and Double Time Rights for Agricultural Workers

Under this bill, the existing exemptions on overtime and double time pay for agricultural workers will be removed. Historically, California's farmworkers have been entitled to overtime at time-and-one-half only if they work more than 10 hours in a day or 60 hours in a week. New overtime rights will be phased in gradually between 2019 and 2022, entitling these workers by January 1, 2022 to overtime at time-and-one-half after eight hours in a day or 40 hours in a week, and double time after 12 hours in a day. These requirements will be extended by three years for small employers with 25 or fewer employees.

SB 1015: Extension of Domestic Worker Bill of Rights

This bill repeals a sunset clause in the Domestic Worker Bill of Rights, which had been set to expire on January 1, 2017. This will preserve indefinitely the existing hours-of-work regulations and overtime requirements for domestic work employees found in Labor Code §§ 1450-1454.

OTHER CHANGES TAKING EFFECT ON JANUARY 1, 2017

- The California minimum wage will increase from $10.00 to $10.50 for workers at businesses with 26 or more employees (eventually reaching $15 on January 1, 2022). The minimum wage for workers at smaller businesses will remain at $10.00 until January 1, 2018.

- The California minimum salary for exempt status under the executive, administrative and professional exemptions will increase from $41,600 to $43,680.

- The minimum salary for exempt status under the California computer professional exemption will increase from $87,185.14 to $88,231.36. Alternatively, the minimum hourly rate for that exemption will increase from $41.85 to $42.35.

- The minimum regular hourly rates paid to collectively-bargained employees for purposes of the various CBA exemptions found in the Labor Code (from overtime, paid sick leave, the Wage Theft Prevention Act, etc.) will increase from $13.00 to $13.65 (30% above the state minimum wage).

- Federal contractors will be required to provide up to 56 hours per year of paid sick leave to employees who work on or in connection with certain federal contracts that are solicited and awarded on or after January 1, 2017. The Executive Order that led to this new requirement, however, might be rescinded by the new Presidential administration.

- San Francisco's paid parental leave ordinance will take effect for employers with 50 or more employees, requiring them to provide paid leave to employees for child bonding, integrated with Paid Family Leave, for up to six weeks. By 2018, PFL will cover 60 to 70% of employees' salary and hourly pay, and employers will be required to cover only the remainder, up to 100%. For more information about this ordinance, see our prior Client Alert found at http://www.gbgllp.com/assets/parental-leave-ord.pdf.

- The Oakland minimum wage will increase from $12.55 to $12.86.

- The San Diego minimum wage will increase from $10.50 to $11.50.

IMPORTANT ISSUES AWAITING DECISION BY THE CALIFORNIA SUPREME COURT

- **The *De Minimis* Doctrine**. The Supreme Court will decide, for the first time, whether employers in California can rely on a "*de minimis*" defense to claims of unpaid wages involving compensable activities of short duration. *Troester v. Starbucks Corp.,* Cal. Sup. Ct. No. S234969.

- **Rest Breaks.** The Supreme Court will address whether an employer owes rest break premiums to employees who were "on call" during rest breaks, although otherwise relieved of all duty. The trial court in this case awarded $89 million in rest break premiums to a class of security guards who allege they were not provided with compliant rest breaks because of the on-call requirement. *Augustus v. ABM Security Services,* Cal. No. S224853.

- **Day of Rest.** The Court is expected to clarify the confusing rules surrounding California's day-of-rest statutes in Labor Code sections 551-556, including, among other things, what it means to "cause" an employee to work more than six days in seven; whether the day of rest should be calculated by the workweek or on a rolling basis; and how the exemption is to be interpreted for employees who work less than 30 hours per week or less than six hours in a day. *Mendoza v. Nordstrom,* Cal. Sup. Ct. No. S224611.

- **Disclosure of Class Contact Information.** Also before the Court is the proper scope of discovery of the names, home addresses and home telephone numbers of the defendant-company's employees in a Private Attorneys General Act ("PAGA") representative action – namely, whether plaintiffs are entitled to discovery of this information at the outset of a lawsuit or, if at all, only after they have made a threshold showing that they experienced Labor Code violations that render them "aggrieved employees." *Williams v. Superior Court,* Cal. Sup. Ct. No. S227228.

- **Definition of "Employee" in Independent Contractor Misclassification Cases.** In this case, the Court will be called upon to decide which of several tests should be used for defining "employee" in a putative class action alleging that persons classified as independent contractors should instead be classified as employees. The plaintiffs are arguing for an extremely broad definition of "employee," while the employer seeks a narrower "common law" definition. *Dynamex Operations West, Inc. v. Superior Court,* Cal. Sup. Ct. No. S222732.

If you have questions about any of these developments, please contact us.

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