Attention California Employers:
New Employment Laws Affecting Your Business Take Effect on January 1, 2016

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In past years the Governor of California has enacted new laws related to employment that place additional burdens on employers, while granting additional rights to employees. This year is no exception. Although there is some minimal relief to employers, Governor Brown has enacted a number of employee-friendly laws, most of which go into effect on January 1, 2016. This is a brief synopsis of the new employment laws that we believe are the most likely to affect your businesses.

The Fair Pay Act

One of the most notable new laws is an amendment to Section 1197.5 of the California Labor Code by SB 358—the Fair Pay Act ("FPA"). The FPA replaces the current "equal work" standard with a new "substantially similar" standard. Prior to the FPA, Section 1197.5 prohibited an employer from paying an employee of one sex less than an employee of the opposite sex for *equal work* on jobs requiring equal skill, effort and responsibility, and performed under similar working conditions. Under the FPA, Section 1197.5 now prohibits employers from paying an employee of one sex less than an employee of the opposite sex for "substantially similar work when viewed as a composite of skill, effort, and responsibility under similar working conditions." Whereas courts have been able to at least look to the federal Equal Pay Act for assistance in interpreting Section 1197.5 due to the similarity of the language, courts and employers are now left on their own to guess as to what constitutes "substantially similar work when viewed as a composite of skill, effort, and responsibility."

Moreover, prior to the FPA, employers were only prohibited from paying opposite sex employees differently when they did equal work at the same establishment. The FPA has deleted the "same establishment" requirement, and now prohibits wage differentials for opposite sex employees doing substantially similar work in *any* of the employer's establishments.

The FPA did not amend away an employer's affirmative defenses and ability to protect itself. Section 1197.5 still authorizes employers to pay employees of the opposite sex who do substantially similar work differently where the employer is able to demonstrate that the wage differential is based upon a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or upon a bona fide factor other than sex, such as education, training, or experience. However, the FPA specifically emphasizes that such a bona fide factor (1) may not be based on or derived from a sex-based differential in compensation, (2) must be job related with respect to the position in question, and (3) must be consistent with a "business necessity." This defense will not apply if the employee is able to show that "an alternative business practice exists that would serve the same business purpose without producing the wage differential."

The FPA also adds a retaliation provision, prohibiting employers from discharging, discriminating, or retaliating against any employee for bringing or assisting with a claim under Section 1197.5. Further, while employers are not required to disclose the wages of one employee to another employee, they may not prohibit employees from disclosing their own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under Section 1197.5.

Finally, prior to the FPA, employers were required to keep records of the wages and wage rates, job classifications, and other terms and conditions of employment of persons employed for a period of two years. Under the FPA, employers are now required to keep these records for three years.

Piece-Rate Compensation

Existing law prohibits an employer from requiring an employee to work during any meal, rest or recovery period, and requires these periods to be treated as hours worked. Existing law also requires employers to furnish accurate, itemized written pay statements that show specified information, such as gross and net wages earned, total hours worked, and all deductions. For employees paid on a piece-rate basis, the number of piece-rate units earned and any applicable piece rates also are required.

AB 1513, which adds Section 226.2 to the Labor Code, requires employers to compensate piece-rate employees for rest and recovery periods and "other nonproductive time" separately from any piece-rate compensation. It also requires employers to include additional items on pay statements for piece-rate employees.

Specifically, piece-rate employees must be compensated separately for rest and recovery periods at an hourly rate that is no less than the higher of (1) an average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods, and (2) the applicable minimum wage.

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(Special payment terms apply to employees who are paid on a semi-monthly basis.) Piece-rate employees must be compensated for other nonproductive time at an hourly rate that is no less than the applicable minimum wage.

With respect to itemized pay statements, Section 226.2 requires employers to state the following items separately: (1) the total hours of compensable rest and recovery periods, the rate of compensation, and the gross wages paid for those rest and recovery periods during the pay period, and (2) the total hours of "other nonproductive time," the rate of compensation, and the gross wages paid for "other nonproductive time" during the pay period.

An employer that pays an hourly rate of at least the applicable minimum wage for all hours worked, in addition to paying any piece-rate compensation, is not required to compensate employees separately for "other nonproductive time," or to include these separate items for "other nonproductive time" on pay statements.

