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EMPLOYMENT LAW UPDATE 2017

WAGE & HOUR

1. **Minimum Wage** (Effective January 1, 2017)

At companies with 26 or more employees, the minimum wage will increase from \$10 an hour to \$10.50. Under the plan, the state's hourly minimum wage will increase from the current \$10 to \$10.50 on Jan. 1, 2017, then to \$11 the following year, and increase by \$1 annually until 2022. ** The City of San Diego's Earned Sick Leave and Minimum Wage Ordinance became effective on July 11, 2016 and is applicable to employees who perform at least two (2) hours of work in one or more calendar weeks of the year within the geographic boundaries of San Diego. All employers must pay each employee, for each hour worked within the geographic boundaries of the City, wages not less than the minimum wage rate of \$11.50, effective January 1, 2017.

2. **Itemized Wage Statements** (Effective January 1, 2017)

Existing law requires that employers provide their employees an accurate itemized statement in writing containing specified information as listed in Labor Code Section 226. This Bill clarifies that employees who are exempt from the payment of minimum wage and overtime are not required to have their hours tacked and logged on an itemized wage statement (pay stub). Employers must continue to include the total hours worked by non-exempt employees in the itemized wage statements for each pay period.

3. **Minimum Wage Violations** (Effective January 1, 2017)

This Bill amends Labor Code Section 1197.1 and requires that an employer appealing a ruling by the Labor Commissioner for violation of wage and hour laws must first post a bond with the Labor Commissioner in an amount equal to the unpaid wages, excluding penalties. The bond must be in favor of the employee and will be forfeited to the employee if the employer fails to pay the amounts owed within 10 days from the conclusion of the proceedings.

4. **Payroll** (Effective January 1, 2017)

This Bill requires employers who must notify employees of their eligibility for the *Federal* Earned Income Tax Credit to also notify said employees that they may be eligible for the California Earned Income Tax Credit under the same conditions.

DISCRIMINATION AND RETALIATION PROTECTIONS

1. Expansion of Fair Pay Act: Prior Salary/Race & Ethnicity (January 1, 2017)

The Fair Pay Act, which went into effect on January 1, 2016, prohibits an employer from paying any of its employees wage rates that are less than what it pays employees of the opposite sex for substantially similar work (formerly, “equal”), when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions (formerly, “same establishment”). The Fair Pay Act provides for exceptions such as, the wage differential is based upon one or more of the following factors: (a) a seniority system; (b) a merit system; (c) a system that measures earnings by quantity or quality of production; (d) a bona fide factor other than sex, such as education, training, or experience.

Salary: AB 1676 amends the Fair Pay Act (Labor Code Section 1197.5) to provide that an employee’s prior salary cannot, by itself, justify any disparity in compensation under the bona fide factors above. The law is intended to help ensure that both employers and workers are able to negotiate and set salaries based on the requirements, expectations, and qualification of the person and the job in question, rather than on an individual’s prior earnings, which may reflect widespread, long-standing, gender-based wage disparities in the labor market.

Race & Ethnicity: SB 1063 amends Labor Code Sections 1197.5 and 1199.5 and expands the requirements of the Fair Pay Act to include employees’ race or ethnicity, and not just gender.

2. Gender Neutral Restrooms (Effective March 1, 2017)

Commencing on March 1, 2017, this Bill requires all single-user toilet facilities in any business establishment, place of public accommodation, or government agency to be identified as all-gender toilet facilities. This Bill would authorize inspectors, building officials, or other local officials responsible for code enforcement to inspect for compliance with these provisions during any inspection

3. Immigration Related Unfair Practices (Effective January 1, 2017)

Employers who are in the process of verifying that workers have the necessary documentation to work in the United States are prohibited from requesting of such workers more documents or different documents than are required under federal law, to refuse to honor documents tendered that on their face reasonably appear to be genuine, to refuse to honor documents or work authorization based upon the specific status or term of status that accompanies the authorization to work, or to reinvestigate or re-verify an incumbent employee’s authorization to work. Under this Bill, that adds Labor Code Section 1019.1, applicants and employees may file a complaint with the Division of Labor Standards Enforcement. Any person who is deemed in violation of this new law is subject to a penalty imposed by the Labor Commissioner of up to \$10,000, among other relief available.

