

2018 Labor Law Update

REGULATORY ACTIONS AND IMPORTANT COURT DECISIONS during this last year made significant changes for employers. We list some of the most important ones you need to know to prepare for this year.

CA LABOR LAW CHANGES

PARENTAL LEAVE FOR SMALL EMPLOYERS

A new law requires that small employers provide new parents with up to 12 workweeks of unpaid leave.

SB 63, the **New Parent Leave Act**, requires small businesses with 20 or more employees to provide eligible employees up to 12 weeks of unpaid, job-protected leave to bond with a new child with continued health care. The leave must be taken within one year of the child's birth, adoption or foster care placement. SB 63 requires employers to provide parental leave only for baby bonding; it does not require employers to provide leave for other reasons, such as a family member's medical issue.

The greatest impact will be on employers with 20 to 49 employees who are not currently required to provide baby bonding leave under the federal Family and Medical Leave Act or the state California Family Rights Act.

HIRING PRACTICES - Significant Changes In Hiring

• BAN-THE-BOX LAW

AB 1008 prohibits employers with five or more employees from asking about criminal history information on job applications and from inquiring about or considering criminal history at any time before a conditional offer of employment has been made. There are limited exemptions for certain positions, such as those where a criminal background check is required by federal, state or local law.

• SALARY HISTORY QUESTIONS BANNED

AB 168 bans employers from asking about a job applicant's prior salary, compensation or benefits (either directly or through an agent, such as a third-party recruiter).

In addition, employers cannot rely on salary history information as a factor in determining whether to hire the applicant or how much to pay the applicant. However, an employer may consider salary information that is disclosed voluntarily by the applicant without any prompting.

• WORKSITE IMMIGRATION PROTECTIONS

The Immigrant Worker Protection Act (AB 450) provides workers with protection from immigration enforcement while on the job and imposes varying fines to \$10,000 for violations.

The law also makes it unlawful for employers to reverify the employment eligibility of current

employees in a time or manner not allowed by federal employment eligibility verification laws.

• DISCRIMINATION, HARASSMENT AND RETALIATION

Several new laws expand employee protections for 2018. Many of these laws focus on gender equality and gender identity/gender expression protections.

• Harassment Prevention Training: Gender Identity Gender Expression, Sexual Orientation

California employers with 50 or more employees must provide supervisors with two hours of sexual, gender identity, gender expression and sexual orientation harassment prevention training every two years.

• Harassment Training: Farm Labor Contractors

SB 295 affects the sexual harassment prevention training that must be provided to receive a farm labor contractor's license. The bill now requires that training be conducted or interpreted into a language understood by the employee, and that the Labor Commissioner receive a list of harassment prevention training materials used and the number of individuals trained.

• Gender Identification: Female, Male - Nonbinary

SB 179 will allow California residents to choose from three equally recognized gender options — female, male or nonbinary — on state-issued identification cards, birth certificates and driver licenses. For changes to birth certificates, the law is effective on September 1, 2018. For changes to driver licenses, the law is effective on January 1, 2019.

• Discrimination: Gender Neutral Language

AB 1556 revises California's Fair Employment and Housing Act by deleting gender-specific personal pronouns in California's anti-discrimination, anti-harassment, pregnancy disability and family/medical leave laws by changing "he" or "she," for example, to "the person" or "the employee."

• Fair Pay Act Expansion

AB 46 extends California's Fair Pay Act — which prohibits wage discrimination on the basis of gender, race and ethnicity — to cover public employers; existing law only covers private employers.

• Data Collection: Sexual Orientation

AB 677 requires that, beginning no later than July 1, 2019, various state labor agencies collect voluntary, self-identified information pertaining to sexual orientation and gender identity in the regular course of collecting other types of demographic data.

• LGBT Rights, Long-Term Care Facility Residents

SB 219 enacts the Lesbian, Gay, Bisexual, and Transgender (LGBT) anti-discrimination protections for LGBT individuals living in long-term care facilities.

