SIMPSON·DELMORE·GREENE

EMPLOYMENT LAW UPDATE

March 2016

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Preparing for New FEHA Regulations, Effective April 1

On April 1, 2016, California employers must comply with a new set of workforce regulations. The new rules impose additional compliance obligations on California employers. Previously exempt employers may find that they are no longer exempt from the FEHA. Employers must understand these critical changes and take the necessary precautions to avoid potential liability.

1. Expanded Coverage and Applicability

The FEHA has always applied to employers with five or more employees. The new regulations expand the FEHA's applicability and coverage to count out of state employees and employees on leave toward the five employee threshold. Practically speaking, this means that an out of state company with only a few employees in California must comply with the FEHA if it employs five or more employees. The regulations further emphasize that coverage extends to unpaid interns and volunteers.

2. New Written Policy Requirements

Most significantly, the regulations now require employers to establish a written policy against discrimination and harassment. The policy must:

- Be in writing;
- Identify the categories of individuals protected;
- Specify that the FEHA applies to coworkers, third parties, supervisors, and managers;
- Provide for a complaint process to ensure that complaints are (i) kept confidential (if possible), (ii) timely responded to, (iii) investigated by qualified personnel in a timely and impartial manner, (iv) tracked and documented, and (v) resolved in a timely manner;
- Include a complaint process that does not require the employee to complain directly to his or her immediate supervisor;
- Instruct supervisors to report complaints to a designated company representative;
- State that allegations will be addressed through a fair, timely, and thorough investigation that provides parties with due process and reaches reasonable conclusions based on the evidence;
- Provide that confidentiality will be kept to the extent possible;
- Indicate that if misconduct is found during the investigation, appropriate remedial action will be taken; and
- Declare that the company will not retaliate against an employee for lodging a complaint or participating in an investigation.

Ensure that your company's anti-harassment and anti-discrimination policies adequately address the above-mentioned requirements. Simpson Delmore Greene's employment attorneys are available to draft or revise your policies to ensure compliance with the new regulations.

3. Dissemination of Written Policies

The new regulations require your company to sufficiently disseminate its FEHA policies to its employees. Employers may provide written or electronic notice or discuss the policies upon hire or at orientation. In any event, your company should obtain a signed acknowledgment form from each employee stating that he or she reviewed and understands the policy. If your workforce contains ten percent or more non-native English-speaking employees, your company must issue the policies in each language.

4. Gender Identity and Expression Clarifications

The new regulations provide new FEHA definitions for "gender expression," "gender identity," and "transgender." As protected classes, discrimination and harassment on any of these bases is unlawful. To avoid liability, human resources personnel should work with employees and supervisors to promote an inclusive workplace.

5. Preemptive Measures to Avoid FEHA Liability

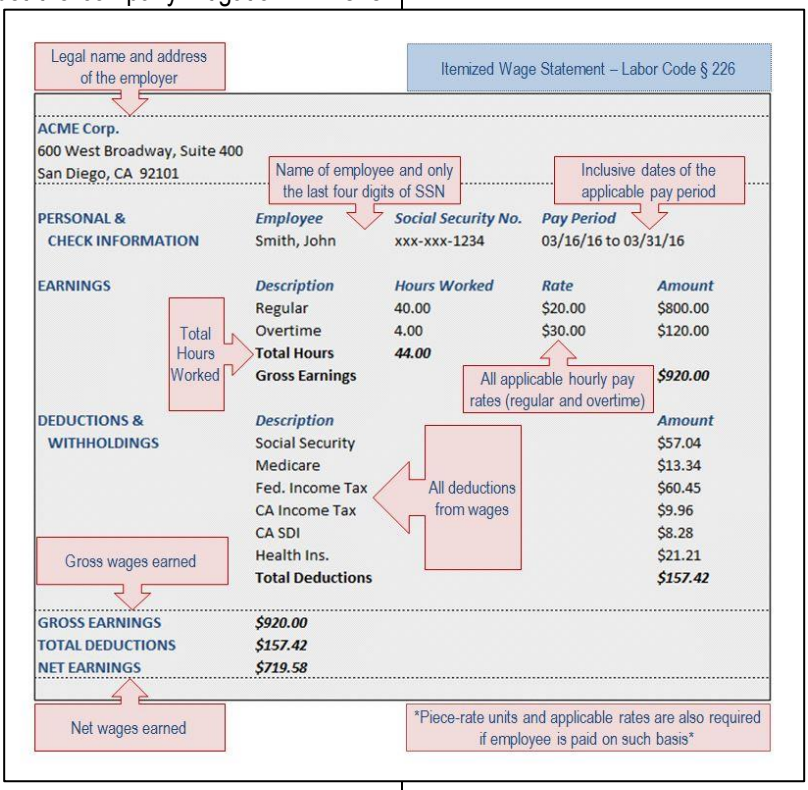
In summary, employers should review existing FEHA policies to ensure compliance with the new regulations. A systematic approach to formulating and implementing these required changes will help mitigate your company's liability exposure.

Minimum Salary Adjustment for Exempt Employees. The Department of Labor is expected to increase the minimum salary threshold for white collar exempt employees in July 2016. Thus, employees exempt from overtime as administrative, executive, and professional workers will have to be paid approximately $50,440 per year to retain the exemption.

Preventing Wage and Hour Liability: Itemized Wage Statement Review

Simpson Delmore Greene's employment attorneys provide an ounce of prevention each quarter in the firm's Employment Law Updates. This quarter we are looking at Labor Code section 226's itemized wage statement requirements.

