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2013 California Employment Law Legislative Update: Things You Need to Know for 2014

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CA Minimum Wage Increase & Resulting 12.9% Salary Increase for Many Exempt Employees—AB 10

Effective July 1, 2014, the California minimum wage will increase from $8 to $9 per hour, pursuant to AB 10. It will increase again to $10 per hour, effective January 1, 2016. We also expect that, not to be outdone, those municipalities with "Living Wage" Ordinances will likewise be boosting their rates and may not wait for July 1, 2014, to do so. All of that is something to monitor.

The thing to be a little careful about now is budgeting for the salary level of your lower level exempt employees in 2014. It is well known that the Federal FLSA salary minimum is inadequate to preserve exempt status in the Golden State. Although it has been a while, you may recall there was a reason why your California supervisors are paid a little more than $33,280 per year, i.e., to preserve the exempt status, the monthly salary must be greater than two times the wages paid to a full time minimum wage employee. For the past few years that number has been $2773.333 per month which annualizes to $33,280. As 2014 begins, that will remain the target floor.

After July 1, 2014, the minimum monthly salary to preserve exempt status under Cal. Labor Code § 515 will rise to $3,120 per month–and therein lies the rub. Many businesses perform annual salary adjustments driven by either an evaluation year or an employee anniversary date year. Plainly, increasing the annual salary to $37,440 on or slightly before January 1, 2014, would be sufficient, but it is also more than required. Increasing the salary to at least $3,120 when the change becomes effective is also essential but the timing can be a bit nuanced. What is less clear is how well any of a variety of alternative strategies will work. Moreover, budgeting for the increase also requires factoring the additional payroll and other taxes, and the impact on accrued but unused vacation. Mid-year changes in wage and hour law can be challenging to implement and a few minutes discussing compensation strategies proposed to the employer as "creative" or "innovative" can achieve substantial liability savings.

Compensation of Domestic Workers—AB 241 and the FLSA Regulations

As background, domestic workers have historically been outside the scope of federal Wage and Hour rules and most of the California Labor Code. That changed in a very big way on September 17, 2013,

when the U.S. Department of Labor announced a final rule extending the Fair Labor Standards Act's minimum wage and overtime protections to most of the nation's workers who provide essential home care assistance to elderly people and people with illnesses, injuries or disabilities. DOL projects that this change will affect nearly two million direct care workers—such as home health aides, personal care aides and certified nursing assistants as well as those to whom they provide services, directly and indirectly. A tectonic policy shift, to be sure, but one not effective until January 1, 2015, and thus providing some time to adapt.

Not to be outdone, Governor Brown signed AB 241, also known as The Domestic Worker Bill of Rights, establishing, among other things, overtime compensation at rate of one and one-half times the regular rate of pay to those employees who work more than nine hours in any workday or more than 45 hours in any work week. The bill excludes individuals who care for persons in facilities providing board or lodging in addition to medical, nursing, convalescent, aged, or child care, including, but not limited to, residential care facilities for the elderly. This new state legislation will be placed in the Labor Code commencing with Section 1450.

All of this matters quite a bit because, candidly, there were social reasons why this area was not regulated. Costs for home healthcare consumers will likely rise significantly as all the wage and hour rules applicable under federal law and most of those under California law are applied. Coupled with the mid-year increase in the California minimum wage and all the challenges that can surface in what can be a 24/7 working environment, this may prove quite challenging to apply in households of the aged and infirmed if one begins to consider "off the clock" issues, donning and doffing, travel time between locations and rest and meal period concerns.

Liquidated Damages for Minimum Wage Violations—AB 442

Our next logical stop is AB 442 which expands the consequences for a minimum wage violation by making the employer also subject to liquidated damages equal to wages that should have been paid. See Labor Code §§ 1194.2 and 1197.

Streamlining Collection of All of the Above—AB 1386

At present, and until this legislative change becomes effective, the Labor Commissioner must file an order, decision, or award within 15 days of hearing an employee complaint; then the Labor Commissioner must file the final order with the superior court clerk, which then enters judgment. Collection efforts can then commence.

Under revised Labor Code § 98.2, once the Labor Commissioner order becomes final, a lien can be created and recorded on the employer's real property until satisfied or released, or for 10 years. Why be concerned about this? In the era of budget cuts, etc., sometimes the mailroom in a local Labor Commissioner's office operates a little slow and decisions can be signed and dated yet not even be mailed until after the appeal date has run. Most of that was sorted out in the judgment application court due process before much harm was done. Now, however, as processes automate, the first real notice of an adverse ruling may be when someone on the business side notices a lien has been recorded.

Even the Seemingly Innocuous Addition of Military and Veterans Status to the Fair Employment and Housing Act Has Some Potential Downsides—AB 556

USERRA and state equivalents have been around a while and rare is the employer who truly disapproves of military service. Thus, apart from providing the military service person access to punitive damages and uncapped emotional distress as a remedy, is this worth much attention?

