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GENERAL

Labor and Employment Law - New Year's Resolutions for 2017

01.04.17 | Linda J. Rosenthal, JD

Now that the hustle and bustle of the holidays are over, it's time to start making resolutions for the New Year.

As a small business or nonprofit organization, January is the ***perfect*** time to look forward and ensure you have the best employment foundation and plan for the coming year.

For example, do you have an employee handbook? When was the last time it was updated? Did all of your employees receive the most recent version and execute a signature page? How long has it been since your employment agreement was updated?

There have been significant changes in California employment law, with more to come throughout 2017 and 2018. A well-drafted, up to date employee handbook can help a business prevent employee disputes and avoid litigation.

Any good employee handbook should address leave, compensation and other provisions – and considering the changes on the calendar, the time to ensure they are up to date is NOW. Below is a brief summary of relevant labor and employment law updates affecting businesses across the state of California in the coming year. Many of these updates are set to take effect on January 1, 2017. Employers should review their policies and practices to ensure compliance and to limit potential exposure depending on their varying needs and concerns.

Tip: Did you know that in 2016 For Purpose Law Group established a new employment practice group in order to better serve our clients with the goal of assisting nonprofit and business employers of all sizes with their employment related needs including litigation and best practices?

We look forward to providing services and insight to our clients in this field. There have been significant changes in California employment law, with more to come in 2017 and 2018. Well-drafted, up to date employee documents can help a business prevent employee disputes and avoid litigation.

California Paid Family Leave Updates

California Paid Family Leave (PFL) provides **wage replacement benefits** to individuals who lose wages when they need to take time off work to care for a seriously ill child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered domestic partner, or to bond with a new child entering the family by birth, adoption, or foster care placement. Benefits are payable for a maximum of 6 weeks during a 12 month period.

Effective January 1, 2018, AB908 established an increase in employee's weekly PFL benefits of 60% or 70% of their weekly wages, depending on the highest quarterly wages earned during a base period instead of the former flat 55%. These increased benefits also apply to disability benefits for individuals who are unable to work due to non-work related illness or injury, pregnancy, or childbirth. Effective January 1, 2018, the amendment also eliminates an existing 7-day non-payable waiting period for PFL benefits.

It is important to understand there is a difference between the job protection and other benefits provided by FMLA and the California Family Rights Act (CFRA) and California Paid Family Leave. It is an area that can get confusing, and even the best-intentioned employers can make a costly mistake. If your information is incorrect, you risk interfering with or improperly withholding your employee's benefits, subjecting you to a possible legal action.

Tip: Do you have a leave of absence policy? Be sure your employee is actually on 'unpaid leave' before requiring or allowing them to use accrued paid leave, vacation or sick time.

The California Family Rights Act (CFRA), Gov. Code, § 12945.2, was established to ensure **job protection** rights. The CFRA applies to private employers that have employed at least 50 employees within a 75 mile radius and provides eligible employees up to 12 weeks of protected, unpaid leave during a 12-month period to care for a seriously ill child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered domestic partner, or to bond with a new child entering the family by birth, adoption, or foster care placement, or due to an employee's own serious medical condition that prevents the employee from performing his or her job duties.

Employers may have complementary leave policies which may include requiring or allowing employees to use accrued paid leave, vacation or sick time, when an employee goes on unpaid leave, which is permitted and regulated by both the CFRA and FMLA. Do you have a stated paid leave policy? It is important to make sure these internal policies align with CFRA and FMLA. This is one of the top areas where employers get tripped up and their policies can unintentionally violate the law, leading to an employee complaint or legal action.