With respect to California employment law, a five minute audit can be the difference between correcting a non-compliant practice and "bet the company" litigation. This is especially true for seemingly harmless infractions, such as failing to include the legal name of your business on an employee's wage statement each period. When these infractions occur over a number of years with respect to dozens, hundreds, or thousands of employees, your company's liability exposure becomes significant.



Human resources personnel should verify with their payroll services provider that their itemized wage statements comply with Section 226. Employers are often surprised to learn that the wage statements affixed to each employee's paycheck must set forth specific information either semi-monthly or at the time of each payment of wages. Many companies rely on payroll service providers to furnish such statements and thus may unknowingly be in violation of the law. Plaintiff's attorneys are aware of this requirement and regularly include Section 226 claims in lawsuits brought by disgruntled employees.

Section 226 makes clear that the following information must be provided to each employee each pay period:

1. Gross wages earned
2. Total hours worked
3. Piece-rate units and applicable rate (if applicable)
4. Any deductions from wages (e.g. health insurance)
5. Net wages earned
6. Inclusive dates of the pay period
7. Name of the employee and last four digits of SSN
8. Legal name and address of the employer entity
9. All applicable hourly rates in effect during the pay period and the corresponding number of hours at each hourly rate (e.g. regular time, overtime)

Liability for failing to include the above-mentioned content can be significant. For instance, companies with a business name different from the name of its legal entity must ensure that the wage statement contains the legal name, including the appropriate LLC or Inc. designation. Failure to do so can result in liability of $50 per employee for the initial violation and $100 per employee for each subsequent violation per pay period, up to an aggregate penalty of $4,000 per employee. Liability is compounded through statutory penalties of $100 to $200 per employee per pay period under the Private Attorney General Act.

Section 226 claims are frequently brought as class action lawsuits because the penalties for non-compliance are so significant. To avoid potential claims, please review your company's itemized wage statement to ensure that it contains the nine enumerated items set forth in this Update. Any discrepancies should be immediately reported to your company's payroll services provider for correction.

Implementing Effective Anti-Retaliation Practices

Summary. The Equal Employment Opportunity Commission ("EEOC") recently published its enforcement statistics for its 2015 fiscal year and the results are consistent with the agency's national priority of prosecuting retaliatory employment actions. About 45 percent of the claims filed were for an employer's unlawful retaliation against an employee. As such, it is imperative for employers to

understand what constitutes unlawful retaliation and to take steps to avoid retaliatory decisions.

Discussion. Liability for unlawful retaliation under state and federal law arises when an employer takes adverse action against an employee for engaging in "protected activity." Typically, harassment, demotion, transfer, or termination of an employee constitutes an adverse employment action. For liability to arise, an employee's "protected activity" must be the motive behind the employer's adverse action. An employee's activity is protected when he or she participates in a complaint or investigative process or opposes certain practices he or she believes are unlawful.

The EEOC is presently in the process of updating its Enforcement Guidance on Retaliation and Related Issues. The "Best Practices" section provides a number of strategies and practices to reduce the incidence of unlawful retaliation:

- Maintain a plain-language anti-retaliation policy, which includes examples of unlawful retaliation, proactive steps for avoiding retaliatory action, a reporting mechanism for employee complaints, and an explanation that retaliation is not permitted;
- Provide training and education to supervisors and employees regarding "protected activity;"
- Offer information to employees and relevant parties after an employee engages in "protected activity" to prevent actual or perceived retaliation;
- Check in with employees and relevant parties during the pendency of a complaint or investigation to identify potential issues before they arise.

Your company's supervisors and personnel should be aware that retaliating against an employee for his or her protected activity is unlawful and against company policy. Your company should also ensure that employees are provided with adequate resources and opportunities to air their grievances in a productive manner.

NLRB Further Expands Definition of "Concerted Activity" to Protect Recording Devices in the Workplace

Summary. A recent National Labor Relations Board decision is another example of the Board's continued expansion of the definition of conduct protected as concerted activity under Section 7 of the National Labor Relations Act. This time, the Board determined that employees may secretly record a conversation with a boss or coworker and later post that recording for others to hear. As this trend continues to develop, employers must proceed with caution with respect to any policy that may infringe upon an employee's right to discuss or improve the conditions of his or her employment.

Discussion. In *Whole Foods Market, Inc.*, 363 NLRB No. 87 (Dec. 24, 2015), the Board found that it is unlawful for an employer to prohibit employees from recording company meetings and conversations without a valid business justification.

The national grocery chain's "Team Meetings" policy prohibited employees from recording conversations or images with any device without prior consent of all parties. The Board found that the policy infringed upon the employees protected "concerted activities," such as recording protected picketing activities, documenting unsafe workplace conditions, recording evidence for use in employment-related actions, and documenting and publicizing discussions about employment terms and conditions. Because the Team Meetings policy indirectly prohibited these activities, it was therefore unlawful.

In its ruling, the Board briefly considered the effect of non-consensual recording statutes. The Board noted that Whole Foods' policy remained unlawful even in states like California where non-consensual recording is illegal because the policy was companywide and unlimited. Because the relevant policies did not specify the applicable state law, the Board did not consider Whole Foods' argument persuasive.

In light of the decision, employers should review their handbooks to ensure that existing policies do not violate Section 7's worker protections. Although blanket recording restrictions are not permitted, employers in California that wish to retain their no recording polices would be prudent to reference California's non-consensual recording statute in their policies or be able to articulate a valid business justification for such policy.

Going forward, employers must narrowly craft their policies with respect to prohibitions that "interfere with, restrain, or coerce employees in the exercise" of their right to discuss or improve the conditions of their employment.

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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.