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2016 Midyear Employment Law Update

By: Gail Cecchettini Whaley, J.D.;
CalChamber Employment Law Counsel/Content

It's only July, but it's already been a busy year for employers with lots of action from the California Legislature, federal and state agencies, local governments and our courts.

All we can say is, "Whew!"

The following recaps some of the more significant developments to date.

Wage and Hour

Not surprisingly, this area of employment law received a lot of attention from policymakers, enforcement agencies and the courts.

The state minimum wage will increase in 2017, and several local minimum wage ordinances take effect July 2016.

State Minimum Wage Increase on the Horizon

Governor Brown signed SB 3, a bill that will increase the minimum wage in California to $15 per hour by 2022. Employers should start preparing for the minimum wage increase by examining all pay practices that may be affected.

SB 3 calls for an increase of $.50 per hour beginning January 1, 2017, and an increase of $.50 per hour in January 2018. The rate would then increase $1 per year thereafter until 2022. Small businesses (25 or fewer employees) won't be required to begin the scheduled increases until 2018.

Once the minimum wage reaches $15 per hour for all businesses, wages could then be increased each year up to 3.5 percent (rounded to the nearest 10 cents) for inflation as measured by the national Consumer Price Index.

In addition to the statewide minimum wage increase, several localities, including Los Angeles, Santa Monica and Pasadena, also passed minimum wage ordinances, with implementation deadlines and rates that can differ from the state's.

Several local ordinances have increases effective July 1. Employers must use the minimum wage rate that is most beneficial to the employee and should check local ordinances.

Federal Overtime Rule Published

The U.S. Department of Labor (DOL) announced the highly anticipated federal overtime rule under the Fair Labor Standards Act (FLSA). The final rule is effective December 1, 2016.

The final rule changes the salary level that must be met before an employee can be exempt from overtime under one of the so-called white-collar exemptions (executive, administrative and professional).

The minimum salary threshold will increase to $913 per week, $47,476 annually for a full-time worker. An employee paid less than this threshold amount will be guaranteed overtime pay. This threshold is higher than California's minimum annual salary threshold for the white-collar exemptions, which is currently $41,600.

Effective December 1, an employee will need to meet the higher federal salary threshold of $913 per week to be classified as exempt under both California and federal law. California employees must continue to meet California's strict duties test, in addition to the salary test.

Employers have options to respond to the federal overtime rule, including: (1) raising employees' salaries to meet the new threshold; or (2) reclassifying positions to nonexempt and paying overtime and complying with other rules, such as meal- and rest-break requirements, that govern nonexempt employees.

Employers who reclassify employees should make sure that the newly nonexempt employees understand California-specific rules, such as rules on meal and rest breaks and timekeeping. Employers concerned about limiting overtime will also need to plan ahead.

California employees must continue to meet California's strict duties test, in addition to the salary test.

Navigating the terrain between California and federal rules can be complicated. Employers must comply with the law that gives the most protection to the employee.

Rounding Practices OK if Neutral

California law requires employers to keep accurate records reflecting the hours their employees work. Sometimes, the legality of an employer's "rounding" of timecard entries comes into question.

In a recent decision, a federal court confirmed that a company can round nonexempt employee time up to the nearest quarter-hour as long as the practice is neutral both on its face and in practice — meaning that, over time, the practice doesn't favor either the employer or the employee.

Further, one minute of uncompensated time was determined "de minimis" and, thus, was not compensable time (*Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership*, 2016 WL 1730403 (9th Cir. 2016)).

No Combined Rest Breaks

A California court affirmed that, in general, rest breaks cannot be combined (*Rodriguez v. E.M.E., Inc.*, 2016 WL 1613803 (2016)).

The case involved employees at a metal-finishing company who worked eight-hour shifts and were provided one 30-minute meal break and one combined 20-minute rest break, which occurred either before or after the meal break.

Relying on the California Supreme Court's guidance in *Brinker Restaurant Corp. v. Superior Court*, the appellate court ruled that "rest breaks in an eight hour shift should fall on either side of the meal break, absent factors rendering such scheduling impracticable." A company has no right to combine rest breaks as a matter of law.

However, unusual or exceptional circumstances may permit a combined rest break. A departure from the general rule is allowed only if the departure: (1) will not unduly affect employee welfare; and (2) is tailored to alleviate a material burden that would be imposed on the employer by implementing the preferred schedule.

Poor Recordkeeping Increases Overtime Liability

A recent U.S. Supreme Court decision highlights one of the many dangers of not keeping proper records of time worked and wages paid: you might not be able to defend yourself if you're sued by employees who claim you didn't pay them the right amount (*Tyson Foods Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016)).

The Supreme Court upheld a $5.8 million verdict for unpaid overtime against Tyson Foods. The underlying case involved workers in a pork-processing plant in Iowa who claimed that time spent "donning and doffing" (changing into required protective clothes/gear), washing up and walking to and from their work stations lengthened their workweek and entitled them to overtime pay.

The company didn't keep complete and adequate time and pay records, so the Court allowed Tyson workers to use an expert's averaging and statistics to show they weren't paid the right amount.

