2017 LABOR AND EMPLOYMENT LAW UPDATE

AMERICAN SOCIETY OF SAFETY ENGINEERS

Bakersfield Chapter

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I. LEGISLATIVE UPDATE

A. Summary of California Bills Signed Into Law

1. Increased FTDI and SDI Benefits (AB 908)

FTDI or PFL benefits are funded by employee contributions and provide up to six weeks of wage-replacement benefits for bonding with a new child or to care for an ill family member. Effective January 1, 2018, state FTDI (also known as Paid Family Leave (PFL)) and State Disability Insurance (SDI) wage-replacement benefits will increase to 60 or 70 percent of a participant’s wages (from the current level of 55 percent), depending on income level and up to the statutory cap. In addition, the current seven-day waiting period for PFL benefits will be eliminated as of January 1, 2018.

2. Phased-In New Overtime Requirements for Agricultural Field Workers (AB 1066)

Industrial Commission Wage Order 14 describes special overtime compensation rules for agricultural field workers in California. The Wage Order provides that field workers do not earn time-and-one-half unless the employee works more than 10 hours in a workday or more than 60 hours in a workweek. AB 1066 initiates a process of eliminating that special overtime rule for agricultural works. The schedule for modifying the overtime rules is as follows:

- **January 1, 2019**
  - 9.5 hours per day
  - 55 hours per week

- **January 1, 2020**
  - 9 hours per day
  - 50 hours per week

- **January 1, 2021**
  - 8.5 hours per day
  - 45 hours per week

- **January 1, 2022**
  - 9.5 hours per day
  - 55 hours per week

- **January 1, 2023**
  - 9 hours per day
  - 50 hours per week

- **January 1, 2024**
  - 8.5 hours per day
  - 45 hours per week
January 1, 2022
8 hours per day
40 hours per week

January 1, 2025
8 hours per day
40 hours per week

For employers with 26 or more employees, beginning January 1, 2022, persons employed in an agricultural occupation, and who works in excess of 12 hours in one day shall be compensated at the rate of no less than twice the employee’s regular rate of pay. However, for employers with 25 or fewer employees the double time rule will not commence until January 1, 2025.

3. **Expansion of Fair Pay Act (AB 1676)**

The legislature continued to modify the California Fair Pay Act which created gender pay equity protections under Labor Code section 1197.5. Along with the changes brought by SB 1063 (below), the statute now states that an individual’s prior salary cannot, by itself, justify a wage differential.

4. **Hearing Impaired now Hard of Hearing (AB 1709)**

Although not an employment law change per se, AB 1709 effects the terminology regarding persons with hearing challenges that is used in virtually every statute in California. This bill replaces all references to “hearing impaired” with the term “hard of hearing” or “a close variation of that term”.

5. **Single User Restrooms (AB 1732)**

AB 1732 provides that effective March 1, 2017, single-occupancy restroom facilities in any business establishment must be identified with signage as “all gender” facilities, rather than designated as male or female. A single-user restroom is a “toilet facility with no more than one water closet and one urinal with a locking mechanism that is controlled by the user.” The signage must comply with Title 24 of the California Code of Regulations, and be designated for use by no more than one occupant at a time or for family or assisted use.

6. **Prohibition Against Asking Applicants About Juvenile Convictions (AB 1843)**

AB 1843 modifies Labor Code section 432.7 to expand restrictions against inquiries about criminal history. The new law expands the “Ban the Box” trend. This change in the law prohibits asking an applicant to disclose juvenile convictions. Additionally, an employer may not: (1) ask an applicant to disclose information related to an arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while the person was subject to the process and jurisdiction of juvenile court law; or (2) seek from any source or utilize as a factor in determining any condition of employment any record concerning or related to an arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while a person was subject to the process and jurisdiction of juvenile court law. The bill makes a narrow exception for employers at a health facility to permit inquiry into an applicant’s juvenile criminal background if a juvenile court made a final ruling or adjudication that the applicant had committed a felony or misdemeanor relating to certain sex or controlled substances
crimes within five years preceding the employment application, although inquiries regarding sealed juvenile criminal records are prohibited. An employer at a health facility seeking disclosure of juvenile offense history under this exception will be required to provide the applicant with a list describing offenses for which disclosure is sought.

