SIMPSON·DELMORE·GREENE

Employment Law UPDATE

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ISSUE HIGHLIGHTS

Minimum Salary Requirement for Exempt Workers Set to Increase December 1, 2016

Think your employees are exempt? You may need to think again. An increase to the federal minimum weekly salary threshold is eminent. Employers with exempt employees making less than $47,476 per year will be impacted. Details on page 2.

New OSHA Regulations Impact Legality of Accident Related Drug Test Policies & More

New OSHA regulations prohibit mandatory drug testing after on-the-job accidents. The new regulations also impose additional scrutiny on safety incentive programs. Details on page 2.

Paystubs! Paystubs! Paystubs!

We have discussed paystubs in previous updates, but waves of new lawsuits continue to be filed for paystub violations which could have been easily avoided. Don't become one of the employers facing hundreds of thousands of dollars in liability because they relied on a payroll company for their paystubs; they often get it wrong. Details on page 3.

California Mandates Participation in State Sponsored Retirement Plan

New legislation requires California employers with five or more employees to offer an employee-sponsored retirement, or to enroll in the new state sponsored retirement plan. Details on page 3.

Significant Employment Laws Taking Effect January 1, 2017

Wage equality legislation has expanded to include race and ethnicity. Prohibitions to criminal record inquiries during the hiring process has expanded. Choice of law and venue provisions in employment contracts for California employees has been limited. A new law impacting single-user restrooms was passed. All on page 4.

New I-9 Form Required After January 21, 2017

A new Form I-9 will be published by the United States Citizenship and Immigration Services on or before November 22, 2016. Employers may continue to use the current version of Form I-9 until January 21, 2017, at which point it will become invalid. Details on page 5.

Requirements and Recommendations for the Maintenance of Employee Records

Failure to maintain proper employee records can expose employers to substantial liability and penalties for violating federal, state, and local record keeping laws. For tips on proper recordkeeping, please see page 5.

Updated Mandatory Federal Posters

See Page 5.

New Employee Notice Required

See Page 6.

Minimum Salary Requirement to Increase December 1, 2016.

Do you have employees paid a salary between $41,600 and $47,476? If so, the imminent increase to the federal minimum salary requirement will impact you. Until now, the federal minimum salary requirement for exempt employees had been so much lower than California's requirement that it was largely ignored by California employers; that is no longer the case.

Beginning December 1, 2016, any employee who is classified as exempt must be paid the new federal minimum salary requirement - $47,476 per year. This is an increase that far exceeds California's requirement that exempt employees (those in executive, administrative or professional positions) be paid a salary that is at least twice the state minimum wage - currently $41,600 per year.

The increase will undoubtedly impact thousands of California employers who will need to implement plans to bring their workforce into compliance prior to the December 1, 2016 deadline. Options for responding to the salary increase include raising exempt employee salaries to the federally-required level, or re-classifying previously exempt employees as non-exempt. Please contacts us with questions or to help implement a solution.

New OSHA Regulations Crackdown on Mandatory Post-Accident Drug Testing

The Occupational Health and Safety Administration's ("OSHA") new final rule, which was published on May 12, 2016, will impact you if you require mandatory drug testing after on-the-job accidents, or if you have a safety incentive program.

OSHA has always prohibited an employer from discharging or discriminating against employees for reporting a work-related injury or illness. However, OSHA's most recent broad interpretation of this rule now prohibits any "adverse action that could…dissuade a reasonable employee from reporting a work-related injury or illness", including any "blanket post-injury drug testing policy" because it deters proper reporting and constitutes an "adverse employment action."

Post-Accident Testing. Mandatory post-accident testing is common in California, and, had been perfectly lawful. The new rule does not prohibit post-accident drug testing altogether, but employers will likely need to revise their drug testing policies and handbooks to bring them into compliance with the new rule. For instance, rather than mandatory post-accident testing, employers may require testing only when there is a reasonable basis to believe that alcohol or drugs contributed to the accident.

Incentive Programs. OSHA's new rule is similarly unforgiving to safety "incentive programs." The new rule states that it is a violation to impose an adverse action against an employee for reporting a work related injury or illness, "whether or not such adverse action was part of an incentive program." In other words, denying employees a benefit that is provided in an incentive program because of an injury or illness was reported (e.g., an employer denies employees a safety bonus due to an injury report) constitutes a form of retaliation under the new rule. Employers should have their safety incentive programs carefully reviewed to ensure compliance.

Paystub Requirements for California Employers

Do you rely on a payroll provider for your employee paystubs? If you do, you may be risking hundreds of thousands of dollars in liability. These companies often issue paystubs which do not comply with California law, and you, the employer, are the one that is liable.

We are presently defending several lawsuits filed by disgruntled employees alleging paystub violations that could have been easily avoided. One of the most popular paystub violations of late is failing to list the complete legal name of the entity that is the employer (a dba is not sufficient).

