SIMPSON·DELMORE·GREENE

Employment Law UPDATE

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ISSUE HIGHLIGHTS

Background Check Laws Change at Federal, State, and Local Levels

In addition to recent changes in federal and state laws regulating the use of pre-employment background checks, employers are now also subject to citywide ordinances. Details on page 2

Commissioned & Piece Rate Employees Must Be Payed Separately for Rest Periods

Employers of commission and piece-rate employees may be in violation of the California Labor Code if employees are not paid *separately* for mandatory rest periods. Details on page 2.

Employers Should Review *Rest Period Policies*

California courts have recently held that on-call rest periods are unlawful. The recent rulings have laid the groundwork for additional lawsuits related to employer's exercising control over employees during rest periods. Consequently, employers should revisit rest period policies. Details on page 3.

Foreign Jurisdiction Clauses in CA *Employment Agreements* May Be Invalid

Out-of-state choice of venue and choice of law clauses included in employment agreements with California based employees may be invalid. Revisions may be necessary. Details on page 3.

Number of Cities With Unique *Paid Sick Leave* Regulations Increases

Santa Monica and Berkeley are the latest California cities to implement unique paid sick leave laws for employees working within the city limits. Details on page 4.

FEHA Expands *Transgender Protections*

Protections for transgender individuals were expanded on July 1, 2017. Employers should update policies and inform all supervisory and management personnel. Details on page 4.

New Notice Requirement for Domestic Violence Leave

Employers with 25 or more employees must provide a new domestic violence leave notice to all new hires, and to current employees upon request. Details and link on page 5.

Another *New Form I-9*

For the second time in less than a year, a new Form I-9 has been issued. The new form must be implemented for all new hires no later than September 18, 2017. Details and link on page 5.

Upcoming: *Tip-Pooling* Restrictions May be Rolled Back

Tip-pooling restrictions previously issued by the U.S. Department of Labor may become a thing of the past. Details on page 5.

USE OF PRE-EMPLOYMENT BACKGROUND CHECKS HAS BECOME MORE DIFFICULT

In addition to evolving federal and state laws regulating the use of pre-employment background checks, several cities have recently passed local ordinances with additional restrictions and requirements. Regulation on the local level will likely continue to rise, and employers utilizing pre-employment background checks should monitor developments in each city where they have employees.

California's Labor Code has long required employers to obtain written consent from an applicant before conducting a background check, and prohibited employers from considering certain types of criminal history when making employment decisions (such as arrests not leading to convictions, sealed records, and diversion programs). Those prohibitions were recently expanded to prohibit consideration of an applicant's juvenile offenses and non-felony convictions for possession of marijuana that are more than two years old.

Federal law similarly requires employers to obtain written authorization prior to conducting a background check, and prohibits employers from considering certain types of criminal history when making employment decisions. Moreover, when a pre-employment background check reveals a criminal history which may be considered by an employer, federal law requires employers to follow strict notice procedures before taking an adverse action (such as denying an applicant a job or rescinding a conditional job offer).

To further complicate matters, the cities of Los Angeles and San Francisco recently implemented local ordinances with heightened requirements. The ordinances restrict an employer's ability to consider criminal history when making employment decisions, and contain even more burdensome procedures that must be followed before an employer can take an adverse employment action, including a requirement that the employer conduct an individualized written assessment.

In light of the numerous, overlapping, and ever expanding laws in this area, employers using background checks and criminal history during the hiring process must exercise caution. Employers should seek legal counsel to review application materials, draft background check policies, and assist in conducting and drafting individualized written assessments.

EMPLOYERS MUST PAY COMMISSION ONLY AND PIECE-RATE EMPLOYEES SEPARATELY FOR REST PERIODS

Pursuant to a recent California Appellate Court decision, employers must pay piece rate and non-exempt commissioned employees separately for rest periods and other "non-productive" time. Non-productive time is time spent doing activities not directly related to earning commissions or making pieces, such as attending meetings or trainings. This means that in many circumstances, compensation for rest periods and other non-productive time must be reflected as separate line items on employee pay stubs.

This rule may not apply when employees are paid at least minimum wage *in addition to* commission. However, if an employer deducts hourly wages paid from employees' future commission compensation (whether described

as a draw or an advance), employees must be separately compensated for rest breaks and other non-productive time.

Employers with employees compensated using incentive-based systems such as piece rate or commission may need to modify their compensation systems, as well as their payroll and timekeeping practices, in order to comply with this decision. Failure to do so may lead to a slew of costly derivative claims, including pay stub violations and waiting time penalties, among other things.

CALIFORNIA EMPLOYERS SHOULD REVIEW THEIR REST PERIOD POLICIES

A recent California Supreme Court decision concluded that state law prohibits employees from being on-duty or on-call during their designated 10-minute rest periods. The Court concluded that even though rest periods are paid time (unlike meal breaks), employers must relieve their employees of all duties and relinquish all control over them during their rest periods.

The Court noted that its ruling does not prevent employers from being able to reasonably reschedule a rest period when a need arises. If a rest period is interrupted, an employer can provide the employee another rest period to replace the interrupted rest period, or the employer may pay the premium for the missed rest period. In this circumstance, premium pay would be an hour of pay.

The Court's decision was based on an employer policy that required security guards to keep their radios and pagers active during rest breaks, and to respond to emergencies. Even though the evidence showed that the security guards rarely were interrupted during their rest periods, the Court found that the employer's exercise of control over the rest periods was enough to violate the law and affirmed a $90 million judgment against the employer.