7. **Smoking in the Workplace (AB2X-7)**

Several years ago California adopted an extensive set of laws prohibiting smoking of tobacco products inside an enclosed space, including at a place of employment. The definition of “employer” in the previous bill did not include “owner operators”. AB 2X-7 expands the prohibition on smoking in places of employment to include an owner-operated business. An “owner-operated business” means a business having no employees, independent contractors, or volunteers, in which the owner-operator of the business is the only worker. The new language also eliminates most of the specified exemptions that permitted smoking in certain work environments, such as hotel lobbies, bars and taverns, banquet rooms, warehouse facilities, and employee break rooms.

8. **Work experience education programs (AB 2063)**

School Districts in California can offer credit for work experience under limited circumstances. This bill expands the opportunity to participate in a work experience education program for credit to students at least 14 years old (previously this only applied to students at least 16 years old). Also, students may now participate in a job shadowing experience for up to 40 hours (rather than the current 25 hours) if the school principal certifies that it is necessary for the pupil’s participation in a career technical education program.

9. **Expanded DLSE Enforcement Authority (AB 2261)**

The Department of Labor Standards Enforcement (DLSE) will have broad independent authority under Labor Code section 98.7 to bring an action against an employer who terminates or discriminates against an employee in violation of any law under the Labor Commissioner’s jurisdiction. The DLSE can bring an action with or without an employee complaint.

10. **Digital Signatures (AB 2296)**

Existing law, the Uniform Electronic Transactions Act, provides that a record or signature may not be denied legal effect or enforceability solely because it is in electronic form and defines an electronic signature for purposes of the act. Existing provisions of the Government Code authorize the use of a digital signature in any written communication with a public entity, and specifies that in those communications, the use of a digital signature has the same force and effect as the use of a manual signature if it complies with specified requirements.

AB 2296 clarifies that an electronic signature includes a digital signature under provisions of the Government Code and that a digital signature under those provisions is a type of an electronic signature as set forth in the Uniform Electronic Transaction Act. The bill specifies that if a public entity elects to use a digital signature, that meets specified requirements, the digital signature has the same force and effect of a manual signature in any communication with the public entity.
11. **Notification to Employees of Right to Time Off If Victim of Domestic Violence, Sexual Assault or Stalking (AB 2337)**

Under AB 2377, companies with 25 or more employees must notify employees of their rights to take protected time off for domestic violence, sexual assault or stalking. Employers must “inform each employee of his or her rights” upon hire and at any time thereafter upon request. The Labor Commissioner will develop a form for these purposes and publish it by July 1, 2017. Employers are required to either use the soon to be created form or create their own form that is substantially similar in content and clarity.

12. **Wage Statements for Exempt Employees (AB 2535)**

AB 2535 clarifies that an itemized wage statement for certain exempt employees need not show the employee’s “total hours worked.” The new provision is applicable to employees who fall under the executive, managerial, professional, outside sales, or computer software professional (provided they are paid on a salary basis) exemptions pursuant to any IWC Wage Order.

13. **New Bond Requirements for Minimum Wage Violations (AB 2899)**

Labor Code section 1194 already prohibits employers from paying less than minimum wage. Employees can recover lost wages, penalties and liquidated damages if violations are proven. Existing law provides notice and hearing requirements under which a person against whom a citation has been issued can request a hearing to contest proposed assessment of a civil penalty, wages, liquidated damages, and any applicable penalties. Existing law further provides that after a hearing with the Labor Commissioner, a person contesting a citation may file a writ of mandate, within 45 days, with the appropriate superior court.

AB 2899 imposes a new requirement that a person seeking a writ of mandate contesting the Labor Commissioner’s ruling to post a bond with the Labor Commissioner in an amount equal to the unpaid wages assessed under the citation, excluding penalties. The new law requires that the bond be issued in favor of the unpaid employees and ensure that the person seeking the writ makes prescribed payments pursuant to the proceedings. AB 2899 also provides that the proceeds of the bond, sufficient to cover the amount owed, would be forfeited to the employee if the employer fails to pay the amounts owed within 10 days from the conclusion of the proceedings.

