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December 29, 2015

Ready Or Not: New Laws Affecting Employers In 2016 And Beyond

By Greg Blueford

Over the course of 2015, the California Legislature enacted many new laws that have already begun affecting employers and many others which will take effect on January 1, 2016 and beyond. The most significant and impactful laws are summarized below.

Assembly Bill 1513 ("AB-1513"): New Formula For Piece-Rate Compensation And An Affirmative Defense For Past Non-Productive Time

AB-1513 is one of the most controversial bills enacted this year. This bill, codified as Labor Code section 226.2, introduces a new formula for compensating piece-rate employees for rest and recovery periods ("R&R") and other nonproductive time. Employers are required to compensate piece-rate employees for R&R at the higher of: the average hourly rate as determined by a complex formula outlined in the statute; or, the applicable minimum wage. Other nonproductive time, such as travel, safety meeting or exercise, is to be compensated at the applicable minimum wage. Most importantly, all California employers who employ piece rate employees must be in compliance with this statute beginning on **January 1, 2016**.

Further, AB-1513 also provides employers with an affirmative defense to any claim based solely on the employer's failure to compensate employees R&R and other nonproductive time for periods between July 1, 2012 and December 31, 2015. To take advantage of this affirmative defense, the employer must comply with various statutory deadlines, the first of which is July 1, 2016.

Frankly put, this is a complicated statute which requires precise compliance. All piece-rate employers should read the full scope of this bill here and here.

Assembly Bill 304 ("AB-304"): Clarification of California's Paid Sick Leave (Already Enacted)

On July 13, 2015, Governor Brown signed AB-304 to clarify the permissible accrual methods an employer may use in calculating sick leave pay. The new amendments took effect immediately. The amendments clarified, among other things, the threshold qualifications to qualify for leave, the method in which the amount of leave accrues, and the payment of sick leave.

You can read the full scope of California's Paid Sick Leave Law clarifications set forth in AB-304 here.

Assembly Bill 987 ("AB-987): Reasonable Accommodation Retaliation Prohibited

AB-987 allows employees to claim retaliation because they requested an accommodation of their disability or religious beliefs, regardless of whether the accommodation request was actually granted. This bill overturns a California Appellate Court case which ruled that requests for accommodation, without more, did not constitute a protected activity under FEHA. Employers can no longer freely terminate employees for requesting a reasonable accommodation.

You can read the full scope of these changes to California's law regarding employment retaliation set forth in AB-987 here.

Senate Bill 588 ("SB -588"): Fair Day's Pay Act

SB-588 amends or adds 13 statutory sections to California's Labor Code and Code of Civil Procedure and gives the Labor Commissioner additional rights and remedies to enforce awards against employers. More importantly, SB-588 creates additional liability to successor employers and to any person acting on behalf of an employer. Any employer which is similar in operation and ownership to a prior employer which has been deemed liable for wage and hour violations may be held liable for the violations of the prior employer. Further, current and former employees may seek liability for wage and hour violations of an employer against any person acting on behalf of the employer. This means an owner, officer or managing agent may be personally liable for the employer's failure to comply with the California Labor Code and/or Wage Orders.

Senate Bill 358 ("SB 358"): California Fair Pay Act

The new California Fair Pay Act provides employees with greater protection against gender wage inequality. Current law generally prohibits employers from paying any employee at wage rates less than the rates paid to employees of the opposite sex for "equal work" in jobs which require equal skill, effort and responsibility. This new bill changes the phrase "equal work" to "substantially similar work." Substantially similar work is viewed as a composite of skill, effort and responsibility when performed under similar working conditions.

The Fair Pay Act requires an employer to demonstrate that wage differentials are based on lawful, nondiscriminatory factors such as: a seniority system, a merit system or a bona fide factor other than sex. The new law also includes an anti-retaliation provision which prohibits employers from taking adverse actions against employees who seek protection under the Fair Pay Act.