Moreover, Section 226.2 establishes an affirmative defense to certain claims for recovery of wages, damages, liquidated damages, statutory penalties, civil penalties or premium pay that are based solely on the employer's failure to pay timely compensation due for rest and recovery periods and other nonproductive time for time periods prior to and including December 31, 2015, if the employer complies with all of the following:

(1) The employer makes payments to each of its employees (except where valid releases are in place prior to specified dates) for previously uncompensated or undercompensated rest and recovery periods and other nonproductive time from July 1, 2012 to December 31, 2015, inclusive, using one of two prescribed formulas.

(2) By no later than July 1, 2016, the employer provides a specified written notice to the Department of Industrial Relations of the employer's election to make these payments to its current and former employees, which the Department will post on its website until March 31, 2017.

(3) The employer begins making the payments to the affected employees as soon as reasonably feasible after providing the notice to the Department, and completes the payments no later than December 15, 2016.

(4) The employer provides the affected employees with an accompanying statement regarding certain details of the payment.

Meal Periods for Health Care Employees

Section 512 of the Labor Code requires that employers provide two meal periods for work in excess of 10 hours, with employees being allowed to waive the second meal period if their total hours of work are no more than 12 hours. Despite this general rule, Section 11(D) of Wage Order 5 allows employees in the health care industry to waive one of their meal periods on shifts exceeding 8 hours. Employers and employees in the health care industry relied on Section 11(D) to allow these employees to waive one of their two meal periods if their shift exceeded 12 hours.

An appellate court decision in 2015 held that Section 11(D) of Wage Order 5 is invalid because it conflicts with Labor Code Section 512. SB 327, which amends Section 512, effective October 5, 2015, effectively overrules that appellate court decision retroactively and makes it clear that healthcare workers have been able, and continue to be able, to waive one of their meal periods if their shift exceeds 12 hours.

Maximum Wage Garnishments

Under SB 501, which amends Section 706.050 of the Code of Civil Procedure effective July 1, 2016, the maximum amount of disposable earnings of an individual judgment debtor for any workweek that is subject to levy under an earnings withholding order must not exceed the lesser of (1) 25% of the individual's disposable earnings for that week, or (2) 50% of the amount by which the individual's disposable earnings for that week exceed 40 times the state minimum hourly wage in effect at the time the earnings are payable.

Private Attorneys General Act: Additional Rights to Cure

The California Private Attorneys General Act ("PAGA") authorizes an aggrieved employee to bring a civil action to recover specified civil penalties, which otherwise would be assessed and collected by the California Labor and Workforce Development Agency, on behalf of the employee and other current and former employees for the violation of certain provisions of the Labor Code. PAGA currently provides the employer with the right to cure certain violations before the employee may bring a civil action. For other violations, PAGA does not provide the employer with a right to cure, but only requires the employee to follow specified procedures before bringing a civil action.

Section 226(a) of the Labor Code requires employers to provide certain specific information on the pay statements it provides to its employees with their wages, such as their gross and net wages, total hours worked and deductions. PAGA does not currently provide a cure period with respect to an employer's failure to include any of this required information on the pay statements of its employees.

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AB 1506 adds the following two required items of information specified in Section 226(a) to the list of violations that are subject to a cure period: (1) the inclusive dates of the period for which the employee is paid, and (2) the name and address of the legal entity that is the employer. A violation either of these sections is considered to be cured upon a showing that the employer has provided a fully compliant, itemized wage statement to each aggrieved employee. Note that AB 2074 limits this right to cure to once in a 12-month period.

E-Verify System

The federal E-Verify system enables participating employers to use the system, on a voluntary basis, to verify that the employees they hire are authorized to work in the United States. Existing law prohibits states and other government entities from requiring a private employer to use an electronic employment verification system (including E-Verify), except when required by federal law or as a condition of receiving federal funds. Existing law also prohibits an employer (or any other person or entity) from engaging in defined unfair immigration-related practices against any person for the purpose of retaliating against the person for exercising specified rights.

AB 622, which adds Labor Code Section 2814, expands the definition of an unlawful employment practice to prohibit an employer (or any other person or entity) from using the E-Verify system at a time or in a manner not required by a specified federal law or not authorized by a federal agency memorandum of understanding 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.