14. **Increase in Minimum Wage (SB 3)**

The California legislature has again enacted changes to California’s minimum wage law. Pursuant to SB 3, the following schedule of minimum wage increases has been adopted:

<table>
<thead>
<tr>
<th>Date</th>
<th>26 or More Employees</th>
<th>25 or Fewer Employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 1, 2017</td>
<td>$10.50</td>
<td>$10.00 (no change)</td>
</tr>
</tbody>
</table>
January 1, 2018 $11.00 $10.50
January 1, 2019 $12.00 $11.00
January 1, 2020 $13.00 $12.00
January 1, 2021 $14.00 $13.00
January 1, 2022 $15.00 $14.00
January 1, 2023 $15.00 $15.00

Following the implementation of the above minimum wage increases, on or before August 1 of each year, the California Director of Finance will calculate an adjusted minimum wage. The calculation will increase the minimum wage by the lesser of 3.5 percent and the rate of change in the averages of the most recent July 1 to June 30, inclusive, period over the preceding July 1 to June 30, inclusive, period for the United States Bureau of Labor Statistics nonseasonally adjusted United States Consumer Price Index for Urban Wage Earners and Clerical Workers (U.S. CPI-W). The result will be rounded to the nearest ten cents ($0.10). Each adjusted minimum wage increase calculated under this subdivision shall take effect on the following January 1. Remember that changes to minimum wage have a ripple effect on other wage and hour issues:

- Exempt employee minimum salary will increase. The minimum salary that must be paid to an employee classified as exempt under the Executive, Administrative and Professional exemptions is two times the minimum wage. At $10.50/hour the new minimum annual salary is $43,680.00.

- Inside salesperson exemption compensation will increase. To meet the exemption the employee must be paid at least 1.5 times the minimum wage and over one-half of the compensation must consist of commissions. Consequently, commissions might have to be increased.

- Employees who are required to provide their own hand-tools must be paid at least two times minimum wage.

- An exemption from California’s overtime compensation rules applies to employees who are covered by a collective bargaining agreement that provides for the wages, hours or work and working conditions of employees, a premium wage rate for all overtime hours worked and a regular hourly rate of pay of at least 30% above minimum wage.

- Wage Theft Prevention Act requires written notice of changes in rates of pay within 7 calendar days of the change.

- Overtime compensation will also increase.

- Sick pay compensation will increase
Compensation for non-productive time under the new piece-rate compensation rules will increase.

15. **Unfair Immigration Related Practices (SB 1001)**

New Labor Code section 1019.1 will make it an “unfair immigration-related practice” to do any of the following in the course of verifying authorization to work: (1) request more or different documents than required under federal law to verify work authorization (the I-9 process); (2) refuse to honor documents tendered that on their face reasonably appear to be genuine; (3) refuse to honor documents or work authorization based on the specific status or term that accompanies the authorization to work; or (4) attempt to reinvestigate or re-verify an incumbent employee’s work authorization using an unfair immigration-related practice. Individuals who suffer an unfair immigration-related practice can file a complaint with the DLSE for enforcement, and violations carry a penalty of up to $10,000.

16. **Pay Equity Protections Expanded (SB 1063)**

Last year California implemented additional measures to protect against gender discrimination in compensation. AB 1063 expands those protections to race and ethnicity. Pursuant to the new law, it is unlawful to pay employees less than employees of another race or ethnicity for substantially similar work.

17. **Indoor Heat Illness Regulations Are In Our Future (SB 1167)**

SB 1167 requires Cal/OSHA, by January 1, 2019, to propose to the Occupational Safety and Health Standards Board for the board’s review and adoption, a heat illness and injury prevention standard applicable to workers working in indoor places of employment. The new law will be codified as Labor Code section 6720. SB 1167 states that the division is not prohibited from proposing, or the standards board from adopting, a standard that limits the application of high heat provisions to certain industry sectors.

18. **Choice of Law and Forum in Employment Contracts (SB 1241)**

Labor Code section 925 will prohibit employers from requiring that an employee who lives and works in California agree, as a condition of employment, to a provision that would: (1) require the employee to litigate or arbitrate outside of California claims that arise in California; or (2) deprive the employee of the protection of California law with respect to a controversy arising in California. A contract that violates these restrictions is voidable at the employee’s request, and the matter would be adjudicated in California under California law. The law applies to contracts entered into, modified, or extended on or after January 1, 2017. However, it does not apply where the employee is individually represented by legal counsel in negotiating the terms of an agreement with respect to choice of law or forum.

19. **City and County May Delegate Enforcement of Wage Programs to the Division of Labor Standards Enforcement (SB 1342)**

SB 1342 creates Government Code section 53060.4 and permits cities and counties to delegate the enforcement of wage programs to the Division of Labor Standards Enforcement.
The new law specifies that a legislative body of a city or county is authorized to delegate that body’s authority to issue subpoenas and to report noncompliance thereof to the judge of the superior court of the county, to a county or city official or department head in order to enforce any local law or ordinance, including local wage laws.