4. Criminal History in Applications for Employment (Effective January 1, 2017)

This Bill amends Labor Code Section 432.7 and prohibits employers from asking applicants to disclose, or from utilizing as a factor in determining any condition of employment, information concerning or related to “an arrest, detention, process, diversion, supervision, adjudication, or court disposition that occurred while the person was subject to the process and jurisdiction of juvenile court law.” For purposes of this Bill, “conviction” does not include “any adjudication by a juvenile court or any other court order or action taken with respect to a person who is under the process and jurisdiction of the juvenile court law.”

*Under existing laws, an employer cannot ask an applicant about an “arrest or detention that did not result in conviction, or information concerning a referral to, and participation in, any pretrial or post-trial diversion program, or concerning a conviction that has been judicially dismissed or ordered sealed pursuant to law.”

EMPLOYEE LEAVES OF ABSENCE, BENEFITS & PROTECTIONS

1. Employment Protections For Victims Of Domestic Violence, Sexual Assault, Or Stalking (Effective July 1, 2017)

This Bill requires that by July 1, 2017, employers with 25 or more employees provide specific information in writing to new employees upon hire and to other employees upon request of their rights to take leave under Labor Code Section 230.1 (relating to victims of domestic violence, sexual assault, or stalking). This Bill also requires that, on or before July 1, 2017, the Labor Commissioner develops a form that employers may elect to use to comply with these provisions and to post it on the Labor Commissioner’s website. Employers are not required to comply with the notice of rights requirement until the Labor Commissioner posts such form.

2. Paid Family Leave Benefits (Effective January 1, 2018)

Paid Family Leave (PFL) provides short-term benefits to eligible employees 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.

This Bill revises the formula for determining benefits available to those eligible employees “for periods of disability commencing after January 1, 2018, but before January 1, 2022.” This Bill provides “a weekly benefit amount minimum of \$50 and increases the wage replacement rate to specified percentages, but not to exceed the maximum workers’ compensation temporary disability indemnity weekly benefit amount established by the Department of Industrial Relations pursuant to existing law.” Further, this Bill removes the existing 7-day waiting period for paid family leave benefits.

3. Paid Sick Leave – CA/San Diego (Effective July 2016)

California Law: California law currently requires that an employee who has worked at least 30 days—whether on a part time or full time basis, and even if working in a temporary position—is entitled to paid sick leave. Annually, each California employee must receive at least three days of paid sick leave, and the law provides employers two options for deciding how sick leave accrues:

OPTION ONE: employees earn at least one hour of paid leave for every 30 hours worked. If you implement such a policy, you can cap employees’ maximum accrual of sick leave at 48 hours or 6 days and can limit use to 24 hours/3 days of the paid sick leave time in any annual period. OPTION TWO: employees receive a lump-sum sick leave bank of 24 hours/3 days at the beginning of each year. If you do this, you need not allow employees to carryover unused accrued sick leave into the next year.

San Diego Ordinance: San Diego’s Ordinance requires these same employees, working within the boundaries of the City of San Diego, must receive up to five days or 40 hours of sick leave per year. Also in line with the California law, the San Diego Ordinance states that sick leave must begin to accrue when employment starts, but employers need not allow employees to use it until the employee’s 90th day of employment.

The Ordinance allows employers to cap an employee’s total earned sick leave at **80 hours**. It is important to note that accrued but unused paid sick leave must still roll over to the next benefit year. However, with the new amendments, once an employee accrues 80 hours of paid sick leave, the employee will stop accruing until he or she uses that sick leave.

Alternatively, employers have the option of providing the 40 hours of paid sick leave to employees at the beginning of each benefit year, similar to California’s sick leave law. A benefit year is any regular and consecutive 12-month period defined by the employer.

Record-Keeping. Employers must create and maintain written or electronic records of their employees’ accrual and use of paid sick leave, provide the records to employees on a regular basis, and retain the records for at least three years. While the state statute already requires employers to provide employees with their available sick leave balances each pay period, the requirement that the employer also provide employees with a record of their use of paid sick leave is unique to San Diego and increases the burden for employers.