Employees who are receiving disability benefits or partial wage replacement benefits while on CFRA leave are not considered to be on "unpaid leave." **Therefore, while employers can require employees to utilize accrued paid leave PRIOR TO or AFTER CFRA leave, they cannot require those employees to use any accrued paid leave DURING the CFRA leave.**

Further, pregnancy is not considered a serious health condition under the CFRA. Where employee leave relating to pregnancy disability is covered under the FMLA, pregnancy itself is not covered as a "serious health condition" under the California Family Rights Act. Instead, in California, a pregnant employee is entitled to a Pregnancy Disability Leave (PDL) of up to 4 months (16 weeks). Unlike CFRA leave, **Employers with only *5 or more employees* are subject to this Act.** There is no eligibility period for employees seeking PDL. The first 12 weeks of PDL can run concurrently with FMLA for eligible employees, and for that period, employers need to keep eligible employees' health benefits.

The eligible CFRA employee can *then* take their 12-week CFRA baby bonding leave in addition to the PDL.

Changes and Updates to California Sick Leave

California sick leave was established by the Healthy Workplaces Healthy Families Act of January 2015. You should already be complying with California Sick Leave requirements, which went into effect on 7/1/2015, however multiple cities in California have now enacted their own sick leave requirements heading in to 2016. The following California cities now have sick leave ordinances applicable to some or all of the employees working within their boundaries: Berkeley, Emeryville, Oakland, Long Beach, the City of Los Angeles, the County of Los Angeles, San Diego, San Francisco, and Santa Monica. No two ordinances are exactly the same, so it is important to make sure you are in compliance. Employers with employees in some or all of those cities or counties must comply with both state law and the applicable city/county ordinance, which can result in a patchwork of necessary policies for ***one*** employer.

Tip: Do you have a sick leave policy? Does it comply with both state and local regulations? Are your managers properly trained on how and when an employee may use sick leave?

The New Year is a good time to take a look at your sick leave policies and ensure that managers understand paid sick leave general requirements, reasons for using paid sick leave, and there is no retaliation against employees for using paid sick leave.

Wage and Hour Update – Minimum Wage on the Rise and the Ripple Effect

As of January 1, 2017, minimum wage will increase for California businesses with 26 or more employees. Smaller businesses, with 25 or less employees, will have an extra year before seeing higher rates, with their increase to take effect on January 1, 2018. Senate Bill 3 established rates up and through 2022, with future increases to be linked to increases in the consumer price index. California state minimum wage will be increase incrementally, as follows:

For employers with 1-25 employees:

- $10.00 as of 1/1/16
- $10.50 as of 1/1/18
- $11.00 as of 1/1/19
- $12.00 as of 1/1/20

For employers with 26 or more employees, the increases are accelerated:

- $10.00 as of 1/1/16
- **$10.50 as of 1/1/17**
- **$11.00 as of 1/1/18**
- **$12.00 as of 1/1/19**

Tip: Make sure you've properly classified your workers as exempt, or non-exempt from California's overtime rules. The criteria for classification include

Minimum salary for **overtime exemption** increases as California minimum wage increases: the exemption is currently pegged at $41,600.00 in California, but as the minimum wage increases, that number will climb! The exemption will increase to $43,680 on 1/1/17 for employers with 25+ employees, and will increase to $45,760 on 1/1/18 for businesses with 25+ employees. If the fight to increase the minimum wage to $15 succeeds, the exemption will become $62,400 annually! This is a flat minimum salary, and cannot be prorated for a part time exempt employee. As we've posted about previously, the United States Department of Labor has long sought to increase the salary and compensation levels necessary for employees to be exempt from the federal Fair Labor Standards Act.

Local Minimum Wages are also going up as the "Fight for $15" movement continues. For example, San Diego's minimum wage will increase to $11.50 as of January 1, 2017. Los Angeles will increase to $12.00 on July 1, 2017. These, and a number of other local municipalities have legislated their own scheduled increases. Additionally, not all of these wage increases take effect in January, so it's important to stay on top of your locally scheduled increase!

