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Revised for 2017

California Labor Law

WHAT YOU NEED TO KNOW

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Table of Content

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What You Need To Know

1 California as a Legal Bellwether

As with most everything else in California, legislation here tends to set the pace or even raise the bar for the rest of the nation.

During the Society for Human Resource Management's 2015 Employment Law & Legislative Conference in Washington, D.C., attorney Joseph Beachboard made this comment, *"California is unique. We could spend all three days of the conference talking about what makes this true."*

An article from CNN echoed this sentiment recently:

> *"The state has been first to pass major public health initiatives that have spread throughout the country. California was first to require smog checks for clean air, pass anti-tobacco initiatives and bike helmets laws. While these laws were met with skepticism and ridicule,*

they've often become standard practice in other states. The Golden State was first to ban smoking in workplaces, bars and restaurants in 1998. Now similar rules exist throughout the country." *(http://www.cnn.com/2012/02/10/health/california-leads-health-laws/)*

For example, California is only the second state in the nation to promulgate a statewide paid sick leave plan. This occurred on September 10, 2014 with the signing of the Healthy Workplaces, Healthy Families Act of 2014. Each year, it seems, brings new legislation with additional or changed regulations and reporting requirements. A large number of new employment laws for 2017 have, or will, go into effect as Governor Brown signed another slew of employment related bills from the California 2016 legislative session.

California Labor Laws

The State of California Department of Industrial Relations (DIR) and other agencies work to keep employers apprised of these updates and changes.

As an employer, you need to familiarize yourself with new laws that will affect your day-to-day operations and policies for the next calendar year. However, without due diligence on the part of the business, it is easy to overlook certain requirements. And these oversights can potentially lead to costly claims and penalties. Staying on top of these changes and additions can be a job in itself.

In addition, even within the state of California, every business is different. Some California employers have employees across a number of other states, and even in other countries. Many only employ part-time employees, while others regularly have overtime hours worked and multiple shifts. Unfortunately, ignorance of the law is never a good defense when it comes to California labor law. While no employer deliberately or maliciously violates the law, lack of information or failing to stay up to date can lead to serious issues.

An updated compliance strategy will help your organization meet its obligations, while providing accuracy and timeliness. So take time to understand the law and prioritize accurate record keeping. In this way, you will make compliance a sure thing. This guidebook is designed to help employers to do just that.

2 What's New for 2017?

Employers Were Presented With a Number of New California Labor Laws from the 2016 Legislative Session

As noted earlier, the California legislature recently passed a large number of new laws relating to labor, and amended many others. Most of these changes will take effect on January 1st, 2017 unless otherwise noted in the list.

As a result, it's important for California employers to review their current policies and practices to ensure compliance and provide for any required new workplace postings.

Below is a summary of some of the most notable labor legislation for 2017:

Employers prohibited from requiring an employee to adjudicate a claim outside the state (SB 1241)

On September 25, 2016, Governor Jerry Brown signed SB 1241, which adds section 925 to the California Labor Code, prohibiting an employer from requiring that an employee who primarily resides and works in California adjudicate a claim outside the state or depriving the employee of the substantive protection of California law. Any such prohibited provision is now voidable by the employee.

Effective January 1, 2017, employers doing business in California can no longer require, in an employment contract or offer letter, that a California employee bring an employment dispute outside California or have a dispute decided under the law of another state or a foreign jurisdiction.

Where an employee voids such a provision under the new law, the matter will be adjudicated in California under California law. The legislation exempts contracts regarding venue, forum or choice

of law where the employee is individually represented by legal counsel in negotiating the agreement.

SB 1241 covers agreements entered, modified or extended after January 1, 2017, whether they apply to court proceedings or arbitration. This means that an employer may not use an arbitration clause to require that a dispute be heard outside California or to avoid the application of California law. In addition, attorneys' fees are available to employees who successfully enforce their rights under the new law.

Workplace notices explaining applicable wage and hour law requirements in multiple languages (AB 2437)

The law will require nail salons and other establishments regulated by the state Board of Barbering and Cosmetology (BBC) to post a workplace notice explaining applicable wage and hour law requirements in multiple languages, so that all employers and employees are provided meaningful notice of their workplace rights and responsibilities, and the resources available should there be any violations. The notice must be posted by July 1, 2017, but are effective starting January 1, 2017. This bill requires the Labor Commissioner to consult with the BBC to draft the notice and the required translations.