B. California Agency Activity

1. DFEH Publishes FAQ for Employers on Transgender Rights

In February, 2016, DFEH published an FAQ for employers on transgender rights in the workplace. The Fair Employment and Housing Act (FEHA) had previously banned discrimination on the basis of "sex, gender, gender identity, [and] gender expression." Gender expression is defined to mean a "person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." FEHA protects transgender persons, as well as persons undergoing gender transition, from discrimination and retaliation. The new FAQ provides explanations regarding transgender rights.

The DFEH FAQ identifies two kinds of gender transition: (1) Social Transition – where an individual "socially align[s]"s their gender with their "internal sense of self," for example by an individual changing their name, pronoun, or bathroom facility usage, and (2) Physical Transition – where an individual undergoes medical treatments "to physically align their body with internal sense of self," for example by hormone therapies or surgical procedures.

The DFEH FAQ states: "A transgender person does not need to complete any particular step in a gender transition to be protected by the law. An employer may not condition its treatment or accommodation of a transitioning employee on completion of a particular step in the transition."

2. New PDL Notices

Changes to California regulations has simplified Pregnancy Disability (PDL) notices into one unified notice that includes:

- Basic protections and information on how to contact DFEH
- Large enough to be easily read
- Can be posted electronically but should be posted where employees will see
- Translated into every language spoken by at least 10% of workforce
- Clarifies that PDL need not be taken continuously
- Clarifies that employees may receive 4 months of PDL per pregnancy, not per year
3. New DFEH Regulations Regarding Sexual Harassment Policies and Investigations

Effective April 1, 2016, California enacted new regulations clarifying reasonable steps employers must undertake to prevent and correct sexual harassment. The new regulations change the following:

a. Requirements for Anti-Harassment Policies

- Must instruct supervisors to report any complaints of misconduct to a designated company representative, such as a human resources manager
- List the categories protected by FEHA
- Make clear that FEHA prohibits co-workers, third parties, supervisors and managers from engaging in discriminatory, harassing or retaliatory conduct
- Provides a complaint process
- Complaints should be kept as confidential as possible, responded to in a timely manner, investigated by qualified personnel in a timely and impartial manner, complaints are documented and tracked. Complaint process must provide for appropriate remedial action, resolution and closure
- Investigations must be conducted in a fair, timely and thorough manner
- Must give employees DFEH brochure 185

b. Requirements for Investigations and Responses to Complaints

In addition to the long-standing obligation to fully and effectively investigate complaints of unlawful harassment in a thorough, objective and complete manner, the new regulations require that the employer ensure:

- Complaints receive a timely response
- Complaints receive a timely closure
- Impartial and timely investigations occur
- Investigations be conducted by qualified personnel
• Complaints are documented and tracked for reasonable progress

c. Requirements for Training

Employers with 50 or more “employees” (interpreted broadly) have long had an obligation to train supervisors every two years on unlawful harassment. The new regulations modify the training obligations to include:

• Trainer must maintain all written questions received and all written responses or guidance provided for a 2 year period after the date of the response

• For web-based training, the employer must maintain a copy of the webinar, all written materials used by the trainer, all written questions submitted during the webinar, and document all written responses or guidance the trainer provided during the webinar

4. Prop 64 - Legalization of Marijuana Use

On November 8, 2016, California voters approved Prop 64, which legalized the recreational use of marijuana. The Proposition included specific language intended to address the application of the law to the workplace. The following language was included in Prop 64:

Nothing in section 113 62.1 shall be construed or interpreted to amend, repeal, affect, restrict, or preempt:

(a) Laws making it unlawful to drive or operate a vehicle, boat, vessel, or aircraft, while smoking, ingesting, or impaired by, marijuana or marijuana products, including, but not limited to, subdivision (e) of Section 23152 of the Vehicle Code, or the penalties prescribed for violating those laws.

(b) Laws prohibiting the sale, administering, furnishing, or giving away of marijuana, marijuana products, or marijuana accessories, or the offering to sell, administer, furnish, or give away marijuana, marijuana products, or marijuana accessories to a person younger than 21 years of age.

(c) Laws prohibiting a person younger than 21 years of age from engaging in any of the actions or conduct otherwise permitted under Section 113 62.1.

(d) Laws pertaining to smoking or ingesting marijuana or marijuana products on the grounds of, or within, any facility or
institution under the jurisdiction of the Department of Corrections and Rehabilitation or the Division of Juvenile Justice, or on the grounds of, or within, any other facility or institution referenced in Section 4573 of the Penal Code.