Defending Wage and Hour Cases: Getting More Expensive

Regular review and annual vigilance is crucial to ensuring compliance with the new wage requirements and avoiding an employee wage and hour action. Assembly Bill 2899 expands the requirement that employers post a bond upon appeal of wage violations under California Labor Code Section 1971.1 AB 2899 now applies the bond requirement to appeals for cases that were initiated by the Labor Commissioner for violations of wage laws. It also requires that employers post a bond with the Labor Commissioner prior to filing an appeal of a decision by the Labor Commissioner relating to violation of minimum wage laws. The bond must cover the **total amount of minimum wages, liquidated damages, and overtime compensation owed** to employees. The total amount of the bond is to be forfeited to the employee if the employer fails to pay the amounts owed *within 10 days* from the conclusion of the proceedings.

Fair Pay Act and the Elimination of Wage Disparities

California law prohibits employers from paying employees at rates less than the rates paid to employees of the opposite sex for substantially similar work when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions. (Labor Code Section 1197.5) This year the California legislature further accentuated the need to use objective, non-discriminatory factors in determining wages, advancement, bonuses and any other compensation.

Question: Are all of your employees being equally compensated for equal work?

Assembly Bill No. 1676 provides that an individual's prior salary cannot, by itself, justify any disparity in compensation. It's easier to make this mistake than you think. Maybe a new hire comes in demanding less than market value for their position. Maybe in considering an employee's compensation, you consider how much they are making now or have been making and just 'bump it up'. Next time it's time to hand out raises or bonuses, or bring on a new employee, employers should consider a number of factors including market value of the position, seniority, merit, that employee's production.

Question: What factors do you consider when issuing employee compensation? Is that enough?

Senate Bill No. 1063 also amends Labor Code Section 1197.5 to expand the Fair Pay Act to prohibit

employers from paying lesser wages to employees of another race or ethnicity for substantially similar work. An employer is going to need to affirmatively demonstrate that wage differentials are based on lawful, nondiscriminatory factors such as: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a bona fide factor other than race or ethnicity.

It is clear this is an area of focus for the California Department of Labor in the coming year, and employers should expect strict enforcement and penalties. Now is the time to dust off the books, take a look at your employees, their compensation and job descriptions, and make sure there are no glaring disparities to an outsider looking in.

Pay Stub Reform – Itemized Wage Statements for Exempt Employees

Labor Code Section 226 currently requires employers to state the total number of hours worked by the employee on his or her itemized wage statements. Previously, the only exception to this requirement applied to employees paid solely by salary and exempt from overtime pay under Labor Code Section 515(a) or applicable Industrial Welfare Commission (IWC) Wage Orders.

Assembly Bill 2535 expands this exception to cover other employees who are exempt from minimum wage and overtime. Employers will not be required to list an employee's total hours worked if the employee is exempt from the payment of minimum wage *and* the employee is exempt from overtime.

Medical Marijuana: California's Prop 64 Impact on Employers

California voters passed Proposition 64, which permits the recreational use of marijuana for adults 21 years old and over. Prop 64 continues to prohibit smoking while driving a vehicle, in all public places, and anywhere that smoking tobacco is prohibited. Possession of marijuana on the grounds of a school, day care, or youth center while children are present is illegal.

Question: Do you have a drug testing policy in place? Can an employer regulate an employee's marijuana use now that Prop 64 has passed?

First, it's important to note that marijuana remains a crime under federal law. Regardless of state and local regulations, federal law supercedes and is the supreme law of the land. Prop 64 contains provisions that codified case law that emerged after the legalization of medical marijuana, making clear that employers remain free to test workers for marijuana use before hiring them, or at any point during their employment if there is a reasonable suspicion of impairment. If employees test positive, Prop 64 allows businesses to terminate their employment even if there is no indication that they were actually impaired on the job.