The notice required by the law will include information regarding the misclassification of employees as independent contractors, and wage and hour laws regarding the minimum wage, overtime, tips, business expense reimbursements, and protections from retaliation. The notice also contains information on how to report violations of the law, which will encourage vulnerable workers to vindicate their rights, and hold unscrupulous employers accountable.

Removing juvenile convictions from the scope of convictions that employers are permitted to ask about (AB 1843)

It used to be that California employers could freely inquire about and consider a job applicant's history of criminal convictions in determining any condition of employment including hiring, promotion, or termination.

Although California law did prohibit employers from asking about or considering arrests, or detentions that did not result in convictions, the law did not impose any restrictions regarding what types of

convictions employers could ask about or consider.

No longer.

On September 27, 2016, California Gov. Jerry Brown signed AB 1843, which removes juvenile convictions from the scope of convictions that employers are permitted to ask about or consider. Specifically, the newly signed bill defines "conviction" to exclude convictions by a juvenile court. It prohibits an employer from asking a job applicant to disclose information (or seeking information from any source) regarding a juvenile court's adjudication. The new law also prohibits an employer from considering an adjudication or court disposition by a juvenile court as a factor in determining any condition of employment.

Lowering the threshold hours for qualifying for overtime wages (AB 1066)

Governor Brown just signed into law Assembly Bill 1066 which incrementally lowers the threshold hours for qualifying for overtime wages so that they are consistent with California's standard overtime rule. That law now expands overtime eligibility for certain categories of employees. Under existing law, California's agricultural workers are entitled to overtime wages when they work more than 10 hours in a work day or more than 60 hours in a work week.

Beginning January 1, 2019, agricultural workers will be eligible for overtime after nine and a half hours worked in a work day, or work in excess of 55 hours in a work week. Beginning January 1, 2020, that overtime threshold will be reduced to nine hours in a workday or 50 hours in a work week. The following year, that number will be reduced to eight and a half hours in a work day or 45 hours in a work week. Eventually, effective January 1, 2022, the overtime basis will be in line with state law, i.e., eight hours in work day or 40 hours in a work week.

To address the concerns of small, independent farms, for businesses with 25 or fewer employees the multi-year phase in is deferred until 2022. The new law also vests with the Governor authority to temporarily suspend the scheduled implementation of the overtime requirements provided that implementation of the scheduled state minimum wage increase is suspended as well.

Employers to Provide New Hires with Written Information about Time-Off Related to Sexual Assault, Domestic Violence or Stalking (AB 2337)

This bill would add new subsection (h) to require employers to provide written information regarding these rights under section 230.1 and rights under Labor Code section 230, subsections (c), (e) and (f) prohibiting retaliation and requiring employers to reasonably accommodate victims of domestic violence, sexual assault or stalking. Employers will be required to provide this written information to new employees upon hire and to other employees upon request.

The bill also requires the Labor Commissioner, by July 1, 2017, to develop a form employers could use and to post it on its website, and specifies that an employer need not comply with these notice requirements until the Labor Commissioner posts the form. Alternatively, employer's may develop and use its own notice provided it is "substantially similar in content and clarity" to the Labor Commissioner's form.

Labor Code section 230.1

prohibits employers with more than 25 employees from discriminating or retaliating against employees who are victims of domestic violence, sexual assault, or stalking from taking time off from work for specified purposes to address the domestic violence, sexual assault, or stalking.

Overtime Provisions for Domestic Worker Employees (SB 1015)

In 2013, California enacted the Domestic Worker Bill of Rights (AB 241) which added Labor Code section 1454 and amended Wage Order 15-2001 to entitle a domestic work employee working as a personal attendant (as defined) the right to daily overtime after nine hours worked and weekly overtime after 45 hours worked. Entitled the Domestic Worker Bill of Rights of 2016, SB 1015 removes the current January 1, 2017 sunset provision for section 1454, thus making those overtime provisions permanent.

