SIMPSON·DELMORE·GREENE

EMPLOYMENT LAW UPDATE

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2016 Legislative Update for California Employment Law

Below is an overview of legislative changes to California employment laws that may affect your workplace. Take some time to review these summaries before the end of the year to prepare for the upcoming changes.

1. *AB 1506 – Employers Can Cure Certain Wage Statement Violations to Avoid PAGA Penalties*

Assembly Bill 1506 became effective on October 2, 2015. The bill amends the Labor Code to grant employers the right to cure certain wage statement violations before an employee can sue for penalties under the Private Attorneys General Act ("PAGA"). Specifically, an employer can now cure two requirements imposed by Labor Code section 226: the requirement to list the inclusive dates of the pay period for which the wages were earned and the requirement to list the name and address of the legal entity of the employer. California employers now have the opportunity to cure these violations upon notice, thus avoiding wage statement penalties under the PAGA. **Recommendation:** Review your wage statements to ensure that they include the nine requirements enumerated in Labor Code section 226, as not all section 226 violations are curable pursuant to Assembly Bill 1506.

2. *AB 1509 – Family Members of Whistleblowers Cannot be Retaliated Against*

Assembly Bill 1509, effective January 1, 2016, amends various sections of the Labor Code to forbid employers from retaliating against employees for being a family member of an employee who is believed to have engaged in protected activities, such as making formal or informal complaints about wages or working conditions or engaging in whistleblowing activities. **Recommendation:** Ensure that managers recognize that retaliatory personnel decisions are unlawful and against company policy. Continue to document employee misconduct and policy violations so that in the event an employee brings a retaliation claim, you can identify a series of lawful reasons for the employee's termination.

3. *SB 358 – California Employers Must Comply with Gender Wage Equality Requirements*

Senate Bill 358, effective January 1, 2016, amends Labor Code section 1197.5 to prohibit employers from paying any employee at a wage rate of less than the rate paid to employees of the opposite sex for doing substantially similar work. The legislation requires employers to demonstrate that any differential is objectively-based on a bona fide factor other than sex, such as a seniority system, merit-based system, or a system which measures earnings by quantity or quality of production. **Recommendation:** Ensure that your company maintains and follows a recorded list of objectively-based factors when setting wage rates for employees. Ensure that the outcomes of these factors do not result in an unfounded disparity between male and female workers.

4. *AB 970 – The State Labor Commissioner Can Enforce Certain Local Overtime and Wage Laws*

Assembly Bill 970, effective January 1, 2016, amends various sections of the Labor Code to authorize California's Labor Commissioner to investigate and enforce local laws concerning overtime and minimum wage provisions. The bill grants the Labor Commissioner the authority to issue citations and penalties for violations of those local ordinances. **Recommendation:** Review the minimum wage chart provided on the last page of this Update to ensure that your employees are compensated at the applicable rate.

5. *AB 622 – Restrictions on the Use of E-Verify*

Assembly Bill 622, effective January 1, 2016, adds section 2814 to the Labor Code, to prohibit a California employer from using E-Verify to check the employment authorization status of an existing employee or an applicant who has not yet received an offer of employment, unless required to do so in order to comply with federal law. Failure to comply with section 2814 may result in liability of $10,000 per violation. **Recommendation:** Do not perform E-Verify checks on applicants or current employees, unless required under federal law or after the applicant receives an offer of employment. Update your policies to reflect this practice.

PREPARATION FOR 2016 FEDERAL OVERTIME EXEMPTION CHANGES. As discussed in our September Employment Law Update, employers across the nation must prepare for the approaching changes to the federal overtime exemption regulations. In its 2015 Semiannual Regulatory Agenda, the Department of Labor estimated that it will publish its final rule regarding overtime exemptions in July 2016. Employers will have 60 days to comply before the regulations become law. We suggest getting ahead of the curve by identifying affected employees, verifying their exempt status, and adjusting budgets.

Recordkeeping Tune-Up for Human Resource Directors

Summary: Clients frequently ask what personnel records should the company keep and for how long. More specifically, what should and should not be kept in an employee's personnel file. A few simple recordkeeping procedures can reduce your company's exposure to liability under state and federal law.

Discussion: There are three reasons for retaining business records: for business-related purposes (e.g. financial information), to comply with state or federal law (e.g. Form I-9), and to assist your company in litigation. These objectives must guide your company's record retention policies.