Assembly Bill 1506 ("AB-1506"): Employers Given Time To Cure Small Wage Statement Errors (Already Effective)

Signed as an urgency law on October 2, 2015, AB-1506 amended the Private Attorneys General Act of 2004 ("PAGA") to cure two minor technical violations of the wage statement requirements under California Labor Code section 226. AB-1506 only addresses the requirement under the law to list all inclusive dates of the pay period and the name and address of the employer. An employer now has 33-days to fix any defects to avoid a civil PAGA action regarding the two above-listed defects upon receipt of written notice from an aggrieved employee. This law was enacted to avoid frivolous litigation over technical violations in which the employee was not effectively harmed.

You can read the full scope of AB-1506 here.

Assembly Bill 1509 ("AB-1509"): Retaliation Liability Extended To Employee Family Members

AB-1509 expands employer liability for retaliation against an employee who is a family member of an employee who engaged in a protected activity under California law. Existing law protects only the employee engaging in the protected activity. This law extends that protection and prevents the employer from retaliating against that employee's family members who are also employed by the same employer. As an example, an employer who employs both a husband and wife cannot take any adverse against the wife in retaliation for the husband engaging in a protected activity, such as whistleblowing.

Assembly Bill 970 ("AB-970"): More Power For The Labor Commissioner

AB-970 expands the enforcement authority of the Labor Commissioner regarding the laws governing overtime, minimum wage and expense reimbursement. In jurisdictions where a local entity has the authority to issue a citation against an employer for a violation of local minimum wage or overtime laws, this bill authorizes the local entity to request the Labor Commissioner to investigate and issue citations against the employer. Should the Labor Commissioner issue a citation, the employer cannot be cited by the local entity for the same violation. Further the Labor Commissioner may now issue citations and recover penalties against an employer on behalf on an employee for the employer's failure to pay for necessary expenditures for the employee's direct job duties.

Assembly Bill 622 ("AB-622"): Penalties For Misusing Federal E-Verify Process

Codified as California Labor Code section 2814, this bill creates a $10,000 penalty for employers who unlawfully use E-Verify to verify whether a person is authorized to work before the person has received an offer of employment, or otherwise use E-Verify in a way that is not consistent with the E-Verify obligations for employers. In addition, when employers use the E-Verify system, the new law requires the employer to provide the person with any notification issued by the Social Security Administration or the

United States Department of Homeland Security specific to their E-Verify case "as soon as practicable."

Counsel To Management:

While it may seem impossible to keep up with all of these legislative changes, it is crucial for employers to make sure they remain versed in the ever-changing legal employment landscape. Please contact The Saqui Law Group if you have any questions regarding recently-enacted legislation, especially any concerns regarding Assembly Bill 1513.

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July 14, 2015

AMENDMENTS TO SICK LEAVE LAW CURE SOME ILLS, NOT OTHERS

Written by: Carl Larson *Category: General Legal Updates*

The long-awaited amendments to the paid sick leave ("PSL") law have arrived. They make a good number of clarifications, change calculations of sick pay, provide a grandfather clause for pre-existing PTO plans, and lays out how it affects certain state employees. Although the amendments still do not explain how the "24 hours or 3 days of sick leave" translates for employees working 10 hour regular shifts, it is a welcome change from the previous version of the law.
A breakdown of the changes is as follows:

Qualification

- Threshold qualification for leave is now employment in California **for the same employer** for 30 or more days within a year from the commencement of employment.
- Broadens the construction exclusion to include construction work not performed onsite.
- Excludes retired annuitants of public entities from the PSL law.

Accrual Basis

- Allows for **accrual on any period basis** so long as it is a regular basis and will result in at least 24 hours or 3 days of sick leave available by the 120th calendar day of employment.
    - No longer limited to using basis of 1 PSL hour accrued for every 30 hours worked. Can be by pay period or other regularly occurring period of time.

Frontload

- Frontloaded sick days are allowed to be provided for **each year of employment, calendar year, or 12 month period**.

Use of Sick Leave

- Allows employers to limit the use of sick leave to 3 days or 24 hours in **each year of employment, calendar year, or a 12 month period**.

Payment of Sick Leave

- Allows three methods of calculating how sick leave is paid and clarifies the formulas regardless of whether the employee has different hourly rates, or is paid by commission or piece rate.
    - For non-exempt employees:
        - **Method 1:** PSL pay is calculated based on regular rate of pay during the workweek in which the employee uses paid sick time **whether or not the employee actually works overtime in that workweek**.
        - **Method 2**: PSL pay is calculated by dividing the employee's total wages, not including overtime, by the total number of hours worked in the full pay periods of the prior 90 days of employment.
    - For exempt employees:
        - **Method 3:** Paid sick time is calculated in the same manner as the employer calculates wages for other forms of paid leave time.