Expanded Protections for Janitorial Service Workers (AB 1978)

Known as the Property Service Workers Protection Act, this law enacts numerous measures to protect janitorial industry employees from sexual assault and other Labor Code violations. It requires the

Department of Industrial Relations to develop training materials, by July 1, 2018 for both supervisors and workers, regarding sexual harassment and sexual violence, and to establish requirements for such training. It also directs Cal-OSHA to require janitorial industry employers to include this training as part of its injury and illness prevention plans. Additionally, it establishes a system of janitorial contractor registration to encourage labor standards compliance and to establish prompt and effective sanctions for violating this part.

Heat Illness Prevention Regulations for Indoor Employees (SB 1167)

Since 2006, California's Division of Occupational Safety and Health (DOSH) has adopted and enforced regulations establishing a heat illness prevention standard for outdoor workers. This law requires DOSH to propose for the review and adoption a heat illness and injury prevention standard applicable to workers working in indoor places of employment. This is to be in place by January 1, 2019. This standard shall be based on environmental temperatures, work activity levels and other factors. The DOSH will have the authority to propose high heat provisions limited only to certain industry sectors.

As a reminder, the Division of Occupational Safety and Health has previously produced a flyer entitled "Cal/OSHA Heat Illness Prevention for Indoor Working Environments" which focuses on five key areas of prevention: a written IIPP; frequent drinking of water; rest breaks; acclimation and weather monitoring; and emergency preparedness.

Employer Participation in State-Sponsored Retirement Program (SB 1234)

In 2012, California enacted SB 1234 to create the California Secure Choice Retirement Savings Program (SCRSP) and to create a feasibility study to determine whether the legal and practical conditions of implementation of SCRSP could be met.

Simply summarized, the SCRSP would establish a state administered retirement program for employees that do not have a private retirement plan through their employers, but exempts employees covered under the Railway Labor Act, or provided certain types of pensions, or that have certain enumerated private retirement plans through their employers.

This bill provides legislative approval of the SRSCP and its implementation on January 1, 2017, and also changes the implementation requirements for employers, depending on size. Employers with 100 or more employees must have an arrangement to allow employees to participate in the SRCSP within 12 months after opening of enrollment, employers with 50 or more employees would have to have such an arrangement within 24 months after opening of enrollment, while employers of five or more employees must have an arrangement within 36 months after opening of enrollment.

Even with these deadlines, any employer would have the option to have a payroll deposit retirement savings arrangement early if they prefer.

Businesses to Provide Single-User Restrooms (AB 1732)

In contradiction to North Carolina's recent public restroom legislation requiring people to use public restrooms that correspond to their biological gender, California has passed a law requiring public facilities be designated "all gender" restrooms.

Assembly member James Gallagher was one of 18 assembly members who opposed the bill. He argued that if the bill became law, that would give the state the power to decide how individual business owners and public entities should best serve their customers. He also argued that the gender inclusive restroom bill would inconvenience far more people than gender specific restrooms did.

On September 29, 2016, California Gov. Jerry Brown signed A.B. 1732, which requires all single-user restroom facilities in any business establishment, place of public accommodation, or government agency to be identified as "all gender" facilities rather than being designated as male- or female- only.

The law also authorizes public inspectors or building officials to inspect facilities for compliance with the new ordinance.

This bill will be codified as Section 118600 of the California Health and Safety Code and goes into effect March 1, 2017. In compliance with the new law, businesses should immediately look into whether their single-occupancy restrooms need to be re-designated.

3 Healthy Workplaces, Healthy Families Act of 2014:

Local Ordinances May Trump State Labor Law in 2017

The California paid sick leave law, or Healthy Workplaces, Healthy Families Act of 2014, was one of the most far-reaching pieces of employment related legislation passed in 2014. Employers throughout California, regardless of how many employees they have, are affected by the stipulations of this law which was implemented in two phases.

On January 1, 2015 the qualifying periods that determine which employees are eligible for paid sick leave and the employee notice required by Labor Code 2810.5 became effective. Actual entitlement began on July 1, 2015.