You might not be able to defend yourself if you're sued by employees who claim you didn't pay them the right amount.

Remember, California employers are required by law to keep accurate time and payroll records, and there are penalties for failing to do so.

Department of Labor Sets Broad Definition of Joint Employer

The U.S. DOL issued new joint employer guidance in an attempt to hold more companies responsible for workers they may hire indirectly, such as when a company uses a temp or staffing agency. The DOL also created a webpage devoted to joint employment issues, which includes answers to frequently asked questions and additional fact sheets.

The DOL clearly intends that joint employment be defined broadly, focusing on the "economic realities" of the working relationship between the employee and the potential joint employer.

According to the DOL, the core question in determining joint employer status where there is an intermediary employer, such as a staffing agency, is whether the worker is "economically dependent" on the company that hired the staffing agency and whether the company is ultimately benefitting from the work. Several factors may be applied, but none of them should be applied in a manner that loses sight of the core question.

Discrimination and Harassment

Employers will have to be aware of key changes relating to discrimination and harassment laws.

New Regulations Emphasize Prevention

Amendments to the state's Fair Employment and Housing Act (FEHA) regulations took effect on April 1. The FEHA covers California's civil rights laws, protecting workers in California from unlawful discrimination and harassment in employment and providing other rights, such as leaves of absence.

The recent amendments cover a wide range of topics under the FEHA, but perhaps the most important thing for employers to know is that the amendments reinforce state law that it's an employer's affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct.

The FEHA protects workers in California from unlawful discrimination and harassment in employment.

Most significantly, the FEHA amendments:

- Mandate that California employers have a written discrimination, harassment and retaliation prevention policy and distribute the policy to all employees with an acknowledgment of receipt.
- Require employers to establish a complaint process that includes information on how to bring a complaint, the company's investigatory process and supervisor reporting obligations. Employers must include the complaint process in the written policy.
- Create new obligations for mandatory supervisor training for employers with 50 or more employees.

Updated PDL Posting Requirement

California's notice obligations relating to pregnancy disability leave (PDL) also changed on April 1. Employers with five or more employees must post the updated PDL notice — *Your Rights and Obligations as a Pregnant Employee* (revision date 4/1/2016). This notice replaces the former "Notice A" and satisfies your PDL posting requirements.

Transgender Guidance

The Department of Fair Employment and Housing (DFEH) issued new guidance for employers to specifically address protections, including restroom-related protections, for transgender persons. Although the guidance is not binding legal authority, it does provide information about how the DFEH will interpret the law and where the agency may focus enforcement efforts.

State law already specifically prohibits discrimination on the basis of both gender identity and gender expression — regardless of the person's assigned sex at birth — and protects an employee's right to appear or dress consistently with his/her gender identity or gender expression.

At the federal level, the Equal Employment Opportunity Commission (EEOC) recently issued a fact sheet regarding bathroom-access rights for transgender employees under federal anti-

discrimination laws. The EEOC also has been involved in several recent cases that involve transgender-related discrimination issues.

Constructive Discharge Claims: When Does the Clock Start Ticking?

An employee who resigns in the face of intolerable discriminatory or harassing working conditions can bring a claim for wrongful termination, known as "constructive discharge." In May, the U.S. Supreme Court held that the time period for filing a constructive discharge claim begins when the employee gives definite notice of his/her resignation (*Green v. Brennan*, 136 S.Ct. 1769 (2016)).

This case resolved a split between federal circuit courts: some ruled that the clock started at the time of resignation, and others ruled that it started at the time of the last allegedly discriminatory act giving rise to the resignation.

Disability Related Protections

Protections for the disabled continue to be an important area of focus.

Duty to Accommodate Non-Disabled Employees

In a controversial ruling, a California appellate court ruled that an employer's duty to provide reasonable accommodation applies not only to disabled employees but also to non-disabled employees who are associated with a disabled person (*Castro-Ramirez v. Dependable Highway Express*, 246 Cal.App.4th 180 (2016)).

The case involved a truck driver who needed accommodations to care for a disabled son who underwent dialysis daily.

Employers now have a duty to accommodate non-disabled employees who are associated with a disabled person.

No other published California ruling has mandated that associates of the disabled are entitled to reasonable accommodation under the state's FEHA. Non-disabled employees have long been protected from adverse employment decisions based on their association with a disabled person. However, no court has previously imposed an affirmative duty to accommodate the non-disabled employee.

This decision could end up before the California Supreme Court. In the interim, employers who receive accommodation requests that relate to caring for a person with a disability, rather than to the employee's own disability, should consult legal counsel.

Wellness Programs and Discrimination Issues

The federal EEOC issued final rules on how the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) apply to employer wellness programs that are part of a group health plan. The new rules set limits on wellness programs that require employees to answer disability-related questions or undergo medical exams, such as health risk assessments or blood pressure checks, to either earn a reward or avoid a penalty.

Under the final ADA rule, companies may offer incentives of up to 30 percent of the total cost of self-only coverage in connection with wellness programs. If the incentives stay under the 30-percent threshold, the wellness program still will be considered voluntary and will not violate ADA prohibitions against disability-related inquiries or medical exams.

