Published on *The National Law Review* https://natlawreview.com

Summary of Key New California Laws for 2016: What Employers Should Know

Article By:

Pascal Benyamini

Governor Brown has signed several laws impacting California employers. A summary of some of the key new laws follows. The effective date of the particular new law is indicated in the heading of the Assembly Bill (AB) and/or Senate Bill (SB). As a reminder, the minimum wage in California is increasing to $10 per hour on January 1, 2016 based on previous legislation signed by Governor Brown in 2013.

AB 622 – E-Verify System (Effective January 1, 2016)

By way of background, under U.S. law, companies are required to employ only individuals who may legally work in the United States – either U.S. citizens, or foreign citizens who have the necessary authorization. E-Verify is an internet-based system that allows employers to determine the eligibility of their employees to work in the United States. The E-Verify system is administered by the United States Citizenship and Immigration Services, the United States Department of Homeland Security (DHS), and the United States Social Security Administration (SSA).

In an effort to prevent discrimination in employment rather than to sanction the potential hiring and employment of persons who are not authorized for employment under federal law, AB 622 prohibits employers from using the E-Verify system to check the employment authorization status of existing employees or applicants who have not received an offer of employment, except as required by federal law or as a condition of receiving federal funds. The new law, which is codified in new Labor Code Section 2814, does not change employers' rights from utilizing E-Verify, in accordance with federal law, to check the employment authorization status of a person who has been offered employment.

Further to the extent, the employer receives any notification issued by the SSA or the DHS containing information specific to the employee's E-Verify case or any tentative nonconfirmation notice, which indicates the information entered in E-Verify did not match federal records, the employer will be required to provide the notification to the affected person, as soon as practicable.

Finally, in addition to other remedies available, an employer who violates this new law may be liable for a civil penalty not to exceed $10,000 for each violation, and each unlawful use of the E-Verify system on an employee or applicant constitutes a separate violation.

AB 970 – Enforcement of Employee Claims by Labor Commissioner (Effective January 1, 2016)

AB 970 expands the enforcement powers of the Labor Commissioner to enforce local laws regarding overtime hours or minimum wage provisions and to issue citations and penalties for violations, except when the local entity has already issued a citation for the same violation. This bill amends Labor Code Section 558 (pertaining to overtime) and Sections 1197 and 1197.1 (pertaining to minimum wage).

This bill also amends Labor Code Section 2802 pertaining to indemnification of employees by employers for expenses or losses incurred by the employee in direct consequence of the discharge of the employee's duties or as a result of obeying the employer's directions. In addition to a private right of action by the employee under Section 2802 to recover for these expenditures, this bill now authorizes the Labor Commissioner to issue citations and penalties against employers who fail to properly indemnify employees.

AB 987 – Employment Discrimination (Effective January 1, 2016)

AB 987 is in response to findings by the California Court of Appeal, such as *Rope v. Auto-Clor System of Washington, Inc.*, 220 Cal.App.4th 635 (2013), where the Court found that a request for accommodation by an employee for a disability or religious belief or observance, without more, is not a "protected legal activity" and does not support a claim for retaliation under the Fair Employment and Housing Act (codified in Government Code Section 12940 *et. seq.*). This bill makes it an unlawful employment practice for an employer to retaliate or otherwise discriminate against an employee for "requesting" an accommodation for a disability or religious belief or observance, regardless of whether the request was granted.

AB 1506 – Labor Code Private Attorneys General Act of 2004 (Effective October 2, 2015)

AB 1506 amends Labor Code Sections 2699, 2699.3, and 2699.5 which codify California's Private Attorneys General Act of 2004 (PAGA) and took effect as of October 2, 2015.

