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Labor & Employment ADVISORY ■

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Don't Be Caught Off Guard by New California Employment Laws

California continues to be a hotbed of employment-related litigation. Careful drafting of your company's employment policies and diligent monitoring of compliance with those policies are critical to avoiding regulatory fines, penalties and employee lawsuits. Here are some current issues worthy of note.

New California Sick Leave Law

Effective July 1, 2015, California will have a new sick leave law that applies to all employers (regardless of size). Under the law, an employee who, on or after July 1, 2015, works in California for 30 or more days within a year from the start of employment is eligible for paid sick leave. The law covers exempt, part-time and temporary employees. Employees must have been employed for 90 days before they can begin using their accrued sick leave, even though they actually begin accruing the leave itself at the commencement of employment or July 1, 2015, whichever is later. The new law provides an accrual rate of one hour for every 30 hours worked, regardless of the number of hours an employee works per week. Employees may use the paid sick leave for the employee's own health condition or that of a family member. In addition, an employee may use the paid sick leave if he/she is a victim of domestic assault, sexual violence and/or stalking.

Under the law, "family members" include the employee's children, spouse, registered domestic partner, grandparent, grandchild and sibling. This is a significant expansion of the definition of family members presently provided for under the California Family Rights Act (grandparents, grandchildren and siblings are not included within that definition). The new law significantly expands the types of family members an employee can take protected leave to care for.

The statute permits an employee to use accrued paid sick time for preventive care that would appear to include physicals, flu shots and other routine health maintenance.

Employers are not required to pay accrued unused sick leave to an employee who is terminated . If you rehire a terminated employee within one year of termination, under the new law the rehired employee will regain his/her previously unused, accrued sick leave.

Employees can begin using their accrued sick days on or after the ninetieth day of employment. Employers must permit the employee to use the paid sick leave upon oral or written request. When the need for sick leave is "foreseeable," the employee must give reasonable advanced notice. The employee need only give notice "as soon as practicable" when the need for leave is "unforeseeable." Employers should give an employee taking sick leave the benefit of the doubt even if you think additional notice should have been given.

Sick leave may be used in increments of less than one day, and employers may set a minimum use of two hours or less.

Under the new law, all unused sick leave the employee has accrued will carry over to the following year. The statute prohibits an employer from disciplining an employee for using sick days accrued under the statute. If an employee uses paid sick days for the purposes described in the statute, disciplining the employee for taking "unexcused" absences could give rise to a retaliation claim.

Employers would be wise to have their attorneys review current PTO policies to ensure compliance with federal, state and local laws.

Misclassification of Independent Contractors

In 2014, federal and state regulators declared their intention to impose fines and penalties on companies that improperly classify employees as independent contractors. Employee lawsuits alleging misclassification of independent contractors are also on the rise. California enacted Labor Code Section 2810.3, which became effective on January 1, 2015. The new law requires companies that use workers provided by staffing agencies to "share with a labor contractor all civil legal responsibility and civil liability" for the payment of wages and the provision of workers' compensation insurance. The effect of this new Labor Code provision is to make it more difficult for companies to argue that they are not joint employers (and that workers are independent contractors) in relation to wage claims and workers' compensation claims. If you use staffing agencies to supply your company with workers, be aware that your company may be jointly liable for the claims of aggrieved workers for unpaid wages, penalties and all other remedies available to an aggrieved temporary employee.

Just a reminder…
The Inside Sales Exemption to Minimum Wage Laws and Overtime Requirements

In 2015, the federal minimum wage is $7.25 per hour. The federal Fair Labor Standards Act (FLSA) establishes that minimum wage and requires employers to pay overtime, or 1.5 times the employee's regular rate of pay, to employees who work more than 40 hours in a work week. The FLSA's minimum wage and overtime requirements apply to all employees, including commissioned employees, unless the employee comes within one of the statutory exemptions. Please note that contractors with government contracts, or doing work in particular cities, are often required to pay prevailing or other hourly wages that are substantially higher than the federal minimum wage.

Commissioned sales employees may fall within one of two statutory exemptions to the FLSA, the outside sales exemption or the inside/retail sales exemption. An employee is exempt under the outside sales exemption if the employee's primary duty is making sales or obtaining orders or contracts for services or the use of facilities from paying clients or customers and the employee is customarily and regularly engaged away from the employer's place of business. Qualified outside sales people are exempt from both minimum wage and overtime requirements.

Commissioned inside sales people may be exempt from overtime (but not minimum wage) under the inside/retail sales exemption if the employee's regular rate of pay (including commissions) exceeds 1.5 times minimum wage and more than half the employee's total earnings are in the form of commissions.

If a commissioned sales employee does not come within one of these two narrowly defined exemptions (sales people will usually not qualify for other FLSA exemptions), the sales employee is not exempt under federal law and is entitled to overtime in addition to commissions.

For 2015, California's minimum hourly wage is $9.00 per hour. Like federal law, California has an exemption that may apply to inside sales persons. The California exemption has two prongs: (1) an employee's "earnings [must] exceed one and one-half (1½) times the minimum wage," i.e., $13.50 per hour; and (2) "more than half of that employee's compensation [must represent] commissions."

California Labor Code Section 204(a) generally provides that wages "are due and payable twice during each calendar month." This requirement applies to commission wages. Employers do not have an obligation to pay unearned commission wages in any particular pay period. Commissions are owed only when they have been earned, even if it is on a monthly, quarterly or less frequent basis. Commissions are payable in the semimonthly pay period in which they are earned. In addition, employees must be paid at least twice a month, and more than half of the compensation must represent commissions. Check with your employment attorney to ensure that your policies and practices will satisfy the federal and state inside sales exemption.

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