Here are some highlights of the new California paid sick leave law, AB1522, known as the Healthy Workplaces, Healthy Families Act of 2014:

- It adds eight new sections to the Labor Code and amends a ninth section, contains detailed recordkeeping and notice requirements, including a new poster requirement, provides penalties for noncompliance.
- The Act applies to all private and public employers regardless of size; small employers are not exempt.
- All employees who have worked in California for 30 or more days within a year from the beginning of their employment will be entitled to paid sick days under the Act.
- Part-time and full-time employees are covered as well as exempt and non-exempt employees.

- The new law requires employers to provide paid sick leave to any employee who worked in California for 30 days at an accrual rate of one hour for every 30 hours worked.
- Employers are allowed to limit an employee's use of paid sick leave to 24 hours or three days in each year of employment and put a maximum cap on total accrual of 48 hours or six days.
- The effective date for employers to begin providing the paid sick leave benefit is July 1, 2015.
- Accrued paid sick days can carry over to the following year of employment, just like vacation. But, an employer can limit the amount of paid sick days an employee can use in each year of employment to 24 hours every three days.
- Some types of employees are not covered under the Act and are limited to the following four groups:
    - Employees covered by a union contract that specifically provides for paid sick leave, has binding arbitration, and meets other specified requirements
    - Construction employees covered by a valid union contract
    - State providers of in-home supportive services under certain sections of the Welfare and Institutions Code
    - Certain air carrier employees

Some of the things you need to do as an employer

Set up payment and tracking procedures for earned and taken leave

The new law requires that an employer provide payment for sick leave taken by an employee no later than the payday for the next regular payroll period after the sick leave was taken. This does not prevent an employer from making the adjustment in the pay for the same payroll period in which the leave was taken, but it permits an employer to delay the adjustment until the next payroll.

Employees must be paid at their regular hourly rate. If their pay fluctuates because they receive a commission or piece rate, the employer will divide the total compensation for the previous 90 days by the number of hours worked and pay that rate.

Provide the required information to employees

Beginning January 1, 2015, employers were required to post in a conspicuous place at the workplace, a poster containing the following information:

- That an employee is entitled to accrue, request, and use paid sick days
- The amount of sick days provided for and the terms of use of paid sick days
- That retaliation or discrimination against an employee who requests paid sick days or uses paid sick days or both is prohibited
- That an employee has the right under this law to file a complaint with the Labor Commissioner against an employer who retaliates or discriminates against an employee.

Know how qualifying employees accrue and take paid sick leave

Starting July 1, 2015, employees began earning at least one hour of paid leave for every 30 hours worked. That works out to a little more than eight days a year for someone who works full time. But employers can limit the amount of paid sick leave you can take in one year to 24 hours, or three days.

Because paid sick leave accrues began on July 1, 2015 or the first day of employment if hired after July 1, 2015, the 12 month period will vary by hire date for those employees hired after July 1, 2015. Therefore, the measurement will mostly be tracked by the employee's anniversary date.

Local Changes Will Affect Paid Sick Leave in 2017

According to a recent article by JD Supra:

> California's paid sick leave law, known as the Healthy Workplaces/Healthy Families Act of 2014, became effective on July 1, 2015. Although subsequently clarified by amendment, employers have struggled to comply with the new, and often confusing, mandatory sick leave requirements. Adding to this burden is the growing trend among California cities to enact even more generous sick leave ordinances; California employers must not only comply with state sick leave law, but must also be aware that more demanding local laws may apply. Indeed, in some cities, if an employee works even briefly within the city limits, that city's sick leave rules will apply, as well as penalties for lack of compliance. It is therefore critically important that employers know the specifics of any local sick leave law that may apply to their employees, and that they develop appropriate policies and procedures for compliance.

4 Affordable Care Act Changes for 2017

The Affordable Care Act (ACA) has ushered in major changes in workforce planning and management for numbers of employers. Because continued changes in the regulations and for your employees are inevitable, maintaining compliance will become increasingly challenging and complex.

When the smallest error can result in significant penalties it is imperative to have the right infrastructure in place to manage the ACA compliance effectively.

2017: Potential Changes for the Affordable Care Act

During 2016 the Affordable Care Act was relatively untouched. There are, however, two significance increases for employers that will apply for plan year 2017:

Affordability Threshold

Inflation adjustments for the so-called "affordability safe harbor percentages" have been established by the IRS. According to the text of the ACA, the threshold for determining whether a health plan is "affordable" for an employee was "9.5% of household income."