AB 622 also requires an employer that uses the E-Verify system to provide the affected employee with any notification issued by the Social Security Administration or the United States Department of Homeland Security containing information specific to the employee's E-Verify case or a tentative non-confirmation notice (i.e., a notice indicating that the information submitted into the E-Verify system did not match the information in the federal system). There is a civil penalty of $10,000 to an employer for each violation.

AB 622 does not affect an employer's right to use E-Verify to verify that an applicant is authorized to work in the United States after the employer has made an offer of employment to the applicant.

Minimum Wage and Related Matters

The minimum wage in California will increase from $9.00 per hour to $10.00 per hour on January 1, 2016. In addition, the minimum wage in San Francisco will increase from $12.25 per hour to $13.00 per hour on July 1, 2016. This is important not only to companies that employ lower-wage workers, but also because it affects the standard for exempt status. For example, in order to be exempt from being paid overtime under the executive, administrative and professional exemptions, the employee must be paid at least twice the minimum wage per month. This means that in 2016 the minimum annual salary to be considered an exempt employee in California will rise to $41,600. With respect to certain computer software employees, their overtime exemption in Labor Code Section 515.5 will require them to receive a minimum of $41.85 per hour, or a salary of $87,185.14 per year, effective January 1, 2016. Lastly, employers should take note that the U.S. Department of Labor is scheduled to release its proposed final rule regarding amendments to the federal Fair Labor Standards Act in 2016. It is anticipated that, among other things, the DOL will raise the weekly salary required for exempt status from $455 to $970, which equates to an annual salary of $50,440. This would create the rare exception where federal law is less friendly to employers than California law.

Discrimination and Retaliation Protections Extended to Family Members

Currently, Labor Code Sections 98.6, 1102.5 and 6310 prohibit an employer from discharging, discriminating, retaliating, or taking any adverse action against any employee or applicant because the employee or applicant has engaged in protected conduct, such as filing a complaint with the Labor Commissioner regarding unpaid wages, or disclosing an employer's violation of a statute or regulation to a government agency. Effective January 1, 2016, AB 1509 amends Sections 98.6, 1102.5 and 6310 to extend the protections of these provisions to an employee who is a family member of a person who is engaged in, or who is perceived to be engaged in, conduct protected by these provisions. Thus, both the employee who engaged in the protected category and the family member of the employee will be entitled to reinstatement and reimbursement for lost wages if they were improperly discharged or suffered an adverse action. Any employer who violates these provisions is subject to a civil penalty of up to $10,000 per violation and may be charged with a misdemeanor if the employer willfully refuses to reinstate or otherwise restore an employee or the employee's family member.

Employee Time Off

Labor Code Section 230.8 applies to employers with 25 or more employees. Existing law prohibits employers from discharging or discriminating against any employee who is a parent, guardian, or grandparent having custody of a child enrolled in a K-12 school or a "child day care facility" for taking up to 40 hours of unpaid time off each year for the purposes of participating in school activities, subject to specified conditions. SB 579 broadens Labor Code Section 230.8 by revising "child day care facility" to "child care

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provider," and by defining "parent" to include the following: parents, guardians, stepparents, foster parents, grandparents, or persons standing in loco parentis to, a child. Under SB 579, employees who are "parents" may take unpaid time off to enroll or reenroll their children in a school or with a licensed child care provider.

SB 579 also amends Labor Code Section 233 ("Kin Care") to align with the Healthy Workplaces, Healthy Families Act of 2014 ("HWHFA") (Labor Code Section 245, *et seq.*). Section 233, which applies to all employers, will now provide that employees may use their paid sick leave for any of the purposes specified in HWHFA, which includes the following: for their own illness or injuries, for the diagnosis, care or treatment of an existing health condition of, or preventive care for, the employee or the employee's family member, or if the employee is a victim of domestic violence, sexual assault, or stalking. In addition, SB 579 redefines "family member" to have the same meaning as defined in HWHFA.