(e) Laws providing that it would constitute negligence or professional malpractice to undertake any task while impaired from smoking or ingesting marijuana or marijuana products.

(f) The rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace, or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees, or prevent employers from complying with state or federal law.

(g) The ability of a state or local government agency to prohibit or restrict any of the actions or conduct otherwise permitted under Section 11362.1 within a building owned, leased, or occupied by the state or local government agency.

(h) The ability of an individual or private entity to prohibit or restrict any of the actions or conduct otherwise permitted under Section 113 62.1 on the individual's or entity's privately owned property.

(i) Laws pertaining to the Compassionate Use Act of 1996.

5. Cal/OSHA Adopts Workplace Violence Prevention in Health Care Standard

On October 21, 2016, the California Occupational Safety and Health Standards Board passed a new General Industry Safety Order entitled “Workplace Violence Prevention in Health Care”. The Office of Administrative Law approved the new standard on December 8, 2016.

The standard applies to any “health facility,” which is defined to mean “any facility, place, or building that is organized, maintained, and operated for the diagnosis, care, prevention, or treatment of human illness, physical or mental, including convalescence and rehabilitation and including care during and after pregnancy, or for any one or more of these purposes, for one or more persons, to which the persons are admitted for a 24-hour stay or longer.” The standard also applies to home health care and home-based hospices, emergency medical services and medical transports, drug treatment programs and outpatient medical services to those incarcerated in correctional and detention settings.
Under the new regulations, “Workplace violence” means any act of violence or threat of violence that occurs at the work site. The term workplace violence shall not include lawful acts of self-defense or defense of others. Workplace violence includes the following:

1. The threat or use of physical force against an employee that results in, or has a high likelihood of resulting in, injury, psychological trauma, or stress, regardless of whether the employee sustains an injury;

2. An incident involving the threat or use of a firearm or other dangerous weapon, including the use of common objects as weapons, regardless of whether the employee sustains an injury;

3. Four workplace violence types:

   “Type 1 violence” means workplace violence committed by a person who has no legitimate business at the work site, and includes violent acts by anyone who enters the workplace with the intent to commit a crime.

   “Type 2 violence” means workplace violence directed at employees by customers, clients, patients, students, inmates, or visitors or other individuals accompanying a patient.

   “Type 3 violence” means workplace violence against an employee by a present or former employee, supervisor, or manager.

   “Type 4 violence” means workplace violence committed in the workplace by someone who does not work there, but has or is known to have had a personal relationship with an employee.

Employers covered by the standard must create, implement and maintain an effective workplace violence prevention plan. The Plan must be in writing, be specific to the hazards and corrective measures for the operation and be available to employees. The written plan may be incorporated into the employer’s written IIPP or maintained as a separate document.

C. Federal Agency Activity

1. “Final” Rule Regarding Overtime Exemptions

For the past year employers across the country have been awaiting the Department of Labor Final Rule regarding overtime exemptions. The Rule was set to go into effect on December 1, 2016. However, at the 11th hour a Federal court issued an injunction preventing the implementation of the rule. Employers will need to standby to see if the Rule is ultimately implemented in some manner.
The proposed Rule changes regulations under Fair Labor Standards Act regarding overtime exemptions for executive, administrative and professional employees. The Rule would have raised the minimum salary level for those exemptions from $455 per week ($23,600/year) to $913 per week ($47,476/year). The DOL also would have permitted non-discretionary bonuses, incentive pay and commissions to satisfy up to 10% of the minimum salary level. Thus, 90% of minimum compensation would need to be paid each workweek ($821.70 or $42,728.40). Up to $4747.60 per year could be used to satisfy remainder of salary requirement. If, at end of quarter, salary plus 10% insufficient, a one-time shortfall payment may be made no later than first pay period of next quarter.

The proposed rule also modified the Highly Compensated Employee Exemption by increasing the minimum salary level from $100,000 to $134,004 per year.

In addition, the Rule would have automatically increased minimum salary every three years beginning January 1, 2020 (40th percentile of weekly earnings of full time salaried workers in lowest wage census region in U.S.)

2. **EEOC Publishes Guidance on Dealing With Employees With Disabilities**

The Equal Employment Opportunity Commission (EEOC) from time to time publishes guidance memos regarding discrimination issues. The guidance memos do not have the force and effect of law but can be instructive. In 2016, the EEOC published a guidance memo regarding dealing with employees with Disabilities. Some of the key aspects of the memo are as follows:

a. Employees with disabilities must be provided with access to leave on the same basis as all other similarly-situated employees. Many employers offer leave -- paid and unpaid -- as an employee benefit. Some employers provide a certain number of paid leave days for employees to use as they wish. Others provide a certain number of paid leave days designated as annual leave, sick leave, or "personal days."