Mandatory Information. Every employer should check their employee paystubs for the following mandatory information:

1. The *legal name* and address of the entity that is the employer (a dba is not sufficient);
2. The name of the employee and the last four digits of his/her SSN (or employee id);
3. Inclusive dates of the pay period;
4. Total hours worked;
5. Gross wages earned;
6. Piece-rate units and rates (if applicable);
7. Any and all deductions from wages (e.g. health insurance);
8. Net wages earned; and
9. All applicable hourly rates in effect during the pay period and the number of hours at each hourly rate (e.g. regular time, overtime).

The penalty for noncompliant paystub violations is $50 per employee for an initial violation and $100 per employee for each subsequent violation, up to an aggregate penalty of $4,000 *per employee*. Those numbers can add up quickly (for example, the penalty for an employer with 150 employees could be as high as $600,000, plus attorney's fees and costs). These types of claims are frequently brought as class action lawsuits because the penalties for non-compliance are so significant.

Each of the lawsuits we are currently defending resulted from payroll providers listing a company's dba on employee paystubs rather than the legal name of the entity. It happens every day. So we say again, *do not rely on your payroll service providers to furnish compliant paystubs.*

Paid Sick Leave Information Must be Listed on Employee Paystubs or on Another Document Issued the Same Day. In addition to the requirements listed above, California requires that employers provide their employees with information on how much paid sick leave they have available on their paystub, or in another document issued the same day as their paycheck. Employers must also keep records showing how many paid sick days employees earned and used for a minimum of three years (we recommend four).

California Mandates that Employers Offer Retirement Plans or Enroll in State Sponsored Plan

On September 28, 2016, a bill which requires employers with five or more employees to either offer an employer-sponsored retirement plan or automatically enroll their employees in the new state sponsored retirement plan ("Secure Choice") was signed into law. Under the new law, mandatory participation will be implemented in phases based upon the size of the employer.

- Employers with 101 or more eligible employees will be required to participate within 12 months of the program opening for enrollment; and
- Employers with 51 to 100 eligible employees will be required to participate within 24 months of the program opening for enrollment; and
- Employers with 5 to 50 eligible employees will be required to participate within 36 months of the program opening for enrollment.

California employer responsibilities under the new law will include the following:

- Establish a payroll deposit arrangement which will enable employees to make automatic contributions from their paycheck
- Provide state developed informational materials about the program to their employees, including disclosure and opt-out forms.
- Transmit payroll contributions to a third party administrator (administrator still to be determined).
- During designated open enrollment periods (which have not yet been designated, but will be at least once every two years) provide employees who previously opted out of the program with informational materials and opt-out forms again.

Unless employees opt-out, they will be automatically enrolled in the retirement plan with a three percent deduction from their salary. Remember, this new law only impacts employers who do not already offer an employee-sponsored retirement plan. More information will be provided in subsequent updates as it becomes available from the state.

Significant Employment Laws Taking Effect January 1, 2017

Wage Equality Expanded. The Wage Equality Act of 2016 essentially adds race or ethnicity to the protections of the California Fair Pay Act. Beginning January 1, 2017, this new California law will prohibit an employer from paying employees less than employees of another race or ethnicity for substantially similar work. Like the Fair Pay Act, the Wage Equality Act shifts the burden to employers to prove wage differentials are not based on race or ethnicity.

Additional Prohibitions on Criminal Inquiries During Hiring. Beginning January 1, 2017, employers will be prohibited from asking job applicants to disclose information related to an arrest, detention, diversion, supervision, or court disposition that occurred while the person was subject to the process and jurisdiction of juvenile court law. Employers will also be prohibited from or from utilizing such factors in determining any condition of employment. This new law will require employers to update their employment application materials to ensure that applicants are not asked to disclose juvenile criminal records. This includes updating online application portals for compliance.

Choice of Law and Venue Limited in Employment Contracts for California Employees. For employment contracts entered, modified, or extended on or after January 1, 2017, this law prohibits an employer from requiring an employee who primarily resides and works in California to agree to a provision requiring the employee to adjudicate an employment claim outside of California or apply the law of another state to a controversy arising in California.

New Single-User Restroom Requirements. All single-user toilet facilities in any business establishment must be identified as all-gender toilet facilities on or before March 1, 2017.

New Form I-9 Required after January 21, 2017.

On August 25, 2016, the Office of Management and Budget ("OMB") approved a revised Form I-9, Employment Eligibility Verification. The revised form will be published on or before November 22, 2016. Employers may continue using the current version of Form I-9 (which has a revision date of 03/08/2013 and expired in March this year) until January 21, 2017. After January 21, 2017, all previous versions of Form I-9 will be invalid.

Proper Maintenance and Retention Periods for Employment Records

Various federal, state, and local laws regulate maintenance of employee records. What files must be kept, how certain files must be kept (electronic or hard copy), and how long certain files must be kept are among things that are regulated by various regulations and ordinances. Penalties for failure to comply can be substantial. Below is a brief summary of the manner in which employee records must be kept, along with mandatory and recommended retention times.

Personnel Records. Personnel records are often used to determine if an employee is qualified for a promotion or additional compensation, or if the employee requires disciplinary action. Examples of personnel records include, but are not limited to, employment applications; resumes; payroll authorization forms; notices of commendation, warning, discipline, and termination; notices of layoff, leave of absence, and vacation; notices of wage attachment or garnishment; education certifications; education and training notices and reports; performance reviews; and attendance records.