Perhaps. Many employment applications have routinely asked about military service as though it were as innocuous as prior employment at worst and a sign of potentially desirable employment traits. Converting the status into a protected class may change things for all the same reasons no one asks in an application about an applicant's race.

The new law also adds the following:

Nothing in this section shall be interpreted as preventing the ability of employers to identify members of the military or veterans for purposes of awarding a veteran's preference as permitted by law.

Again, innocuous enough except that veteran's preferences "permitted by law" tend to be creatures of government contracting statutes. There is also EEOC Guidance on the disparate impact such preferences can have on women. The point being—some attention to your job applications may be warranted.

Employers Must Afford a Temporary Leave of Absence to Volunteer Firefighters—AB 11

AB 11 requires employers with 50 or more employees to allow an employee who performs emergency duty as a volunteer firefighter, reserve peace officer, or as emergency rescue personnel to take a temporary leave of absence for the purpose of engaging in fire, law enforcement, or emergency rescue training.

Getting Your Car Washed Will Get Even More Expensive Than You Might Expect (Even Factoring in the Minimum Wage Increase), Assuming You Can Find an Operating Car Wash—AB 1387

Due to the history of abuse in the industry, existing law requires employers of car washes to post a $15,000 bond to compensate employees damaged by the employer's nonpayment of wages. That legislation was partially in response to the reality that when DLSE sweeps in and finds numerous violations and issues its blizzard of fines, the car wash is often put out of business and the unpaid wages, the jobs, and the employer all evaporate simultaneously. The bond was a partial solution. AB 1387 increases the employer's bond requirement amount to $150,000, unless . . . the employer has a collective bargaining agreement that expressly provides for wages, hours of work, working conditions, and expeditious process to resolve disputes concerning nonpayment of wages. AB 1387 goes into effect January 1, 2014 and will appear as amendments to Labor Code § 2055.

Farm Labor Contractors: Successor Liability for Wages and Penalties—SB 168

Somewhat like the car wash issue, "bad" farm labor contractors tend to dry up and disappear when things go badly or they get caught. In a constitutionally interesting move, under the new law, the next farm labor contractor to come along is responsible for unpaid wages and penalties of his or her predecessor, if the successor: (1) uses substantially the same facilities or workforce to offer substantially the same services as the predecessor; (2) shares in the ownership, management, control of the workforce, or interrelations of business operations with the predecessor; (3) employs in

a managerial capacity any person who directly or indirectly controlled the wages, hours, or working conditions of the employees owed wages or penalties by the predecessor; or (4) is an immediate family member of any owner, partner, officer, licensee, or director of the predecessor or of any person who had a financial interest in the predecessor.

There are some defenses to this liability. On the one hand, one can look at this and agree that principals of a scofflaw should not be able to walk away from liability and set up shop under a new name and begin violating the laws all over again with no responsibility for past conduct. On the other hand, one must acknowledge (a) a certain “no good deed goes unpunished” aspect of this for a new contractor coming into a failed situation to assist in cleaning up the mess and (b) a risk of workforce dislocation for the affected farmworkers if the new entity chooses to manage this risk by starting over with an entirely new workforce. Due diligence efforts in takeover scenarios may need to be more robust.

Immigration-Related Changes—AB 263 and SB 666

Both Bills:

- Create new rights under Labor Code § 98.6 for employees to make a written or oral complaint that the employee is owed unpaid wages, prohibit retaliation and make an employer liable for a penalty of up to $10,000 for each violation of these rules regardless of immigration status;

- Provide that an employee need not exhaust administrative remedies or procedures to enforce any provision of the Labor Code unless the provision in question requires exhaustion specifically; and

- Prohibit an employer from retaliating against an employee who provides information to, or testifies before, any public body conducting an investigation, hearing, or inquiry.

AB 263 also:

- Makes it unlawful for an employer or any other person to engage in, or direct another person to engage in, an unfair immigration-related practice against a person for the purpose or intent to retaliate for exercising any right protected under the Labor Code or local ordinance. "Unfair immigration-related practice" is defined as: (1) requesting more or different documents than required under federal immigration law or a refusal to honor documents that reasonably appear to be genuine; (2) using the federal E-Verify system when not required to do so by federal law - a memorandum of understanding governing the use of the federal E-Verify system; (3) threatening to file or filing a false police report; or (4) threatening to contact or contacting immigration authorities. Excluded is any conduct undertaken at the express and specific direction of the federal government.

- Creates a rebuttable presumption that engaging in an unfair immigration-related practice within 90 days of a person's exercise of rights protected under the Labor Code or local ordinance is retaliation.

- As rights without remedies are unfashionable, the new law authorizes an employee or any other person subject to an unfair immigration-related practice to sue for equitable relief, damages, and penalties, and provides a prevailing employee attorney's fees and costs.

- Establishes a license suspension scheme for violations found by a court.