The rules will apply only prospectively to workplace wellness programs beginning on or after January 1, 2017. The new rules also contain provisions intended to ensure confidentiality and privacy of collected information and anti-discrimination protections.

Working Conditions

The biggest development in this area of employment law deals with "suitable seating" and when employers have to provide such seating to employees.

Suitable Seating Addressed by Supreme Court

The California Supreme Court issued a long-awaited decision on the issue of when an employer must provide "suitable seats" to an employee (*Kilby v. CVS Pharmacy, Inc.*, 63 Cal.4th 1 (2016)). The majority of California's Wage Orders require "suitable seats when the nature of the work reasonably permits the use of seats."

But questions lingered about how to apply this requirement, and workers, such as bank tellers and cashiers, filed class-action lawsuits over when seating was required.

When are employers required to provide "suitable seating" to employees?

The state Supreme Court ruled: If the tasks performed at a given location reasonably permit sitting and providing a seat would not interfere with the performance of any other tasks that may require standing, a seat is called for.

To determine whether the nature of the work "reasonably permits" use of a seat at a particular location, courts will also look at the totality of circumstances, including:

- The relationship between standing and sitting tasks;
- The frequency and duration of those tasks with respect to each other;
- Whether providing a seat would unduly interfere with other standing tasks;
- Whether the frequency of transition from sitting to standing may interfere with the work; and
- Whether seated work would affect the quality and effectiveness of overall job performance.

An employer's business judgment, customer service considerations and the physical layout of the workspace are all relevant to the issue of whether a seat must be provided, but the weight given to any factor by a court will depend on the circumstances. An employer's "mere preference" that tasks be performed while standing is not enough.

This ruling will require employers in many industries to perform a case-by-case analysis of tasks performed at various locations, such as check-out aisles, to determine if a seat is required at that location. The burden is on the employer to show that compliance is not feasible.

Workplace Safety

Safety in the workplace also received attention from policymakers and the courts.

Smoking Ban Extended

Governor Brown signed a package of bills that changed the rules relating to smoking in the workplace and expanded already-existing, smoke-free workplace protections. These rules became effective on June 9, 2016.

In part, the new legislation:

- Treats the use of e-cigarettes and other nicotine-delivery devices, such as vaporizers, as "smoking" — thus extending existing smoking bans to cover such products.
- Expands smoke-free workplace protections by getting rid of most of the existing exemptions that permitted smoking in certain work environments, such as bars, hotel lobbies and warehouse facilities.
- Eliminates the ability to have employer-designated smoking break rooms.
- Expands the workplace smoking ban to include owner-operated businesses and to eliminate any small business exception for employers with five or fewer employees.
- Raises the legal smoking age from 18 to 21, except for active military personnel.

Employers will want to review existing workplace smoking policies to ensure compliance with the new law. Consult legal counsel if you think an exemption might apply to your place of work.

New workplace smoking rules took effect June 9, 2016. Employers should review existing policies.

Court Sides With Employer in Workers' Comp Case

A state appeals court ruled that a worker's claim of a psychiatric injury did not meet the tests to qualify for workers' compensation coverage because the worker had been on the job for less than six months and the injury did not result from a "sudden and extraordinary" employment condition (*Travelers Casualty & Surety Company v. Workers' Compensation Appeals Board*, 246 Cal.App.4th 1101 (2016)).

State law provides an exception to allow a workers' compensation claim for psychiatric injury to be covered within the first six months an employee is on the job if the injury is the result of a sudden and extraordinary employment condition.

Although the employee's injury was "more serious than might be expected," the court said, "it did not constitute, nor was it caused by, a sudden and extraordinary employment event" within the meaning of the law.

The employee, a live-in maintenance supervisor for an apartment complex, slipped and fell on a concrete walkway while walking in the rain to another building in the complex. The employee routinely walked between apartment buildings on concrete walkways, and the slip and fall was "the kind of incident that could reasonably be expected to occur."

Don't Forget Laws From Last Year

Several laws that passed last year also are effective on **July 1, 2016**.

Wage Garnishment

Beginning July 1, 2016, a withholding order cannot exceed the lesser of:

- 25 percent of an individual's weekly disposable earnings; or
- 50 percent of the amount by which the disposable earnings for the week exceed 40 times the state minimum hourly wage in effect. If the debtor works in a location where the local minimum hourly wage is greater than the state minimum hourly wage, the local minimum hourly wage in effect at the time the earnings are payable must be used for the calculation.

Piece-Rate Employees

Employers with piece-rate workers who have concerns regarding whether they properly paid workers in the past for rest and recovery periods or other non-productive time must file notice with DIR by July 1 of intent to make back payments to take advantage of the affirmative defense that is created by statute.

State Disability Insurance

The Unemployment Insurance Code is amended effective July 1 to reflect that a second disability claim filed within 60 days of the initial claim will be considered one disability benefit period. Also, the seven-day waiting period before disability benefits begins is waived for someone who has already served the waiting period for an initial disability and then files a second disability benefits claim for the same or related condition within 60 days after the first claim.

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