Updated personnel records may be kept in hard copy or in a secure electronic database, as long as they can be printed and made available to the employee at the location where the employee works within 30 days of a written request. California law mandates that personnel records be kept for a period of not less than three years after the employment terminates. However, we recommend keeping these records for a minimum of four years after termination of employment because of the statute of limitations for wage and hour violations.

Payroll, Wage and Hour Records. Time records demonstrating when the employee begins and ends work, total wages earned each payroll period, total hours worked in the payroll period and applicable rates of pay, records of additions or deductions from wages, and payroll records may also be stored electronically, as long as they are unalterable and properly dated. Additionally, such records must be available for copying and transcription upon request from the Department of Labor and the copies must be clear and identifiable. Given the statute of limitations in California for wage and hour claims, we recommend keeping these records for four years after termination of employment.

Under the newly enacted Healthy Workplaces Healthy Families Act of 2014, an employer must keep records documenting the hours worked and paid sick days accrued and used by an employee for at least three years. These records may be kept electronically as long as the Labor

Commissioner may be allowed access to the records.

I-9 Forms may be kept electronically if the electronic storage system meets all of the following requirements:

- there are reasonable controls to ensure integrity, accuracy, and reliability of the electronic storage system;
- there are reasonable controls to prevent and detect alteration of the I-9 Forms;
- there is an inspection and quality assurance program that evaluates the electronic generation and storage system;
- there is a retrieval system that includes an indexing system which permits searches by any data element; and
- it has the ability to reproduce legible paper copies.

Copies of I-9 Forms must be made available on three days' notice of inspection by U.S. Immigration and Customs Enforcement.

To avoid the many pitfalls associated with the production of employment records in response to employee requests, government requests, or subpoenas, we recommend seeking counsel upon receipt of a records request.

Medical Records. Medical information, including documents related to a disability accommodation request or Family Medical Leave Act ("FMLA") request, must be kept confidential and separate from an employee's basic personnel file. If an employer chooses to store medical records electronically, any employee medical data should be in its own separate database with its own separate access protocol. Employee medical information should be retained for four years after the date the employee is terminated to fully comply with the Americans with Disabilities Act and FMLA.

Documents related to work place injuries may also be maintained electronically or in hard copy. These documents should be kept for at least five years after the date of injury, whether the claim is still active or closed. For all closed workers' compensation claims, the employer should keep the above documents for at least two years from the date the claim closed. For open claims, the employer should keep the listed records for five years from the date of injury or last date for benefit payment, whichever is later.

Records required by the Occupational Safety and Health Administration ("OSHA") may be kept either in hard copy or electronically, provided the computer they are stored on can produce forms equivalent to OSHA forms and access to injury and illness records are limited. OSHA records should be stored in a manner where they can be retrieved within four days subject to a government request. X-rays must be preserved in their original form.

Mandatory Federal Posters Updated

Effective July 2016, the US Department of Labor has mandated that Federal Minimum Wage and Employee Polygraph Protection Act posters be replaced with updated versions. The law requires employers to display these posters where employees can easily see them.

The Federal Minimum Wage notice has been modified in three major ways. First, the notice requires that nursing mothers who are subject to

the overtime requirements of the Federal Labor Standards Act ("FLSA") be provided reasonable break time to express breast milk and a place to do so shielded from view and free from intrusion by coworkers and the public; this room may not be a bathroom. Second, the notice requires that employers must avoid misclassification of independent contractors, to whom minimum wage and overtime pay protections do not apply, and employees, to whom those protections do apply. Third, the enforcement provision sets forth significant revisions explaining additional penalties for violation of the FLSA. The new poster can be downloaded at https://www.dol.gov/whd/regs/compliance/posters/minwage.pdf.

The Employee Polygraph Protection Act notice sets forth the circumstances under which employees may be subjected to a polygraph test by their employer. Unlike the changes to the Federal Minimum Wage notice, the changes to the Employee Polygraph Protection Act notice are not substantive. Nonetheless, the US Department of Labor requires an update. Click below for the new poster: https://www.dol.gov/whd/regs/compliance/posters/eppac.pdf.

Notice Now Required For California Domestic Violence Leave

California law now requires employers with 25 or more employees to provide their employees with written notice of their rights to take protected time off for domestic violence, sexual assault or stalking. Such notice must be provided to employees upon hire and at any time thereafter upon request. Employers are not required to comply with the notice requirements until a form notice is published by the Labor Commissioner, which will be not later than July 1, 2017. Additional information will be provided in the next update.

We also recommended that California employers verify that their employee handbooks include a provision addressing domestic violence leave. The policy should explain to employees their rights to a leave of absence for the following issues that arise from being a victim of domestic violence, sexual assault, or stalking, including:

- To seek medical attention for injuries;
- To obtain services from a domestic violence shelter, program or rape crisis center;
- To obtain psychological counseling;
- To participate in safety planning and take related actions (such as temporary or permanent relocation).