If an employer receives a request for leave for reasons related to a disability and the leave falls within the employer's existing leave policy, it should treat the employee requesting the leave the same as an employee who requests leave for reasons unrelated to a disability.

**Example 1:** An employer provides four days of paid sick leave each year to all employees and does not set any conditions for its use. An employee who has not used any sick leave this year requests to use three days of paid sick leave because of symptoms she is experiencing due to major depression which, she says, has flared up due to several particularly stressful months at work. The employee's
supervisor says that she must provide a note from a psychiatrist if she wants the leave because "otherwise everybody who's having a little stress at work is going to tell me they are depressed and want time off." The employer's sick leave policy does not require any documentation, and requests for sick leave are routinely granted based on an employee's statement that he or she needs leave. The supervisor's action violates the ADA because the employee is being subjected to different conditions for use of sick leave than employees without her disability.

**Example 2:** An employer permits employees to use paid annual leave for any purpose and does not require that they explain how they intend to use it. An employee with a disability requests one day of annual leave and mentions to her supervisor that she is using it to have repairs made to her wheelchair. Even though he has never denied other employees annual leave based on their reason for using it, the supervisor responds, "That's what sick leave is for," and requires her to designate the time off as sick leave. This violates the ADA, since the employer has denied the employee's use of annual leave due to her disability.

**Example 3:** An employee with a disability asks to take six days of paid sick leave. The employer has a policy requiring a doctor's note for any sick leave over three days that explains why leave is needed. The employee must provide the requested documentation.

b. Leave and the Interactive Process Generally

As a general rule, the individual with a disability - who has the most knowledge about the need for reasonable accommodation - must inform the employer that an accommodation is needed. When an employee requests leave, or additional leave, for a medical condition, the employer must treat the request as one for a reasonable accommodation under the ADA. However, if the request for leave can be addressed by an employer's leave program, the FMLA (or a similar state or local law), or the workers' compensation program, the employer may provide leave under those programs. But, if the leave cannot be granted under any other program, then an employer should promptly engage in an "interactive process" with the employee - a process designed to enable the employer to obtain relevant information to determine the feasibility of providing the leave as a reasonable accommodation without causing an undue hardship.

The information required by the employer will vary from one employee to another. Sometimes the disability may be obvious; in other situations the employer may need additional information to confirm that the condition is a
disability under the ADA. However, most of the focus will be on the following issues:

- the specific reason(s) the employee needs leave (for example, surgery and recuperation, adjustment to a new medication regimen, training of a new service animal, or doctor visits or physical therapy);
- whether the leave will be a block of time (for example, three weeks or four months), or intermittent (for example, one day per week, six days per month, occasional days throughout the year); and
- when the need for leave will end.


On November 21, 2016, the EEOC published new guidance regarding national origin discrimination. The publication states that “Generally, national origin discrimination means discrimination because an individual (or his or her ancestors) is from a certain place or has the physical, cultural, or linguistic characteristics of a particular national origin group. Title VII prohibits employer actions that have the purpose or effect of discriminating against persons because of their real or perceived national origin. National origin discrimination includes discrimination by a member of one national origin group against a member of the same group.” The EEOC also described the following:

A. Employment Discrimination Based on Place of Origin

National origin discrimination includes discrimination "because of an individual's, or his or her ancestor's, place of origin[]." The place of origin may be a country (e.g., Mexico, China, Syria) or a former country (e.g., Yugoslavia). The place of origin may be the United States. Finally, it may be a geographic region, including a region that never was a country but nevertheless is closely associated with a particular national origin group, for example, Kurdistan or Acadia.

B. Employment Discrimination Based on National Origin Group or Ethnicity

Title VII also prohibits employment discrimination against individuals because of their national origin group. A "national origin group," or an "ethnic group," is a group of people sharing a common language, culture, ancestry, race, and/or other social characteristics. Hispanics, Arabs, and Roma are ethnic or national origin groups.
Employment discrimination against members of a national origin group includes discrimination based on:

**Ethnicity**: Employment discrimination because of a person's ethnicity as defined above, for example, discrimination against someone because he is Hispanic. National origin discrimination also includes discrimination against a person because she does not belong to a particular ethnic group, such as less favorable treatment of employees who are not Hispanic.