By way of background, PAGA authorizes an allegedly aggrieved employee to bring a civil action to recover specified civil penalties, that would otherwise be assessed and collected by the Labor and Workforce Development Agency, on behalf of the employee and other current or former employees for certain Labor Code violations. Under PAGA, an employer has the opportunity to cure certain alleged violations before a lawsuit is filed. However, there are also Labor Code violations that PAGA does not provide the employer with an opportunity to cure the alleged violation before a lawsuit is filed, such as violations under Labor Code Section 226, where an employer is required to provide an itemized wage statement (or paystub) containing very specific information, including but not limited to, wages, the inclusive dates of the pay period and the name and address of the legal employer.

Due to various lawsuits (including class action lawsuits) filed against employers on technical violations of Section 226 that did not in any way cause any injury to employees, this bill provides an employer with the right to cure a violation of the requirement that an employer provide its employees with the inclusive dates of the pay period and the name and address of the legal employer before an employee may bring a civil action under PAGA. The employer may cure the alleged violation within 33 calendar days of the postmark date of the notice it receives. This bill also provides that the alleged violation is deemed cured only upon a showing that the employer has provided a fully compliant paystub to each aggrieved employee and limits the employer's right to cure with respect to alleged

violations of these provisions to once in a 12-month period.

AB 1509 – Protections for Family Members (Effective January 1, 2016)

AB 1509 amends Labor Code Sections 98.6, 1102.5, 2810.3 and 6310, which generally prohibit an employer from discharging or taking any adverse action against any employee or applicant for employment because the employee or applicant has engaged in conduct protected by these code sections. Section 98.6 pertains to complaints of discrimination, retaliation or any adverse action made to the Labor Commissioner. Section 1102.5 pertains to complaints by whistleblowers. Section 6310 pertains to complaints about unsafe working conditions. And Section 2810.3 pertains to retaliation in alternative staffing context, such as temporary workers from staffing agencies or in the construction/contractor context.

This bill extends the protections of the foregoing provisions to an employee who is a family member of another person (i.e., where multiple family members work for the same employer) who engaged in, or was perceived to engage in, the protected conduct or made a complaint protected by these provisions. That is, an employer, or a person acting on behalf of the employer, shall not retaliate against an employee because the employee is a family member of a person who has, or is perceived to have, engaged in any acts protected by these provisions. The term “employer” or “person acting on their behalf” includes “client employers” (i.e., a business entity, regardless of its form, that obtains or is provided workers to perform labor within its usual course of business from a labor contractor) or a “controlling employer” (i.e., an employer listed in Labor Code Section 6400(b) regarding multi-employer worksites).

The bill further amends Labor Code Section 2810.3 to exclude liability on certain client employers, such as client employers that use Public Utilities Commission-permitted third-party household goods carriers.

AB 1513 – Piece-Rate Compensation (Effective January 1, 2016) (see footnote 1)

AB 1513, which adds new Labor Code Section 226.2 and repeals others, applies to employees who are compensated on a piece-rate basis for any work performed during a pay period. This new law requires that employees be compensated for rest and recovery periods and “other nonproductive time” (see footnote 2) separate from any piece-rate compensation as follows:

AB 1513, which adds new Labor Code Section 226.2 and repeals others, applies to employees who are compensated on a piece-rate basis for any work performed during a pay period. This new law requires that employees be compensated for rest and recovery periods and “other nonproductive time” separate from any piece-rate compensation as follows:

Rest and Recovery Periods. Employers are to compensate their employees for rest and recovery periods at a regular hourly rate that is no less than the higher of:

> (i) 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

(ii) The “applicable minimum wage,” which is defined as “the highest of the federal, state or local minimum wage
applicable to the employment.”

For those employers who pay on a semimonthly basis, employees shall be compensated at least at the applicable minimum wage rate for the rest and recovery periods together with other wages for the payroll period during which the rest and recovery periods occurred. Any additional compensation required for those employees pursuant to the average hourly rate requirement is payable no later than the payday for the next regular payroll period.