Labor Commissioner's Power to Enforce Judgments and Individual Liability

SB 588 bestows on the Labor Commissioner the right to use any of the existing remedies available to a judgment creditor and to act as a levying officer when enforcing a judgment. That is, effective January 1, 2016, a Labor Commissioner can place a lien or levy on an employer's property, bank accounts and/or accounts receivable to collect on wages owed and attorneys' fees. SB 588 also provides that a new business will be considered the "same employer" for purposes of liability if (1) the employees of the successor employer are engaged in "substantially the same work in substantially the same working conditions under substantially the same supervisors," or (2) the new entity "has substantially the same production process or operations, produces substantially the same products or offers substantially the same services, and has substantially the same body of customers."

Moreover, SB 588 adds Labor Code Section 558.1, which states that any "other person acting on behalf of an employer" (defined as a natural person who is an "owner, director, officer, or managing agent of the employer") who "violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates [certain designated sections of the Labor Code], may be held liable as the employer for such violation." This new section thus expands the potential liability of the specified individuals beyond the civil penalty described in Labor Code Section 588.

Accommodation Requests for Disability or Religious Purposes

AB 987 is in response to several recent California appellate court decisions holding that the act of requesting an accommodation is not considered to be a protected activity. (See *Nealy v. City of Santa Ana* (2015) 234 Cal.App.4th 359; *Rope v. Auto-Chlor Sys. Of Washington, Inc.* (2013) 220 Cal.App.4th 645). AB 987 is intended to overturn these court decisions by amending the Fair Employment and Housing Act to prohibit an employer or covered entity from retaliating or otherwise discriminating against a person for requesting accommodation for his or her disability or religious beliefs, regardless of whether the accommodation request was granted.

Disability Benefits Waiting Period

Under existing law, a disabled individual is eligible to receive state disability benefits only after a waiting period of seven consecutive days of being unemployed and disabled. If an employee returns to work after a period of temporary disability for more than two weeks before experiencing a reoccurrence of the same condition, the employee is required again to serve a seven consecutive day waiting period before being eligible for benefits. Effective July 1, 2016, SB 667 waives the seven day waiting period for an individual who has already served a seven day waiting period for the initial claim when that person files a subsequent claim for disability benefits for the same or related condition within 60 days after the initial disability benefit. SB 667 further provides that if an individual receives two consecutive periods of disability benefits due to the same or a related cause or condition, and if the periods are not separated by more than 60 days, they are considered as one disability benefit period.

Vetoed Bills

In addition to the above bills that were signed into law, there were a number of bills that were vetoed by Governor Brown, the most notable of which are as follows:

AB 465 would have made it unlawful for an employer to discharge, discriminate, or retaliate against an employee for refusing to sign an arbitration agreement as a condition of employment. Because AB 465 was vetoed, California law still permits an employer to mandate that its employees sign arbitration agreements as a condition of employment.

AB 676 is the California Legislature's second attempt at making "unemployment status" a protected category. Had AB 676 been signed by Governor Brown, employers would have been prohibited from either (1) posting a job opening stating that unemployed persons are not eligible for the job, or (2) asking applicants to disclose their current employment status. Like he did last year, Governor Brown vetoed the bill because "nothing has changed," and

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the bill does "not provide a proper or even effective path to get unemployed people back to work."

In AB 1017, the California Legislature tried to add a provision to the Labor Code that would prohibit an employer from seeking salary history information from an applicant for employment. Proponents of the bill stated that AB 1017 is meant to combat the effects of past discrimination due to gender or other immutable characteristics. Although Governor Brown vetoed the bill, in so doing, he stated that AB 1017 may not be necessary due to the enactment of the Fair Pay Act, and that there is little evidence that AB 1017 would ensure more equitable wages.

SB 406 is the California Legislature's attempt to broaden the scope of the California Family Rights Act of 1993 ("CFRA"). Currently, CFRA provides that a qualified employer must allow an eligible employee to take up to 12 weeks of unpaid protected leave to take care of the employee's parent, spouse, or child who has a serious health condition. SB 406 would have expanded CFRA by also allowing eligible employees to take up to 12 weeks of unpaid leave to care for siblings, grandparents, grandchildren, domestic partners and parents-in-law with serious health conditions. Governor Brown vetoed SB 406 because the bill conflicted with the federal Family and Medical Leave Act and would in certain circumstances unfairly "require employers to provide employees up to 24 weeks of family leave in a 12 month period."

Employers should audit their current policies and practices, and make any necessary changes to ensure that they are in compliance with these new laws.

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