**Physical, linguistic, or cultural traits**: Employment discrimination against an individual because she has physical, linguistic, and/or cultural characteristics closely associated with a national origin group. For example, subjecting an individual to an adverse employment action because of her African-sounding accent or traditional African style of dress could constitute discrimination based on African origin.

Employment discrimination based on place of origin or national origin (ethnic) group includes discrimination involving:

**Perception**: Employment discrimination based on the belief that an individual (or her ancestors) is from one or more particular countries, or belongs to one or more particular national origin groups. For example, Title VII prohibits employment discrimination based on the perception that someone is from the Middle East or is of Arab ethnicity, regardless of how she identifies herself or whether she is, in fact, from one or more Middle Eastern countries or ethnically Arab.

**Association**: Employment discrimination against an individual because of his association with someone of a particular national origin. For example, it is unlawful to discriminate against a person because he is married to or has a child with someone of a different national origin or ethnicity.

**Citizenship status**: Employment discrimination based on citizenship status if it has the purpose or effect of discriminating based on national origin.
Finally, the Commission's position is that employment discrimination because an individual is Native American or a member of a particular tribe also is based on national origin.

4. **EEOC Issues Guidance on Mental Health Conditions in the Workplace**

On December 12, 2016, the EEOC issued a new guidance regarding accommodation of mental health conditions in the workplace. The guidance states that “if you have depression, post-traumatic stress disorder (PTSD), or another mental health condition, you are protected against discrimination and harassment at work because of your condition, you have workplace privacy rights, and you may have a legal right to get reasonable accommodations that can help you perform and keep your job.” The guidance is created in a question/answer format and sets forth rights to request an accommodation for various mental health related disabilities.

5. **New I-9 Form**

The U.S. Citizenship and Immigration Service issued a new Form I-9. The purpose of the form is to assist employers with completing the form and to reduce errors. The new form is in an editable PDF form with better functionality and error-checking features. The form has dropdown functionality for filling in some of the information, prompts on certain fields, embedded instructions for completing each field, designated area to insert additional information and a bar code unique to each form for audit purposes. Some of the changes are as follows:

- "Other Names Used" field in section 1 replaced with "Other Last Names Used". The purpose is to avoid possible discrimination issues and to protect the privacy of transgender and other individuals who have changed their first names.

- Section 1 has been modified to request that certain foreign national employees enter either their Form I-94 number or foreign passport information (rather than both).

- Employees who provide an Alien Registration Number/USCIS number in section 1, must also indicate whether the number is in fact an A-Number or a USCIS number (even though currently these are the same).

- If the employee does not use a preparer or translator to assist in completing section 1, he or she must indicate so on a new check box labeled, “I did not use a preparer or translator.” In addition, the form enables the completion of multiple preparers and translators, each of whom must complete a separate preparer and/or translator section.
- A new "Citizenship/Immigration Status" field is added at the top of section 2, where the employer is expected to write the number corresponding with the citizenship/immigration status selected by the employee in section 1.

- Section 2 has a new dedicated area to enter additional information that employers are currently required to notate in the margins of the form (such as TPS extensions, OPT STEM extensions, H-1B portability, etc.).

6. **New OSHA Regulations Regarding Post-Injury Drug Testing**

OSHA has enacted new regulations that are designed to reduce intimidation of employees by threat of drug testing. The new OSHA regulations do not prohibit employers from drug testing employees who report work-related injuries or illnesses so long as they have an objectively reasonable basis for testing, and the rule does not apply to drug testing employees for reasons other than injury-reporting. When evaluating whether an employer had a reasonable basis for drug testing an employee who reported a work-related injury or illness, the central inquiry will be whether the employer had a reasonable basis for believing that drug use by the reporting employee could have contributed to the injury or illness. If so, it would be objectively reasonable to subject the employee to a drug test.

When OSHA evaluates the reasonableness of drug testing a particular employee who has reported a work-related injury or illness, it will consider factors including whether the employer had a reasonable basis for concluding that drug use could have contributed to the injury or illness (and therefore the result of the drug test could provide insight into why the injury or illness occurred), whether other employees involved in the incident that caused the injury or illness were also tested or whether the employer only tested the employee who reported the injury or illness, and whether the employer has a heightened interest in determining if drug use could have contributed to the injury or illness due the hazardousness of the work being performed when the injury or illness occurred. OSHA will only consider whether the drug test is capable of measuring impairment at the time the injury or illness occurred where such a test is available. Therefore, at this time, OSHA will consider this factor for tests that measure alcohol use, but not for tests that measure the use of any other drugs. The general principle here is that drug testing may not be used by the employer as a form of discipline against employees who report an injury or illness, but may be used as a tool to evaluate the root causes of workplace injuries and illness in appropriate circumstances.