Notable Employee Handbook Updates

Based on the new regulations, it is highly likely you are going to need to update your employee handbook. If you cannot remember the last time your employee documents were updated, or worse, you have multiple versions circulating, it is time to update your handbook and related documents. Here are some updates you will need in 2017:

SB1241: FORUM SELECTION CLAUSE

Senate Bill No. 1241, now codified as California Labor Code Section 925, mandates that an employer cannot require employee who lives and works in California to agree, as condition of employment, to non-California venue or choice of law.

Section 925 permits employees who primarily reside and work in California to unilaterally void forum selection or choice of law clauses in most agreements with their employers that are entered into, modified, or extended after January 1, 2017 that would require the employee who *primarily resides and works in California* to adjudicate claims arising in California in any locale outside the state. This applies to all employment agreements required as a condition of employment—such as arbitration agreements, executive agreements, and commission agreement. An employee may void only the specific provision, however, not the entire agreement.

AB 1843: BAN THE BOX

Assembly Bill 1843 Prohibits employers from seeking or using juvenile criminal history in consideration of employment. California Labor Code Section 432.7 prohibits most employers from asking an applicant to disclose any arrest or detention that did not result in a conviction, or from using such information. AB1843 expands this prohibition to include any information concerning or relating to an arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while the person was subject to the process and jurisdiction of juvenile court law.

AB2337: NEW NOTICE REQUIREMENTS

Assembly bill 2337 is going to require written notice to new employees, and current employees on request, regarding domestic violence, sexual assault, and stalking protections. Existing law prohibits an employer from discharging or in any manner discriminating or retaliating against an employee who is a victim of domestic violence, sexual assault, or stalking for taking time off from work for specified purposes related to addressing the domestic violence, sexual assault, or stalking.

The bill requires the Labor Commissioner, on or before July 1, 2017, to develop a form that an employer may elect to use to comply with these provisions. *Employers are not required to comply with the notice of rights requirement until the Labor Commissioner posts the form, but it is worth preparing your documents now.*

Cases Worth Watching

These are the major highlights of new California regulations that employers will face in 2017. In addition to the slew of new legislation, there are some notable cases on the horizon worth watching including:

Troester v. Starbucks Corp., Docket No. S234969: Which will address whether FLSA de minimis doctrine applies under California law, meaning whether infrequent and insignificant periods of time beyond the scheduled working hours, which cannot as a practical matter be precisely recorded for payroll purposes, may be disregarded. The courts have previously held that such periods of time are insignificant “de minimus”. In some industries, particularly where time clocks are used, there has been the practice for many years of recording the employee’s starting and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Such practices of recording working time have generally been acceptable, provided they do not result in failure to count all the time the employees have actually worked. This decision may affect a large number of employers, and is one we will be keeping an eye on.

McLean v. State of Cal., 1 Cal.5th 615 (2016) regarding how final paycheck timing rules apply to employee who is retiring.

Alvarado v. Dart Container Corp. of California, Docket No. S232607 regarding the proper method for

calculating overtime rate based on hourly wage plus flat-sum bonus.
Doe v Google – regarding the breadth and legality of employee confidentiality agreements and corporate internal surveillance of employees.

New Year Checklist

Based on the new regulations taking effect and in anticipation of the current trends in California employment law, employers should review their policies and practices—preferably with legal counsel—to ensure compliance and to limit potential exposure depending on their varying needs and concerns.
To assist employers prepare for 2017, we have prepared a checklist:

- Update employee handbook and all employment documents for compliance with new laws for 2017
- Review current employment contracts and applications for non-compliant terms and provisions
- Conduct pay audits of current employee salaries and consider eliminating prior salary questions from job applications
- Train staff and managers on new laws
- Review state and local sick leave requirements and ensure policies are in compliance
- Ensure all CA employees are receiving paid sick leave or PTO
- Post updated state and local workplace notices
- Assess workplace drug policy in light of Prop 64
- Review I-9 procedures to ensure they are being followed
- Update no-smoking policy
- Ensure all single occupancy bathrooms are now designated ‘all gender’
- Ensure compliance with state and local minimum wage increases for both hourly and salaried employees.