Certain employers (see footnote 3) – who comply with the applicable minimum wage requirement – will have until April 30, 2016 to program their payroll systems to perform and record the calculation required under the average hourly rate requirement and comply with the itemized statement (or paystub) requirements (see below), so long as such employers pay piece-rate employees retroactively for all rest and recovery periods at or above the applicable minimum wage from January 1, 2016, to April 30, 2016, inclusive, and pay the difference between the amounts paid and the amounts that would be owed under the average hourly rate requirement, together with interest by no later than April 30, 2016.

Other Nonproductive Time. Employers are to compensate their employees for other nonproductive time at an hourly rate that is no less than the applicable minimum wage. The amount of other nonproductive time may be determined either through actual records or the employer’s reasonable estimates, whether for a group of employees or for a particular employee, of other nonproductive time worked during the pay period.

Further, Section 226.2 requires that additional information be added to wage statements, making compliance with wage statements more difficult. In addition to the list of items that are required by Labor Code Section 226 for itemized statements, Section 226.2 requires that the itemized statements include (a) the total hours of compensable rest and recovery periods, (b) the rate of compensation, and (c) the gross wages paid for those periods during the pay
period.

Further, those employers that do not pay an hourly rate for all hours worked in addition to piece-rate wages, then such employers must also list on the itemized statements (a) the total hours of other nonproductive time, (b) the rate of compensation for that time, and (c) the gross wages paid for that time during the pay period.

In addition, this new law provides that, until January 1, 2021, an employer has an affirmative defense to any claim or cause of action for recovery of wages, damages, liquidated damages, statutory penalties, or civil penalties based solely on the employer’s failure to timely pay the employee the compensation due for rest and recovery periods and other nonproductive time for time periods prior to, and including, December 31, 2015, if the employer complies with certain specified requirements by no later than December 15, 2016, which include: (a) making payments to each of its employees, for previously uncompensated or undercompensated rest and recovery periods and other nonproductive time from July 1, 2012, to December 31, 2015; (b) paying accrued interest; and (c) providing written notice to the Department of Industrial Relations of the employer’s election to make payments to its current and former employees by no later than July 1, 2016.

Finally, it appears that Section 226.2 applies to companies with a unionized workforce as Section 226.2 does not have a collective bargaining exemption.

SB 327 – Wage Orders: Meal Periods (Effective October 5, 2015)

By way of background, Labor Code Section 512 requires two meal periods for work periods of more than 10 hours. However, employees are allowed to waive their second meal period if the total hours worked in their shift is no more than 12 hours. Under Section 11(D) of Wage Order 5, however, health care industry employees who work shifts in excess of 8 total hours in a workday are permitted to waive their second meal period.

A recent appellate court decision, *Gerard v. Orange Coast Memorial Medical Center*, 234 Cal.App.4th 285 (2015), held that Section 11(D) of Wage Order No. 5 is invalid to the extent that it conflicts with Labor Code Section 512 and that the California Industrial Welfare Commission exceeded its authority by creating an exception to Section 512's meal period requirements.

Concerned that, without immediate clarification, hospitals will alter their scheduling practices as a result of uncertainties created by the *Gerard* decision, Governor Brown signed SB 327 on October 5, 2015 to amend Labor Code Section 516 effective immediately. Accordingly, this bill provides that the health care employee meal period waiver provisions in Wage Order 5 were valid and enforceable, and continue to be valid and enforceable.

SB 358 – Equal Pay Act (Effective January 1, 2016)

Under SB 358, known as the California Fair Pay Act, employers will be subject to one of the strictest and most aggressive equal pay laws in the country. The California Fair Pay Act is intended to increase requirements for wage equality and transparency and amends Labor Code Section 1197.5 relating to private employment. For a more thorough discussion of this new law, please click here.

SB 501 – Wage Garnishment Restrictions (Effective July 1, 2016)

SB 501 amends, repeals, and adds Section 706.050 of the Code of Civil Procedure, relating to wage garnishment. The new law reduces the prohibited amount of an individual judgment debtor's weekly disposable earnings subject to levy under an earnings withholding order from exceeding the lesser of 25% of the individual's weekly disposable earnings or 50% of the amount by which the individual's disposable earnings for the week exceed 40 times the state minimum hourly wage, or applicable local minimum hourly wage, if higher, in effect at the time the earnings are payable.