**D. Other Changes of Note**

1. IRS Mileage Reimbursement Rate: Beginning January 1, 2017, the recommended IRS reimbursement rate for business miles driven is 53.5 cents per mile, down from 54 cents per mile.
2. Physicians and Surgeons Overtime Exemption Rate: Effective January 1, 2017, the hourly rate is $77.15, up from $76.24.

3. Computer Professional Overtime Exemption Rate: Effective January 1, 2017, the hourly rate is $42.35, up from $41.85. The minimum monthly salary is $7352.62 and the annual salary is $88,231.36.
II. CASE LAW UPDATE

1. Associational Disability Discrimination

In Castro-Ramirez v. Dependable Highway Express, Inc. decision, Plaintiff Luis Castro-Ramirez's son needed a kidney transplant and required daily home dialysis. Ramirez was the only family member who knew how to administer his son's daily treatments. When Ramirez was hired by Dependable Highway Express, Inc. ("DHE") in 2010, he informed the recruiting manager of his daily obligations at home related to administering dialysis to his son. For over three years, Ramirez's supervisors accommodated his need by providing Ramirez shifts that allowed him to be home in time to administer his son's dialysis. In 2013, a new supervisor changed Ramirez's work schedule to a later shift that would not allow Ramirez to be home on time. When Ramirez complained to his new supervisor regarding the need to work an earlier shift, the supervisor refused to change Ramirez's work shift and threatened to fire Ramirez if he did not comply with his work assignment. When Ramirez refused to work the assigned shift, the supervisor terminated Ramirez's employment.

Ramirez sued DHE for associational disability discrimination claiming DHE was substantially motivated, in part, to terminate him because of his association with a disabled family member. He also sued for retaliation alleging DHE's conduct was in retaliation for his assertion of rights under the FEHA. The trial court granted DHE's motion for summary judgement, rejecting Ramirez's theory that DHE violated the FEHA by terminating him for requesting an accommodation to care for a relative with a disability. Ramirez appealed the trial court's decision.

The California Court of Appeal for the Second Appellate District reversed the lower court's decision finding that the FEHA provided for a cause of action for associational disability discrimination.

2. No On-Duty Rest Periods

In Augustus v. ABM Security Services, Plaintiffs worked as security guards for defendant ABM Security Services, Inc. (ABM). A requirement of employment at ABM was for guards to keep their pagers and radio phones on — even during rest periods — and to remain vigilant and responsive to calls when needs arose. Plaintiffs sued ABM, alleging the company failed to provide the rest periods that state law entitles employees to receive. The company argued that, if it required anything at all during guards' rest periods, it was merely that guards remain on call — that is, to keep radios and pagers on — in case an incident required a response. ABM also offered evidence that class members regularly took breaks uninterrupted by service calls. But the trial court granted plaintiffs' motion, concluding that ABM's policy was to provide guards with rest periods subject to employer control and the obligation to perform certain work-related duties. The court reasoned that a rest period subject to such control was indistinguishable
from the rest of a workday; in other words, an on-duty or on-call break is no break at all. The court subsequently granted plaintiffs’ motion for summary judgment on damages, awarding approximately $90 million in statutory damages, interest, and penalties. The Court of Appeal reversed the trial court’s decision but the Supreme Court in turn reversed the Court of Appeal and upheld the judgment.

3. **Retirement Triggers Obligation to Pay Final Wages**

In McLean v. State of California, the California Supreme Court considered a case in which plaintiff Janis S. McLean, a retired deputy attorney general, filed suit against the State of California on behalf of herself and a class of former state employees who, having resigned or retired, did not receive their final wages within the time periods set out in the statute. Under Labor Code sections 202 and 203, an employer must make prompt payment of the final wages owed to an employee who “quits” his or her employment, or else pay statutory penalties. In this case, the court considered two questions arising from McLean’s suit. First, do sections 202 and 203 apply when employees retire? Second, is McLean’s suit subject to dismissal on the ground that it was filed against the State of California, rather than the state agency for which she had worked? The court concluded that Labor Code sections 202 and 203 apply when employees retire from their employment. The court also concluded that McLean’s decision to name the State of California as a defendant rather than the Department of Justice is not a basis for dismissing her suit.