Employee Reinstatement

- Makes clear that an employer who rehires an employee within 12 months of separation is **not required to reinstate any paid time off that was cashed out**.

Tracking of Sick Leave

- Allows employers with unlimited leave policies to indicate "unlimited" on the wage statement.
- Makes clear the employer has no obligation to inquire into purposes of sick leave.

PTO Compliance Method

- Employers who provide a paid time off ("PTO") or other paid leave policy (not limited to sick leave) that provides an amount of leave that can be used for the same purposes under the same conditions, do not need to provide additional sick days under the PSL law if:
    - It satisfies the accrual, carry over, and use requirements of the PSL law listed above.

      OR
    - It satisfies the new grandfather clause:
        - An employer provided paid sick leave before January 1, 2015 pursuant to a sick leave or PTO policy on any regular accrual basis that resulted in at least 1 day or 8 hours of leave within the first three months of employment of each calendar year or 12 month period and the employee was eligible to earn at least 3 days or 24 hours within 9 months of employment.
            - If the plan is modified from the one in place Jan 1, 2015, then it must comply with the new PSL law requirements.

State Employees

- For state employees, leave provided pursuant to specified sections of the government code covering leave or as part of a memorandum of understanding will satisfy the requirements of the paid sick leave law.

Notice Requirements

- Delays the notice of PSL rights requirement for employers covered under wage order 11 and 12 to Jan 21, 2016.

Counsel to Management:

The new amendments provide a great deal more flexibility in crafting a PSL plan that complies with the law. It will also ease some of the administrative burden of implementing these policies. Check with the experts at the Saqui Law Group to be certain your existing policy complies, and is still meeting your needs.

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August 11, 2015

Retaliation Because of Request for Disability or Religious Accommodation Prohibited

By: Greg Blueford

California passed AB 987 on July 16, 2015 prohibiting an employer from retaliating or otherwise discriminating against a person for requesting a reasonable accommodation of his or her disability or religious beliefs, regardless of whether the accommodation request was granted.

Existing law requires an employer to provide reasonable accommodation of a person's disability and religious belief. It also prohibits discrimination against any person because the person has opposed the employer's unlawful practices or has filed a complaint of discrimination. However, it was unclear whether the making of a request for accommodation was a protected activity. In October 2013, the Second District Court of Appeal held that making a request for a reasonable accommodation is not protected activity under the Fair Employment and Housing Act ("FEHA"). Due to this ruling, firing an employee based on a request for reasonable accommodation did not give rise to a retaliation claim. As a result, courts have dismissed cases where employees were fired or discriminated against as retaliation for making a request for reasonable accommodation for disability or religion.

The passage of AB 987 legislatively overturns this precedent by specifically declaring a request for a reasonable accommodation to be a protected activity under FEHA. Employers can no longer freely terminate employees for requesting a reasonable accommodation.

Counsel to Management:

This bill clarifies that employees have the right to request an accommodation without fear of retaliation or reprisal. This bill does not require employers to grant all accommodation requests; however, it no longer allows employers to terminate employees based on the request. This does not affect the duty of the employer to engage in a timely interactive process to determine if a reasonable accommodation is available. An employee who places a request for accommodation can raise tricky issues when it comes to taking personnel actions with the employee. The proper response to an accommodation request is fact-intensive and can vary widely from case to case. Please contact The Saqui Law Group for advice on how to respond to requests for accommodation.

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September 14, 2015

Take A Break & Pay Your Piece-Rate Employees Off

By Helen Braginsky, Glen Williams and Greg Blueford

On September 11, 2015, the California legislature passed a game-changing bill affecting employers who compensate their employees on a piece-rate basis for *any work performed* during a pay period. The bill, AB-1513, has two main purposes: 1) to set forth new requirements for compensating piece rate workers for their non-productive time ("NPT"), which includes rest and recovery periods ("R&R"), travel time, safety meetings, etc. and; 2) to create a safe harbor for employers who are currently facing lawsuits regarding a failure to compensate piece rate workers for their NPT.