HEALTH AND SAFETY IN THE WORKPLACE

1. Smoking In The Workplace (Effective June 9, 2016)

California law already prohibited smoking of tobacco products inside an enclosed place of employment for certain employers. This Bill amends Labor Code Section 6404.5 and expands the prohibition on smoking of tobacco products in all enclosed places of employment to all employers of any size, including a place of employment where the owner-operator is the only employee (i.e., owner-operated business). “‘Enclosed space’ includes covered parking lots, lobbies, lounges, waiting areas, elevators, stairwells, and restrooms that are a structural part of

the building.” There are, however, certain exemptions. “Place of employment” does not include: (1) 20% of the guestroom accommodations in a hotel, motel, or similar transient lodging establishment; (2) Retail or wholesale tobacco shops and private smokers’ lounges; (3) cabs of motortrucks; (4) theatrical production sites, if smoking is an integral part of the story in the theatrical production; (5) medical research or treatment sites, if smoking is integral to the research and treatment being conducted; (6) private residences, except for licensed family day care homes; (7) patient smoking areas in long-term health care facilities.

A violation of this law is punishable by a fine not to exceed \$100 for a first violation, \$200 for a second violation within one year, and \$500 for a third and for each subsequent violation within one year.

2. Heat Regulations For Indoor Workers (Effective January 1, 2019)

Under existing law, OSHA has adopted regulations establishing a heat illness prevention standard for outdoor workers. This Bill, which adds Labor Code Section 6720, requires that, by January 1, 2019, the Division is propose to the Occupational Safety and Health Standards Board (“Board”) for the Board’s review and adoption, a heat illness and injury prevention standard applicable to workers working in indoor places of employment. “The standard shall be based on environmental temperatures, work activity levels, and other factors.”

EMPLOYMENT CONTRACTS

1. Choice Of Law And Forum In Employment Contracts (Effective January 1, 2017)

This Bill adds Labor Code Section 925 and prohibits employers from requiring California-based employees to enter into agreements (including arbitration agreements) requiring them to: (1) adjudicate claims arising in California in a non-California forum; or (2) litigate their claims under the law of another jurisdiction, unless the employee was represented by counsel. Any provision of a contract that violates this new law is voidable by the employee, any dispute arising thereunder shall be adjudicated in California under California law and the employee is entitled to recover reasonable attorneys’ fees.

PUBLIC WORKS AND PREVAILING WAGES

1. Release of Funds Pending Prevailing Wage Determination (Effective January 1, 2017)

Existing law permits an employer to deposit with the Department of Industrial Relations (DIR) the full amount of a civil wage and penalty assessment (CWPA) or of a Notice of Withholding of Contract Payments (Notice) for failure to pay a prevailing wage on a public works project to avoid liability for liquidated damages while the CWPA or Notice is under review. Funds are held in escrow pending administrative and judicial review, and released at the conclusion of all administrative and judicial review proceedings. This bill requires the DIR to release the funds held in escrow, plus interest earned, within 30 days following either: (1) the conclusion of all administrative and judicial review, or (2) the department receiving written notice from the Labor Commissioner or an authorized labor compliance program of a settlement or other final disposition of the CWPA or Notice.

2. Payment of Apprentices for Pre-Employment Activities (Effective January 1, 2017)

Existing law requires that persons employed on public works projects be paid at a rate that is not less than the general prevailing rate of per diem wages as determined by the Director of the Department of Industrial Relations. This bill would provide that, unless otherwise provided by a collective bargaining agreement, when a contractor on a public works project requires an apprentice to fill out an application, or undergo testing, training, an examination, or other pre-employment processes as a condition of employment, the apprentice shall be paid at prevailing wage rates for the time spent on the required activity, including travel time.

3. Limits on Credit Made Against Prevailing Wage (Effective January 1, 2017)

Under current law, all workers on public works projects over \$1,000 are to earn a prevailing rate of per diem wages. “Per diem wages” include various types of employer payments for fringe benefits, including those made for industry advancement and collective bargaining agreements’ administrative fees, “provided these payments are required under a collective bargaining agreement,” and also include payments made for “other purposes similar to those specified” in the statute. Employer payments operate as a credit towards the employer’s obligation to pay the “general prevailing wage rate of per diem wages.” This bill amends Labor Code section 1773.1 to specify that “per diem wages” include industry advancement and collective bargaining agreements’ administrative fees *only* when the employer is required by a collective bargaining agreement to make those payments. If the payments are not required by a collective bargaining agreement, the bill would prohibit employers from taking a credit for such payments against the general prevailing wage rate of per diem wages.

If you have any further questions regarding employment related issues, please do not hesitate to contact Sierra J. Spitzer, Esq. at (619) 236-8821 or by email at sierra@sscmlegal.com.