2017 Labor and Employment Law Update

AMERICAN SOCIETY OF SAFETY ENGINEERS

Bakersfield Chapter

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Increased FTDI and SDI Benefits (AB 908)

• Effective January 1, 2018

• FTDI/PFL (Paid Family Leave) and SDI benefits will increase

• Wage replacement benefits will be 60-70 percent of a participant’s wages

• Seven-day waiting period for PFL benefits will be eliminated
IWC Order No. 14

Previously:
- Overtime over 10 hours in day/60 hours in week
- No double time

Effective January 1, 2019—new OT rules phased in if have 26 or more employees
Effective January 1, 2022---new OT rules phased in if have 25 or fewer employees

See Handout for schedule

Beginning January 1, 2022, double time for hours worked over 12 if 26 or more employees
Beginning January 1, 2025 double time if 25 or fewer employees
California Fair Pay Act (AB 1676)

- Effective January 1, 2017
- Applies to private sector employers
- Last year new law stated standard as: “rates paid to employees of the opposite sex for substantially similar work when viewed as a composite of skill, effort, and responsibility and performed under similar working conditions”
- Limited exceptions
- New Law: individual’s prior salary cannot, by itself, justify a wage differential
Hearing Impaired (AB 1709)

- Not employment law per se
- Replaces all references in California statutes to “hearing impaired” with the term “hard of hearing” or “a close variation of that term”
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 with Title 24 of the California Code of Regulations, and designated for use by no more than one occupant at a time or for family or assisted use.
• Modifies Labor Code section 432.7 to expand restrictions against inquiries about criminal history
• “Ban the Box” expansion
• 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.
Smoking in Workplace (AB 7)

- Expands law to include owner-operator businesses
- Eliminates previous exceptions
- Includes employee break rooms
School districts can offer credit for work experience under special programs

Expands law to allow students at least 14 years old to obtain credit (previously 16 years)

Expands job shadowing from 25 hours to 40 hours
Expanded DLSE Enforcement Authority (AB 2261)

- DLSE has broad independent authority to bring an action against an employer who terminates or discriminates against an employee in violation of any Labor Code provision
- Employee does not need to file a complaint for the DLSE to take action
- Labor Code is very large and getting bigger every year
Digital Signatures (AB 2296)

- Department of Fair Employment and Housing can rely on electronic signatures
- Most complaints filed on line
- Further simplifies complaint filing process
Companies with 25 or more employees must notify employees of their rights to take protected time off because victim of 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.
Wage Statements for Exempt Employees (AB 2535)

- Wage Statements for exempt employees need not show “total hours worked”
- Executive, Administrative, Professional, Outside Sales, or Computer Software Professionals exemptions
• If an award for a minimum wage violation is assessed against an employer, the employer may seek a writ of mandate seeking to overturn the award

• Employer must post a bond with the Labor Commissioner in the amount of the assessed unpaid wages, excluding penalties

• If monies not paid to employee, bond monies are forfeited to the Labor Commissioner
SB 3 – Minimum Wage Increases

- Signed by Governor on April 4, 2016
- Raises MW—eventually to $15.00 per hour
- Starts on January 1, 2017 for employers with 26 or more employees
- One year delay for employers with 25 or fewer employees
<table>
<thead>
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<th>Date</th>
<th>26 or More Employees</th>
<th>25 or Fewer Employees</th>
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<tr>
<td>January 1, 2017</td>
<td>$10.50</td>
<td>$10.00 (no change)</td>
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<tr>
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<td>January 1, 2022</td>
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<tr>
<td>January 1, 2023</td>
<td>$15.00</td>
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• Increases can be temporarily delayed by the Governor during the next 6 years (but only 2 times)
• General economic or state budgetary reasons
• Beginning August 1, 2022, MW will be adjusted annually by California Director of Finance-using formula
• Increases to be implemented the following January 1
• Only increase, no decreases
• Employer means any person employing another under any appointment or contract for hire, and includes the state, political subdivisions of the state and municipalities
“Employee” does not include the following:

- An employee covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for paid sick days or a paid leave or paid time off policy that permits the use of sick days for those employees, final and binding arbitration of disputes concerning the application of its paid sick days provisions, premium wage rates for all overtime hours worked, and regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate.