The compensation provisions of AB 1513 require employers to do all of the following:

(1) Separately compensate R&R NPT and other NPT;
(2) Separately capture R&R and other NPT on employees' wage statements, including itemizations of the total hours, rate, and gross wages paid for each; and
(3) Compensate R&R at the *higher of* either the **applicable minimum wage** *or* the **average hourly rate**, which is calculated as:

$$\frac{\text{(total workweek compensation) – (R\&R compensation and any overtime premium)}}{\text{(total workweek hours worked) – (R\&R hours worked)}}$$

The most controversial aspects of the Bill are its safe harbor provisions. The purpose of the safe harbor is to bar claims seeking the recovery of wages, damages, liquidated damages, statutory penalties, or civil penalties for an employer's failure to properly compensate R&R and other NPT. To qualify for the safe harbor, an employer who is a defendant in such a lawsuit would be required to:

(1) Make payments to all piece-rate employees for uncompensated or under-compensated R&R and other NPT during the period of **July 1, 2012 – December 31, 2015**, using one of the following calculations:
   a. Actual Sums Due – Employer determines the actual R&R and other NPT due plus 10% interest; *or*
   b. 4% of each employee's gross earnings from July 1, 2012 – December 31, 2015 *minus* any amounts already paid for R&R and other NPT (but such credit cannot exceed 1% of the employee's gross earnings in that period).

(2) Provide notice of such payments to the Department of Industrial Relations by or before **July 1, 2016**;

(3) Complete all such payments by or before **December 15, 2016**; and

(4) Provide detailed statements regarding the payments to each employee.

However, employers are only eligible for this safe harbor if they are defendants in lawsuits that were filed on or after March 1, 2014 (or amended by July 1, 2015 to include NPT claims), which assert claims for failure to pay NPT. Furthermore, an employer may not utilize the safe harbor provision if the lawsuit includes any of the following claims:

- NPT claims made in any case filed prior to April 1, 2015, when the case contained an allegation that the employer intentionally deprived wages using fictional/ghost workers;
- Any claims for unpaid wages after January 1, 2016;
- Any claims pertaining to unlawful employment policies (e.g., failure to advise employees of their rights to take R&R breaks, R&R breaks were not made available, or employees were prevented from taking R&R breaks).

While AB-1513 is designed, in part, to stop the bleeding for employers facing massive liability on NPT

lawsuits, many concerns still exist. First, the bill's compensation provisions apply to employees who are compensated on a piece-rate basis for ***any time*** worked during a pay period. If the bill becomes law, employers will be required to track *all* NPT when employees perform even *one minute* of piece-rate work during a pay period.

Additionally, the new NPT compensation rate significantly differs from the NPT rate utilized by Labor Commission Julie Su, which requires compensation based on piece-rate hours. The AB-1513 formula compensates based on the total hours worked during the workweek, exclusive of R&R periods. Thus, piece-rate employees' NPT rates will be affected by any hourly work they perform at a different rate.

Lastly, the Bill is sure to upset those employers who are facing lawsuits filed prior to March 1, 2014, as well as Plaintiffs' attorneys who have expended significant time and resources into their lawsuits. It may only serve to refocus Plaintiffs' attorneys on the other causes of actions not addressed by AB 1513, such as meal period violations. Moreover, employers will still need to decide if making payments under the safe harbor is more cost effective than proceeding without it.

Counsel To Management

AB 1513 will be presented to the Governor for his signature or veto, which he must do by or before October 11, 2015. Employers should keep abreast of whether the bill becomes law, and we will provide a further update and guidance if and when it does. If it becomes law, all companies employing piece-rate workers would need to bring their compensation practices into compliance with the new requirements by January 1, 2016. Additionally, employers facing lawsuits regarding compensation for NPT should speak to experienced attorneys regarding the effects of the safe harbor provisions in AB 1513. Please contact The Saqui Law Group if you have questions pertaining to the potential effect AB-1513 could have on your company.