This means that the cost of that employee's coverage cannot exceed this amount. However, the law also provides for inflation adjustments to this threshold percentage. The first adjustment took effect for 2016, increasing the 9.5% of household income threshold to 9.66%.

The IRS announced in April 2016 that applicable large employers (ALEs) can use 9.69% of any of the three safe harbors when calculating the affordability of their group health plan for their full time employees when reporting 2017 coverage in early 2018.

Increased Penalties

The ACA noncompliance penalties have been adjusted for inflation in the same way the safe harbor penalties. At the start of the ACA, applicable large employers (ALEs) that didn't offer coverage to at least 95% of their full-time employees would be subject to a $2,000 per-employee penalty (minus the first 80 employees in 2015 and the first 30 employees thereafter).

In addition, employers that offered unaffordable coverage would be hit with a $3,000 per-employee penalty for each worker who obtained coverage on an exchange.

However, because of the inflation-based premium adjustment percentage, the IRS announced in Notice 2015-87 that the penalty amount would go up to $2,080 for the 2015 plan year and $2,160 in 2016.

The original $3,000 per employee penalty was bumped up to $3,120 for 2015 plan year and $3,240 for 2016. For 2017 the IRS will be assessing a per employee penalty of $282.50 per month, or $3,390.00 per year. This means that an employer with 100 FTE workers could be fined an additional $150 per employee over the amount from the 2016 plan year.

Reviewing the Basics of the ACA Employer Compliance

The IRS issued employers a notice of the specific information they need to collect and report.

The IRS uses employers' Section 6055 and 6056 reports to enforce the so-called "Play or Pay" mandate. Section 6055 requires sponsors of self-insured group health plans and insurance issuers to report on individual enrollments in minimum essential health coverage.

Section 6056 requires employers subject to the "Play or Pay" mandate to report on health coverage offered to full-time employees and their dependents, including information such as each full-time employee's dollar share of the lowest cost monthly premium for self-only coverage.

ACA Compliance Steps You Should be Taking

Because of the complexity of the new information reporting requirements, employers should take the following actions:

- Learn about the new information reporting requirements and review the IRS reporting forms.
- Develop procedures for determining and documenting each employee's full-time or part-time status by month.

- Develop procedures to collect information about offers of health coverage and health plan enrollment by month.
- Review ownership structures of related companies and engage professionals to perform a controlled/affiliated service group analysis.
- Discuss the reporting requirements with the health plan's insurer/third-party administrator and the company's payroll vendor to determine responsibility for data collection and form preparation.
- Ensure that systems are in place to collect the needed data for the reports.

5 What About Covered California?

Although there are no significant policy changes slated for 2017 there will be significant rate increases. And Covered California still faces a potential crisis of insolvency.

Covered California, the state's health insurance marketplace created by the federal health law, warned in July that 2017 premiums would go up an average of 13.2 percent, or more than triple the average 4 percent rate increases that consumers have seen since the exchange started offering coverage in 2014.

While rates are going up an average of 13.2 percent statewide, Covered California's largest insurers — Anthem and Blue Shield of California — are increasing rates by 17.2 percent and 19.9 percent respectively. The state has no laws or regulations that cap premium increases.

The state's three-year-old health insurance exchange was supposed to become completely self-sustaining in 2015. However, the exchange is drowning in red ink and there's no funding coming from the federal government although the $1.1 billion in federal funding is exhausted. Covered California received this money to get the Affordable Care Act exchange up and running. California state law prohibits the state legislature from spending any money to keep the exchange going.

Covered California spent $454 million, nearly half a billion dollars, on their computer system and tens of millions on grants to promote the program. In addition, $80 million was spent on television, radio and Internet marketing campaign including $1.3 million on a promotional video.

In April of 2014 Covered California had a nearly $80 million budget deficit for its 2015-16 fiscal year. Covered California Executive Director Peter Lee acknowledged in December 2014 that there are

questions about the "long-term sustainability of the organization." A 2013 report by the state auditor stated that, until the state's health insurance exchange actually started enrolling Californians in health plans, its "future solvency" was "uncertain." Thus, Covered California was listed as a "high-risk" issue for the state.