Among other things, SB 219 makes it unlawful to willfully and repeatedly fail to use a resident's preferred name or pronoun or to deny admission to a long-term care facility because of gender identity or sexual orientation. Facilities are required to post a notice about the protections and follow recordkeeping requirements.

• ALL GENDER RESTROOMS

All single-user toilet facilities in any business establishment, place of public accommodation or government agency must be identified as "all-gender" toilet facilities.



• Anti-Discrimination Protections for Veterans

AB 1710 expands the current protections for members of the armed services by prohibiting discrimination in all "terms, conditions, or privileges" of employment.

This legislation conforms state law to the federal Uniformed Services Employment and Reemployment Rights Act (USERRA) by protecting servicemembers in civilian jobs from hostile work environments.

• Labor Law Enforcement, Retaliation

SB 306 allows the Labor Commissioner to investigate an employer — even without a complaint from an employee — when the Labor Commissioner suspects retaliation or discrimination against a worker during a wage claim or other investigation.

The Labor Commissioner also can obtain a court order prohibiting an employer from firing or disciplining an employee, even before completing its investigation or determining retaliation has occurred. SB 306 also creates a new citation process for alleged violations and penalties.

• Human Trafficking

AB 260 extends the list of businesses that must post a human trafficking information notice to include hotels, motels and bed and breakfast inns. SB 225 requires the human trafficking notice to include a new number for those who wish to send text messages. Businesses are not required to post the updated notice until on or after January 1, 2019.

• **ALCOHOL SERVERS**

AB 1221 requires that businesses licensed to serve alcohol make sure each alcohol server receives mandatory training on alcohol responsibility and obtains an alcohol server certification. These requirements go into effect in 2021, after the course is developed by the Department of Alcoholic Beverage Control.

• **BARBERING AND COSMETOLOGY**

Two new laws affect barbering and cosmetology employers and licensees.

SB 490 allows workers licensed under the Barbering and Cosmetology Act to be paid a commission in addition to a base hourly rate if certain conditions are met.

AB 326 requires Board of Barbering and Cosmetology schools to include information on physical and sexual assault awareness in the required health and safety course for licensees 7/1/2019.

• **CAL/OSHA NOW ENFORCING SILICA REGS**

Employer obligations under the new Respirable Crystalline Silica standard for construction, found in the California Code of Regulations, Title 8, section 1532.3, are now being enforced by Cal/OSHA.

MINIMUM WAGE ADJUSTMENTS

California's minimum wage rates:

26 Employees or More \$11.00/hour 1/1/18

25 Employees or Less \$10.50/hour 1/1/18

REMEMBER -- The increase will directly impact non-exempt minimum wage hourly workers.

However, it also affects lower-salaried exempt employees and other groups of non-exempt employees. Review your compensation plans to ensure they continue to comply with laws impacted by the minimum wage increase.

The key areas are:

- Exempt Employees
- Inside Salesperson - Commission Exemption
- Tools or Equipment
- Calculation of Split Shift Premiums
- Collective Bargaining Agreements
- Voluntary Crediting Agreements

Exempt Employees

Businesses with more than 25 employees \$22.00

Monthly \$3,814 Annual \$45,760

Businesses with 25 or fewer employees \$21.00

Monthly \$3,640 Annual \$43,680

AGRICULTURAL OVERTIME

AB 1066 will phase in increased overtime requirements for agricultural employees over the course of four years beginning 1/1/2019. Currently, agricultural employees are exempt from certain wage requirements.

Agricultural employers will initially start paying overtime when employees work more than 9.5 hours per day/55 hours per week. This number will decrease yearly until it reaches 8 hours per day/40 hours per week by January 1, 2022.

With 25 or fewer employees will have an additional three years to comply with the phasing in of these rules and won't start paying overtime until 2022.

DAY OF REST

Agricultural employers were exempt from the Labor Code requirement to provide one day's rest in seven worked. Agricultural employers are no longer exempt from this provision and cannot cause employees to work more than six days in seven. However, *Mendoza v. Nordstrom* may provide some relief. (See Handout)

IRS MILEAGE REIMBURSEMENT RATE:

Beginning 1/1/18, the recommended IRS reimbursement rate for business miles driven is increased by 1 cent to 54.5 cents per mile.