- An employee in the construction industry covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of employees, premium wage rates for all overtime hours worked, and regular hourly pay of not less than 30 percent more than the state minimum wage rate, and the agreement either (A) was entered into before January 1, 2015, or (B) expressly waives the requirements of this article in clear and unambiguous terms.

- An individual employed by an air carrier as a flight deck or cabin crew member that is subject to the provisions of Title II of the federal Railway Labor Act (45 U.S.C. Sec. 151 et seq.), provided that the individual is provided with compensated time off equal to or exceeding the amount established in paragraph (1) of subdivision (b) of Section 246.
• MW increases will have the following ripple effect:

  • 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.

  • 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 required to provide own hand tools must be paid 2 times the MW.

  • CBA exemption from overtime and other rules if CBA addresses wages, hours of work, terms and conditions of employment and regular hourly rate is at least 30% of MW.

  • Piece rate workers
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.
• 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.
By January 1, 2019, Cal/OSHA must propose heat illness and injury prevention standard applicable to employees working in indoor places of employment

Proposed regs can be limited to certain industry sectors.
Several California Cities and Counties have created local Minimum Wage and Paid Sick Leave Policies

Few have enforcement mechanism

SB 1342 allows local governments to delegate enforcement to State
Labor Code section 925 will prohibit employers from requiring that an employee who lives and works in California to 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.

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.
California Agency Activity

• DFEH Publishes FAQ on Transgender Rights

• New Pregnancy Disability Leave Notices

• New DFEH Regulations Regarding Sexual Harassment Policies and Investigations
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 11362.1 shall be construed or interpreted to amend, repeal, affect, restrict, or preempt:

  - (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.
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.
“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 defined.
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.
DOL Final Regulations Amending Overtime Regulations

• Were supposed to be effective December 1, 2016—NOW ON HOLD
• Changes regulations under Fair Labor Standards Act regarding overtime exemptions for executive, administrative and professional employees
• “White Collar Exemptions”
For white collar exemption to apply, three primary factors must be met:

• Salary level test – do you earn enough?

• Salary basis test – is your compensation a true salary?  
  (Employees must be paid a fixed, predetermined salary that is not subject to reductions based on quality or quantity of work.)

• Duties test – do you primarily perform duties that meet the requirements of the exemption?
Executive Exemption (Manager Exemption):
• Primary duty is management of the enterprise or recognized department or subdivision
• Supervises two or more FTE employees
• Authority to hire or fire or effectively recommend
• 50% plus
• Uses independent judgment and discretion

Administrative Exemption:
• Office or non-manual work directly related to management policies or general operations of employer
• Independent judgment and discretion
• Be careful with this exemption

Professional Exemption:
• 8 enumerated categories
• Learned exemption
• Raises minimum salary level from $455 per week ($23,600/year) to $913 per week ($47,476/year)
• Permits non-discretionary bonuses, incentive pay and commissions to satisfy up to 10% of the minimum salary level
  • Thus, 90% of minimum compensation must be paid each workweek ($821.70 or $42,728.40)
• Up to $4747.60 per year may 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.
• Highly Compensated Employees: Increases minimum salary level from $100,000 to $134,004 per year.
• Automatically increases 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.)
• No changes were made to duties test to meet exemptions

• No changes to salary basis test. Employees must be paid a fixed, predetermined salary that is not subject to reductions based on quality or quantity of work.
Important Takeaways

• California requires minimum salary of two times minimum wage. Effective December 1, 2016, Federal level will be higher than California. Therefore, must comply with federal rule so long as it is higher.

• January 1, 2016: If 26 or more employees = $10.50/hour ($21.00 X 2080 = $43,680)

• Compare to Federal: $47,476

• California does not provide for applying bonuses, etc. toward minimum salary.

• California does not have a HCE exemption!!
Federal Agency Activity

- EEOC Guidance on Dealing with Employees with Disabilities
- EEOC Issues Guidance on National Origin Discrimination
- New I-9 Form
- New OSHA Regulations regarding drug testing
Other Changes of Note

- IRS Mileage Rate
- Physician’s Exemption
- Computer Professional Exemption
Key Court Decision in 2016
QUESTIONS