Meal and rest break compliance continues to be the source of a great deal of litigation against California employers. The Court's decision is likely to have consequences beyond its application to on-call and on-duty rest periods. All employers should take another look at their rest period policies and practices to ensure they do not run afoul of the Court's prohibition on employers exercising control over employee rest periods.

IMPORTANT CLAUSES IN EMPLOYMENT AGREEMENTS MAY BE INVALID

On January 1, 2017, legislation took effect which prohibits employers from requiring employees who primarily live and work in California to do either of the following: 1) agree to litigate or arbitrate claims that arose in California outside of California, or 2) agree to apply another states law to disputes arising in California.

The new law does not impact employment agreements entered prior to January 1, 2017. However, employment contracts entered prior to that date may become subject to the new law if they are subsequently extended or modified. For example, agreements which automatically renew from year-to-year would become subject to the law upon renewal. Agreements which call for annual salary renegotiations, and which are actually renegotiated under the terms of the agreement, may become subject to the law upon salary modification.

The law does contain a few exceptions. First, agreements that are not required as a condition of employment are not impacted by the law. Second, employment agreements which provide employees with a window of time to opt-out of those particular provisions of the agreement before they become effective are also not impacted by the law. Finally, if an employee is represented by counsel during the negotiation of the employment agreement, the agreement would not be impacted by the law. If the employee is represented by counsel during negotiations, best practice would be to amend the agreement to reflect that counsel was involved.

Moving forward, employers who use employment agreements containing out-of-state venue or choice of law clauses should contact counsel to ensure that the agreements are compliant with the new law. Employers should also have existing employment agreements reviewed to see if any renewal or modification terms will make the agreements subject to the new law.

BERKELEY AND SANTA MONICA IMPLEMENT PAID SICK LEAVE

Adding to the patchwork of local paid sick leave ("PSL") laws in California, Berkeley and Santa Monica have adopted their own ordinances requiring that employers of all sizes provide PSL to eligible employees. Santa Monica's PSL law went into effect on January 1, 2017, while Berkeley's PSL law will go into effect on October 1, 2017. In addition to complying with local PSL laws by the effective dates, employers with employees working in these cities must also continue to comply with California's PSL laws. To the extent that certain provisions of local and state PSL laws differ, employers must comply with the provision that is the most employee-friendly. For example, during the first year of its implementation, the Santa Monica PSL law caps accrual for small employers to 32 hours. However, those employers must follow the more employee-friendly provision of the California PSL law allowing an accrual cap of no less than 48 hours.

PSL laws now exist in 30 cities, seven states, three counties, Washington D.C., and counting. In order to avoid harsh administrative penalties and civil litigation, employers in areas with PSL laws should consult with counsel to draft, implement, or update their PSL policies.

PROTECTIONS FOR TRANSGENDER EMPLOYEES EXPANDED

New regulations that took effect July 1, 2017, increased protections for transgender employees. The new regulations expanded the definition of "transgender" to include individuals who are transitioning, have transitioned, or are perceived to be transitioning.

The law requires employers to honor employee requests to be identified by a gender, name, or pronoun of the employee's choice, including gender-neutral pronouns. An employer's failure to do so can lead to liability, including hostile work environment claims.

With limited exceptions, the law also prohibits employers from asking employees or potential employees, directly or indirectly, questions that would identify them on the basis of sex, gender, gender identity, or gender expression. Employment applications and interview questions should be updated accordingly.

Lastly, employers must be allowed to use facilities that correspond with their gender identity (including restrooms, locker rooms, or shower areas). Feasible alternatives to address privacy concerns of other employees are permitted, including locks on toilet stalls or staggered shower schedules. All supervisors and managers should be made aware of the new requirements, and anti-harassment and anti-discrimination policies must be enforced to protect transgender individuals.

NEW DOMESTIC VIOLENCE NOTICE

Under certain circumstances, employers with 25 or more employees must provide employees with a protected leave of absence to address domestic violence, stalking, or sexual assault. As of July 1, 2017, employers with 25 or more employees are also required to provide written notice of the law's requirements to all new employees upon hire, and to any existing employee upon request. Employers may satisfy this requirement by giving employees this notice, which was developed by the Labor Commissioner. Alternatively, employers may create and distribute their own substantially similar notice.

NEW FORM I-9 MUST BE IMPLEMENTED BY SEPTEMBER 18, 2017

For the second time in just eight months, US Citizenship and Immigration Services has issued a new Form I-9. In order to avoid stiff penalties, employers must implement the new form for all new hires no later than September 18, 2017. The new form can be downloaded in both English and Spanish by clicking here.

US DEPARTMENT OF LABOR MAY RESCIND TIP-POOLING RESTRICTIONS

The US Department of Labor's ("DOL")'s new regulatory agenda reveals that it intends to claw back tip-pooling restrictions that have hampered California restaurants. The DOL previously issued rules establishing that tip pools must exclude employees who were not customarily tipped (such as back of the house employees like cooks and dishwashers). The DOL rule has led to substantial litigation, including a case that is pending before the U.S. Supreme Court.

However, the DOL appears set to rescind the rule that has caused so much uncertainty and litigation. In a recent Notice of Proposed Rulemaking, the DOL indicated that will scrap tip pooling restrictions for employers who pay employees at least minimum wage without taking a tip credit. Because California employers are already prohibited from taking tip credits, California employers may soon be able to enforce tip pooling policies which require front of the house staff to share tips with back of the house staff. Nevertheless, until the DOL officially rescinds the rule, employers should maintain tip-pooling policies that prohibit back of the house employees from participating in the tip pool.