1. Records for the General Personnel File

With the exception of records for taxes, safety and pension and benefit plans, most employment records should be kept for the duration of each worker's employment plus five years. This ensures that you retain the records for a period of time exceeding the statute of limitations for employment law and civil claims. The following provides an overview of documents that employers should retain in an employee's general personnel file:

- Resumes, cover letters, application materials
- Description of current and former job listings
- Offer of employment
- IRS Form W-4
- Compensation and salary information
- Employment agreements
- Handbook and policy acknowledgments
- Benefit acknowledgments and summaries
- Emergency contact information
- Records of training completion
- Performance evaluations
- Disciplinary documentation and notes
- Termination and separation letters

2. Records for the Confidential File

Because of the sensitive nature and legal requirements affecting employee records, certain documents must be segregated from an employee's general personnel file. Your company should develop and follow a written policy that sets forth the obligation to exclude the following records from an employee's general file:

- Equal Opportunity/Self-Identification Records
- Reference information
- Lawful background and/or credit checks
- Drug test results
- Medical and insurance records
- Child support/garnishment information
- Workers' compensation claims
- Investigation records
- Requests for employment/payroll verification
- Documents regarding ongoing litigation

These records should be kept in a secure location at your workplace, in a place where only those who "need to know" have access. Records can be backed up electronically, but should be saved in a secure, password-protected format.

3. Unnecessary Information

If your company does not have a business purpose, legal obligation, or legal need to retain information, the records are unnecessary and should be destroyed or removed from the employee's general or confidential personnel file. An example of unnecessary information is e-mails containing "gossip" about an employee or other member of the organization. These e-mails often turn up as a deposition exhibit and can impede your company's litigation strategy and defense.

4. Records Kept Outside of the Employee's File

Although not all information needs to be kept in the same location—for example, employee time cards are often categorized separately from the general file—it is prudent to ensure that your recordkeeping policies are organized and compliant with the applicable law.

5. The Final Word on Employee Records

Without the name, signature, or date from an employee on your company's handbooks, acknowledgments or other policies—such as a meal period waiver—your counsel may not be able to use that document in defense of a claim brought by the employee at a later date. Indeed, signed employee acknowledgments, written disciplinary notes, and detailed write-ups are often the difference between a successful legal defense and a reluctant settlement. For example, in a claim brought by a disgruntled former employee for employment discrimination or retaliation, any and all information—such as e-mail correspondence, written notes, and disciplinary reports—that can assist your company in establishing that the decision makers did not have a discriminatory or retaliatory animus will be invaluable to your company's defense. If recordkeeping policies are not implemented or followed, records or correspondence reflecting the lawful reason for the termination of the employee may not be adequately preserved for your legal defense.

Minimum Wage Rates in California

Cities and counties across the United States are enacting minimum wage ordinances that affect compensation and overtime obligations for companies employing workers in those jurisdictions. Importantly, not only will the minimum wage increase in 2016 for the State of California, it will also increase in a number of California cities.

City	Current Rate	Scheduled Increase
Berkeley	$11.00	$12.53 effective Oct. 1, 2016
Emeryville	$12.25	$13.00 effective July 1, 2016
Mountain View	$10.30	Rate remains the same for 2016
Oakland	$12.25	$12.55 effective Jan. 1, 2016
Richmond	$9.60	$11.52 effective Jan. 1, 2016
Sacramento	State rate applies until increase to $10.50, effective Jan. 1, 2017	
San Diego	State rate applies, pending results from July 2016 referendum	
San Francisco	$12.25	$13.00 effective July 1, 2016
San Jose	$10.30	Rate remains the same for 2016
Sunnyvale	$10.30	Rate remains the same for 2016
California	$9.00	$10.00 effective Jan. 1, 2016

With the passing of Assembly Bill 970, discussed above, we anticipate that the Labor Commissioner will target employers that fail to compensate employees at the proper rate.

The Development of Protected Concerted Activity

The expansion of administrative and judicial trends regarding protected concerted activity is a developing flood that will continue to define the employment landscape as we enter 2016.

In our May Employment Law Update, we addressed the National Labor Relations Board's ("NLRB") memorandum on employee handbooks and policies. Notably, the focus of the memorandum was the impermissibility of policies that infringe upon an employee's right to engage in protected concerted activities. Generally, activity is protected if an employee intends to improve the terms and conditions of his or her employment. Our February Update explained the depth of this doctrine when we discussed the National Labor Relations Board's protection of an employee who advocated for paid sick leave legislation while simultaneously dissuading, in an insensitive manner, customers from patronizing his employer's restaurant. And most recently, the Second Circuit Court of Appeals affirmed the NLRB's decision in *Three D, LLC v. NLRB*, wherein the NLRB held that two employees engaged in protected concerted activity on Facebook when one employee "Liked" the other employee's profane and disparaging comment about the company's owner.

As these concerted activity trends continue to develop, it is imperative for companies of all sizes to understand their compliance obligations by updating and maintaining effective workplace policies.

SDG'S News and Announcements

- This is our fourth and final quarterly Employment Law Update for 2015. All of Simpson Delmore Greene's 2015 Employment Law Updates can be readily downloaded from our website, at www.sdgllp.com/articles.
- Simpson Delmore Greene is pleased to announce the addition of Nicholas J. Ferraro as an associate with the firm. Mr. Ferraro is graduate of the University of San Diego School of Law (J.D., 2015) and Gonzaga University (B.A., 2012). He enjoys skiing, baseball and watching college basketball.

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The purpose of our Employment Law Update is to inform clients and interested parties of recent developments in employment law. It should not be regarded as a substitute for comprehensive legal advice.