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# Employment Law Alert

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## New California Employment Laws for 2016 – And How to Get Ready

As 2015 draws to a close, California employers should consider reviewing their employee handbooks and policies in light of a host of new workplace laws slated to take effect in the new year. Here is an overview of the key measures signed into law by Governor Brown; unless otherwise specified, these laws take effect January 1, 2016.

- *Fair Pay Act*: S.B. 358 creates one of the strongest pay equity laws in the nation by expanding the existing equal pay provisions in Cal. Labor Code § 1197.5 to now require equal pay for "substantially similar" work. The new law prohibits employers from paying an employee at a wage rate less than that paid to employees of the opposite sex for doing substantially similar work, based on a composite of skill, effort, and responsibility, even if the employees work in different locations. Before the amendment, an employee had to demonstrate he or she was not being paid at the same rate as someone of the opposite sex for "equal work" at the same establishment. The new law also requires employers defending against fair pay allegations to affirmatively demonstrate that a wage differential is based entirely and reasonably upon enumerated factors, such as a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a bona fide factor that is not based on or derived from a sex-based differential in compensation and that is consistent with business necessity. In addition, employers cannot prohibit employees from disclosing their own wages, discussing the wages of others, or inquiring about another employee's wages, although the legislation stops short of creating an *obligation* to disclose wages.

- *Kin Care and School Activities Leave*: A.B. 579 amends California's existing kin care law, Cal. Labor Code § 233, to align the definition of family member and permitted kin care uses with California's new paid sick leave law. As such, the kin care law will now cover time off to care for grandparents, grandchildren, and siblings, and expands kin care reasons to include leave related to diagnosis, care, or treatment for an existing health condition, or for preventive care, as well as certain absences resulting from domestic violence, sexual assault, or stalking. The legislation also expands Cal. Labor Code § 230.8, which addresses time off for

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children's school activities, to permit time off for finding child care and enrolling children in child care or school, as well as for child care emergencies.

- *Accommodation Requests as Protected Activity:* A.B. 987 clarifies that requesting a reasonable accommodation for a disability or religious reasons is a protected activity under the California Fair Employment and Housing Act (FEHA). The law overturns a recent court decision, *Rope v. Auto-Chlor System of Washington, Inc.*, 220 Cal. App. 4th 635 (2013), which held that the FEHA's retaliation protections did not extend to accommodation requests.

- *Retaliation for Labor Code Protected Activity:* While California law already prohibits retaliation against employees who engage in certain protected activity under the Labor Code, A.B. 1509 extends these protections to prohibit an employer or a person acting on their behalf from retaliating against an employee because he or she is a family member of someone who has engaged in protected activity. The new law also spreads financial responsibility for retaliation by a staffing firm or other labor contractor to the "client employer," which is defined as "[a] business entity, regardless of its form, that obtains or is provided workers to perform labor within its usual course of business from a labor contractor."

- *Piece-Rate Compensation*: A.B. 1513 builds on recent California court decisions holding that an employer paying its employees on a piece rate cannot simply average out total piece-rate compensation across "nonproductive" hours (such as rest breaks) in order to satisfy their minimum wage obligations. The new law specifies that employers must pay piece-rate employees for nonproductive time, including rest and recovery periods, *separately from* (and in addition to) their piece-rate compensation. Such nonproductive time must be compensated at an average hourly rate that is no less than the minimum wage and that is determined by dividing the employee's total compensation for the workweek (not including compensation for rest and recovery periods and overtime premiums) by the total hours worked in the workweek (not including rest and recovery periods). If employers pay an hourly rate for all hours worked in addition to piece-rate wages, then those employers would not need to pay amounts in addition to that hourly rate for the nonproductive time. The new law also specifies these additional categories of information that must appear on a piece-rate employee's itemized wage statement: total hours of compensable rest and recovery periods; rate of

compensation paid for those periods; gross wages paid for those periods; and, if employers do not pay a separate hourly rate for all hours worked (in addition to piece-rate wages), the total hours of other nonproductive time, the rate of compensation for that time, and the gross wages paid for that time.

- *Meal Break Rules for Health Care Workers:* S.B. 327 confirms that employees in the health care industry who work shifts of more than eight hours in a day may waive one of their two meal periods by written agreement signed by both the employer and employee. The new law, which took effect immediately upon signing, overturns *Gerard v. Orange Coast Memorial Medical Center*, 234 Cal.App.4th 285 (2015), which had called into question meal break rules applying to the health care industry.

- *Curing Wage Statement Defects*: A.B. 1506 allows employers to cure certain wage statement defects after receiving notice of a PAGA (Private Attorneys General Act) claim from an employee. Specifically, this new law applies to claims alleging that the employer has not included on the wage statement the inclusive dates of the pay period and/or the name and address of the employer. Such violations will be deemed "cured" upon a showing that the employer has provided a fully compliant, itemized wage statement to each aggrieved employee for each pay period for the three-year period prior to the date of the PAGA notice. The cure must occur after the employer receives notice of a PAGA claim within the 33-day period before the employee can file a lawsuit. This law took effect immediately upon signing.

- *Restrictions on Use of E-Verify*: A.B. 622 creates new Cal. Labor Code § 2814, to prohibit employers from using E-Verify to check the employment authorization status of an existing employee or an applicant who has not received an offer of employment, except as required by federal law or as a condition of receiving federal funds. The law imposes a penalty of up to $10,000 per violation.

- *Labor Commissioner Enforcement of Local Wage and Hour Laws:* A.B. 970 authorizes the California Labor Commissioner to investigate and enforce local overtime and minimum wage laws -- such as San Francisco's Minimum Wage Ordinance -- and to issue citations and penalties for violations, except when the local entity has already cited the employer for the same violation. The measure

also gives the Labor Commissioner authority to issue citations and penalties to employers who violate the expense reimbursement provisions of Cal. Labor Code § 2802.

- *Grocery Store Employee Retention*: AB 897 requires successor grocery store employers to retain eligible workers for a 90-day transitional period and, upon completion of that period, to consider offering continued employment to those workers. The new law applies to retail stores in California that are over 15,000 square feet and sell primarily household foodstuffs for offsite consumption. To be "eligible" under the new law, an employee must have worked for the predecessor employer for at least six months and not be a manager, supervisor, or employee with access to confidential or discretionary information (such as legal, budgeting, or development of policies and procedures pertaining to labor/employee relations). Significantly, successor employers cannot refuse to hire inherited employees based on results of background checks or other typical pre-employment screens. Instead, a new employer that does not wish to employ an inherited employee must have a valid reason to terminate the employee "for cause" during the 90-day transitional period.

- *"Cheerleaders" Are Employees:* A.B. 202 requires that professional sports teams classify "cheerleaders" as employees, thereby causing such workers to be covered under wage and hour laws, laws against discrimination and harassment, and other employment statutes. The statute defines "cheerleader" broadly to include any individual associated with a California-based professional sports team "who performs acrobatics, dance, or gymnastic exercises on a recurring basis." As such, for example, the statute would cover not just cheerleaders at NFL games, but also dance teams at NBA games and some costumed mascots.

Employers should take steps now to ensure that their policies and practices are reviewed and updated to comply with these new workplace laws. For a full discussion of these laws and other employment developments, along with best practices for compliance, join Miller Law Group for our annual Year in Review webinar on Thursday, December 10 from 10am-11:30am PST. You can register for the webinar here.

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