Enrollment, however, has been insufficient to keep up with the costs of sustaining the exchange. As of February 7, 2016 Covered California had increased its enrollees by almost 170,000 over the same time in 2015.

How a possible failure of the health exchange will impact employers in California is uncertain, but it is still a real possibility. And, based on the relatively low numbers enrolling, and the ongoing problems managing and communicating with enrollees and employers, any future adjustments of this scale will be equally confusing and costly.

6 California's FUTA Problem and California Employers

The FUTA tax levies a federal tax on employers covered by a state's Unemployment Insurance (UI) program. The standard FUTA tax rate is 6.0 percent on the first $7,000 of wages that are subject to FUTA. The funds from this FUTA tax create what is known as the Federal Unemployment Trust Fund, which is administered by the United States Department of Labor, or DOL.

Generally, employers receive a credit of 5.4% when they file their Form 940 to result in a net FUTA tax rate of 0.6 percent, or 6.0 percent tax rate less the 5.4 percent credit. However, when a state's own UI funds are depleted, the state can borrow from the Federal Unemployment Account (FUA), and if such loans are not repaid within two years that state is designated as a "credit reduction state".

This means that part of the 5.4% FUTA tax credit is reduced, thereby increasing the effective FUTA tax rate in affected states. When this "credit reduction" is applied, the FUTA tax typically increases by 0.3%, or $21 per employee. The tax credit continues to be reduced annually by 0.3% until loans are repaid.

So, although the FUTA tax is a federal tax on employers, the amount of the tax that employers pay is based on the status of the state the employer is based in.

As of 2016, California was in its sixth year as credit reduction state with little hope of seeing its balance paid in the short term. The state still had a loan balance of $ 3,623,853,597 in October 2016. In addition, because California has had an outstanding FUTA debt for six years now, the state has been subject to a special "Benefit Cost Ratio (BCR)" add-on tax since 2014. If applied, this tax could add another 1.5%. The combination of credit reduction and BCR could result in over a five-fold increase over the normal FUTA tax rate.

Fortunately, the state submitted an application requesting a waiver for the BCR add-on which was granted for tax year 2016. But this process will need to be repeated each year going forward until the loan balance is repaid.

These gradual reductions in the tax credit represent a loss of 0.3 percent FUTA credit for 2011, 0.6 percent for 2012, 0.9 percent for 2013, 1.2 percent for 2014 and 1.5 percent for 2015. Tax year 2016 is going to see a loss of 1.8 percent. This represents, for employers, a total FUTA Tax per employee (Regular FUTA $42+$ Offset) of $168. For an employer with 100 full-time employees, that means an additional $16,800 in payroll taxes for the 2016 tax year.

The good news is that, by 2018, the year that the state's UI fund loan should be repaid in full, employers can expect to be paying the normal rate of 6%, offset by a credit of 5.4%, for a payable rate of 0.6% on wages up to $7,000 a year.

California's UI fund will then be "in the black", and the state can begin to build a reserve. This reserve will be depleted again, however, if another recession hits California, unless changes are made to California's UI financing structure.

7 Summary

Yet again, California labor law tends to become the benchmark for the rest of the nation and compliance can be more challenging than in many other states. Each year brings new requirements and new laws that must be complied with.

Most of these changes took effect on January 1st and others may be rolled out later so staying on top of these changes and additions can be a job in itself.

Unfortunately, ignorance of the law is never a good defense when it comes to California labor law, and, while no employer deliberately or maliciously violates the law, lack of information or failing to stay up to date can lead to serious issues.

An updated compliance strategy will help your organization meet its obligations, while providing accuracy and timeliness. So please be sure to take time to understand the California labor laws and prioritize accurate record keeping. In this way, you will make compliance a sure thing.

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Leslie serves on several business and community boards, including serving as a director of the San Rafael Chamber of Commerce. She has served on several key committees in the recent past including Governmental Afairs, Workforce Housing and Leadership Institute. Leslie was appointed by the County Board of Supervisors to serve on the County Workforce Investment Board from 2007- 2010.

9 Related Resources

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