PHYSICIANS-SURGEONS O/T EXEMPT RATE:

Effective 1/1/18, the hourly rate is \$79.39

COMPUTER PROFESSIONAL O/T EXEMPT RATE:

Effective 1/1/18 the hourly rate is \$43.58, the minimum monthly salary is \$7,565.85 and the annual salary is \$90,790.07

EDD Online Filing Required

Beginning January 1, 2018, all employers are required to electronically submit employment tax returns, wage reports, and payroll tax deposits to the Employment Development Department (EDD). Frequently asked questions are available from the EDD.

Note: You may also use "e-Services for Business" to submit a Report of New Employee(s) (DE 34) online.

STATE COURT DECISIONS!

In *Mendoza v. Nordstrom*, the California Supreme Court clarified some ambiguous issues involving requirements under the California Labor Code involving when a "day of rest" must be provided

The Court clarified:

- That a day of rest is guaranteed for each workweek (as the workweek is defined by the employer).
- There is an exception for employees who work shifts of six hours or less every single day in the workweek.
- An employer can't "cause" an employee to go without a day of rest, but an employee can "choose" to forgo that right as long as s/he is fully apprised of the entitlement.

Cornell v. Berkeley Tennis Club

Does obesity require equal treatment and reasonable accommodation? Obesity can qualify as a disability if it can be shown it is caused by a physiological disorder and limits a major life activity.

Featherstone v. Southern California Permonente Medico/ Group

Does employer who refuses to rescind an employee's voluntary resignation constitute an adverse employment action

under FEHA? Absent a written contract, an employer is under no duty to allow an employee to rescind his or her resignation.

Silva v. See's Candy Shops, Inc.

Grace periods and rounding practices are areas of intense contention in wage and hour law. It is often argued that grace periods and rounding practices will inherently work to the detriment of the employee and as such employees are undercompensated for time worked and in some instances for overtime. The policies adopted by See's Candy were not rounding practices that improperly favored the employer.

Proposition 65 Coffee Warning

Chemicals known to the State of California to cause cancer and reproductive toxicity, including acrylamide, are present in coffee, baked goods, and other foods or beverages sold here. Acrylamide is not added to our products, but results from cooking, such as when coffee beans are roasted or baked goods baked. As a result, acrylamide is present in our brewed coffee, including coffee made at home or elsewhere from our beans, ground or instant coffee, baked goods or other foods sold here, in grocery stores or other retail locations.

Your personal cancer risk is affected by a wide variety of factors. The FDA not advised people to stop drinking coffee or eating baked goods that contain acrylamide. For more information regarding FDA's views, see www.fda.gov. For more information about acrylamide and Proposition 65, visit www.oehha.ca.gov/prop65/acrylamide.html

NATIONAL LABOR RELATIONS BOARD "REVERSED"!

- NLRB - Overrules 2016 *DuPont Decision: Raytheon Case* Reinstates Past Practice in Duty to Bargain - *The Board concluded that the employer's changes to employee healthcare benefits in 2013 were a continuation of Raytheon's past practice involving similar unilateral changes made at the same time every year from 2001 to 2012*
- NLRB - Reinstates Traditional Community-of-Interest Standard for Bargaining Units.
- NLRB - Overturns the *Lutheran Heritage Village-Livonia* standard for reviewing work rules unrelated to protected activity.
- The U.S. Court of Appeals, Eighth Circuit, reversed NLRB's Jimmy John's "Sick Day" decision *MikLin Enterprises, Inc.*
- NLRB Overrules Browning-Ferris Industries - Reinstates prior joint employer standard - *Hy-Brand Industrial Contractors, Ltd.* *In all future and pending cases, two or more entities will be deemed joint employers under the National Labor Relations Act (NLRA) if there is proof that one entity has exercised control over essential employment terms of another entity's employees (rather than merely having reserved the right to exercise control) and has done so directly and immediately (rather than indirectly) in a manner that is not limited and routine.*