SB 579 – Employee Time Off (Effective January 1, 2016)

SB 579 amends Labor Code Section 230.8, which applies to employers with 25 or more employees. Under Section 230.8, employers are prohibited from discharging or discriminating against an employee who is a parent, guardian, or grandparent having custody of a child in a licensed "child day care facility" or in kindergarten or grades 1 to 12, inclusive, for taking off up to 40 hours of unpaid time off each year for the purpose of participating in school activities, subject to specified conditions. The new law revises references to a "child day care facility" to instead refer to a "child care provider" and defines "parent" for these purposes as a parent, guardian, stepparent, foster parent, or grandparent of, or a person who stands in *loco parentis* to, a child, thereby extending these protections to an employee who is a stepparent or foster parent or who stands in *loco parentis* to a child. This new law also allows employees to take unpaid time off to enroll or reenroll their children in

a school or with a licensed child care provider.

SB 579 also amends Labor Code Section 233, which applies to all employers. Under Section 233 (aka “California’s Kin Care Law”), employers are required to allow employees to use one-half of their accrued sick leave to care for a “family member” (as defined). In light of the Healthy Workplaces, Healthy Families Act of 2014 (Labor Code Section 245 *et. seq.*), which went into effect on July 1, 2015, this bill requires an employer to permit an employee to use sick leave for the purposes specified in the Healthy Workplaces, Healthy Families Act of 2014, redefines “sick leave” as leave provided for use by the employee during an absence from employment for these purposes, and prohibits an employer from denying an employee the right to use sick leave or taking specific discriminatory action against an employee for using, or attempting to exercise the right to use, sick leave for these purposes. In other words, employees may use paid sick leave for their own health condition or preventative care; a family member’s health condition or preventative care; if the employee is a victim of domestic assault, sexual violence, and/or stalking and needs to take time off. Further, “family member” now includes: a child regardless of age or dependency (including adopted, foster, step, or legal ward); parent (biological, adoptive, foster, step, in-law, or registered domestic partner’s parent); spouse; registered domestic partner; grandparent; grandchild; or siblings.

SB 588 – Judgment Enforcement by Labor Commissioner (Effective January 1, 2016)

Among the key provisions of this new bill, SB 588 provides the California Labor Commissioner with additional means to enforce judgments against employers arising from the employers’ nonpayment of wages. The new law authorizes the Labor Commissioner to use any of the existing remedies available to a judgment creditor and to act as a levying officer when enforcing a judgment pursuant to a writ of execution. The new law also authorizes the Labor Commissioner to issue a notice of levy if the levy is for a deposit, credits, money, or property in the possession or under the control of a bank or savings and loan association or for an account receivable or other general intangible owed to the judgment debtor by an account debtor.

For instance, if a final judgment against the employer remains unsatisfied after a period of 30 days after the time to appeal the judgment has expired and no appeal of the judgment is pending, the employer cannot continue to conduct business unless the employer has obtained a bond up to $150,000 (depending on the unsatisfied portion of the judgment) and has filed a copy of that bond with the Labor Commissioner. The bond shall be effective and maintained until satisfaction of all judgments for nonpayment of wages.

As a result of the foregoing new laws and amendments, employers should consult with legal counsel to ensure their policies are compliant and their employee handbooks are up to date.

1. AB 1513 also makes amendments to provisions of workers’ compensation for injuries sustained in the course of employment.

2. “Other 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.

3. These employers are defined as: those acquired by another legal entity on or after July 1, 2015, and before October 1, 2015; those who employed at least 4,700 employees in California at the time of the acquisition; those who employed at least 17,700 employees nationwide at the time of the acquisition; and those that were a publicly traded company on a national securities exchange at the time of the acquisition.

National Law Review, Volume V, Number 296