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September 16, 2015

Pay Your Piece-Rate Employees Off – UPDATE Regarding AB 1513

By Helen Braginsky and Glen Williams

We recently informed you of the California legislature's passage of AB 1513 (*Link to Previous E-Blast*), which – if signed by the Governor – would establish new requirements for compensating piece-rate workers for their non-productive time ("NPT") and would create a safe harbor for employers currently facing lawsuits regarding this issue. We are receiving a lot of inquiries regarding the effects and applications of AB 1513 and will provide new useful information regarding these issues as questions arise.

Safe Harbor – To obtain the litigation safe harbor, an employer must pay its piece-rate employees for under-compensated rest and recovery periods ("R&R") and for other miscellaneous non-productive time ("other NPT") for the period of July 1, 2012 – December 31, 2015. One payment option: paying 4% of each employee's gross earnings over those same 42 months *minus* a credit for any amounts already paid for R&R and Other NPT.

- **NEWSFLASH**: The credit for payments made toward other miscellaneous NPT cannot exceed 1% of the employee's gross earnings in that period, but there is no cap on the credit for R&R already compensated. This means that employers could be credited for every dollar and cent already paid to each employee for his or her R&R time, constituting significant savings in this payment option!

- **NEWSFLASH**: Also, unlike the other Actual Sums Due payment option, this 4% Gross Earnings option does not require the employer to pay 10% interest on the sums due!

Other NPT Compensation – Employers will have to separately capture and compensate employees' R&R and other NPT at different rates.

- **NEWSFLASH**: Unlike R&R, other NPT need only be compensated at an hourly rate no less than the applicable minimum wage.

- **NEWSFLASH**: In capturing employees' other NPT, an employer can do so either: (1) through actually recording the time spent on other NPT; OR (2) by reasonably estimating other NPT time worked during the pay period.

- **NEWSFLASH**: If the employer makes a "good faith error" determining or estimating the amount of other NPT but then remedies the error, the employer will not be liable for civil penalties or liquidated damages based on that error.

Counsel To Management

There will be more to come! Employers should continue to follow developments regarding AB 1513, which must be signed or vetoed by the Governor by or before October 11, 2015. Please contact The Saqui Law Group if you have questions pertaining to the potential effect of AB 1513 on your company.

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October 6, 2015

Employers Receive Small Wage Statement Reprieve

By Kimberley Worley and Greg Blueford

As all employers know, California Labor Code section 226 requires them to provide employees with itemized wage statements with each paycheck. Failure to comply with the nine listed requirements of section 226 subjects employers to extensive lawsuits seeking exorbitant penalties in representative actions brought under the Private Attorneys General Act of 2004 ("PAGA"). In general, PAGA allows up to $200 as a civil penalty per aggrieved current or former employee per pay period.

On October 2, 2015, Governor Jerry Brown AB 1506 (effective immediately) that provides a small reprieve to employers who work quickly to correct the section 226 deficiencies. This new law details an employer's right to "cure" a limited type of wage statement violations, in order to cut off a civil PAGA lawsuit for those specified violations.

The cure process in the new law applies only to the following items required by section 226:

- The inclusive dates of the period for which the employee is paid; and
- The name and address of the legal entity that is the employer; and
- If the employer is a farm labor contractor, the name and address of the legal entity that secured the services of the employer.

The required PAGA process is for the "aggrieved" current or former employees (or their attorney) to send a certified letter identifying wage and hour violations to both the employer and the Labor and Workforce Development Agency. Now, employers have 33 days within which they can cure the specified errors in their itemized wage statements. The 33 calendar days run from the postmark date of the notice.

To cure the alleged violations and avoid the penalties, the employer must provide fully compliant itemized wage statements to each aggrieved individual for each pay period for the three-year period prior to the date of written notice.

Counsel To Management:

The law does not change an employee's ability to seek the costly "statutory" penalties for direct 226 violations in either a class action lawsuit or individually. Therefore, it is imperative that employers comply with all wage statement requirements, regardless of how insignificant they may seem.

Because the 33 calendar day cure period runs from the postmark date of the PAGA notice, quick action must be taken by the employer to take advantage of this opportunity. Mobilizing immediately to identify the extent of the errors, make necessary wage statement adjustments for three years and distribute the new wage statements to current and existing employees is paramount. Please contact The Saqui Law Group if your company receives a notice of PAGA violations or with any other questions regarding PAGA or wage statement compliance.

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