Not to be outdone, SB 666 also:

- Subjects an employer's business license to revocation or suspension if the licensee has been determined by the Labor Commissioner or the court to have violated these new provisions in the Labor Code, and the court or Labor Commissioner has taken into consideration any harm such suspension or revocation would cause to employees of the licensee, as well as the good faith efforts of the licensee to resolve any alleged violations after receiving notice;

- Subjects any member of the State Bar to suspension, disbarment, or other discipline, who reports suspected immigration status or threatens to report suspected immigration status of a witness or party to a civil or administrative action, or his or her family member, to a federal, state, or local agency because the witness or party exercises or has exercised a right related to his or her employment;

- Prohibits an employer from preventing or retaliating against an employee who provides information to, or testifies before, any public body conducting an investigation, hearing, or inquiry.

Ultimately, all of this will be effective as of January 1, 2014, and codified in Business and Professions Code sections 494.6 and 6103.7 and Labor Code sections 98.6, 244 and 1102.5.

Time Off for Victims to Testify—SB 288

New Labor Code section 230.5 prohibits an employer from taking action against victims of certain crimes for taking time off from work to appear in court to be heard at any proceeding in which a right of the victim is at issue, provided that reasonable advance notice is given. The specified offenses include usual suspect crimes involving deaths, acts of violence, and sexual assault but also adds solicitation for murder and stalking to the list. "Victim" includes the employee or the employee's spouse, parent, child, sibling, or guardian. The bill also specifies the proof the employer must consider sufficient to certify the absence, including a police report, court order, or medical documentation.

Revisions to Labor Code sections 230 and 230.1 extend protections to victims of stalking. Employers must engage in an interactive process and provide reasonable accommodations—absent undue hardship—for a victim of domestic violence, sexual assault, or stalking who requests an accommodation for his or her safety while at work, who has disclosed his or her status as a victim. The employer may require certification of the employee's continued victim status for the reasonable accommodation.

Meal and Rest Periods: “Recovery Periods”—SB 435

Labor Code section 226.7 expands prohibitions on work during meal and rest periods to also include "recovery periods," defined as a cooling-down period afforded an employee to prevent heat illness. Those who have followed the issue of workplace heat as a safety issue will note the introduction of the “cool down” concept into the Labor Code.

Employers Generally Cannot Recover Defense Costs in Wage Disputes—SB 462

It was never easy for a prevailing employer to recover its defense costs in defending against an employee's claim for unpaid wages. Pursuant to amended Labor Code section 218.5, recovering it will become nearly impossible. Under the amended provision, an award to the employer cannot occur unless the employer proves that the action was brought "in bad faith."

Incremental but Important Changes in Permissible Pre-Employment Questions—SB 530

California employers have long been banned from asking an applicant for employment about arrests or detention that did not lead to conviction, or which led to a referral to a diversion program. Inquiries regarding older marijuana convictions have also long been taboo.

The change this year amends Labor Code § 432.7 such that in addition to all of that, an employer cannot ask an applicant to disclose, nor can the employer use as a factor in determining any condition of employment, information concerning a conviction that has been judicially dismissed or ordered sealed. There are exceptions if: (1) the employer is required by law to obtain information regarding conviction of an applicant; (2) the applicant will possess or use a firearm in the course and scope of employment; (3) an applicant is banned from holding the position despite the expungement; and (4) the employer is prohibited by law from hiring an applicant who has been convicted of a crime. These are relatively narrow exceptions, and as with the military status issue, may require re-evaluation of the employment application.

Disability Benefits: Paid Family Leave—SB 770

Beginning July 1, 2014, the definition of family for purposes of family temporary disability wage replacement benefits provided through EDD will include seriously ill grandparents, grandchildren, siblings and parents-in-law. We raise it here because of the “lore vs. law” phenomenon. Many employees confuse EDD’s program described as paid family leave with the employer programs required under FMLA/CFRA. This legislation has no real impact on CFRA legal leave requirements applicable to the employment relationship. We will not be surprised when employees nonetheless start seeking family leave from the employer for grandparents based on the incorrect belief that the new law amends CFRA. The changes apply only to the EDD program and are found exclusively in statutes within the Unemployment Insurance Code.

Sexual Harassment Need Not Be Motivated by Sexual Desire—SB 292

Effective January 1, 2014, under the California Fair Employment and Housing Act, employees who assert claims of sexual harassment need not show the harassment is motivated by sexual desire. Rather, statements or gestures that are sexually crude, offensive and demeaning may lead to an actionable harassment charge, assuming they meet the other elements of a sexual harassment claim.

San Francisco Employers Should Note the Health Care Security Ordinance Rates for 2014 Have Been Published Along with Guidance on How that Ordinance Will Operate in a Post-ACA World.

The dedicated public servants in the San Francisco Office of Labor Standards Enforcement

announced that the rate for affected employers with more than 100 employees will be $2.44 per hour and the rate for smaller covered employers (20-99 employees) will be $1.63 per hour. Find more info on how the ACA fits into what San Francisco requires.

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