



Happy 2014 – Gear Up For New Wage And Hour Laws

Insights

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As the new year begins, California employers, already weary from added wage and hour laws and regulations enacted over the past several years, have yet more to comply with. Here are the highlights.

Piece-Rate Or Incentive Agreements

Historically, both California and federal law have provided considerable leeway to compensation agreements between employers and employees so long as the minimum wage has been satisfied based on total hours worked and compensation paid. Indeed, the historical view has been that “straight-time wages above the minimum wage are a matter of private contract between the employee and the employer.” *Schachter v. City Group, Inc.* But this principle as applied to California law continues to be eroded as state and federal courts have interpreted California law to prohibit averaging a piece rate for productive work to include periods on the clock when piece rates are not being produced. *See, e.g., Gonzalez v. Downtown LA Motors.*

The practical consequence of these rulings is to add opportunities for employees to claim they have not been paid at least the minimum wage for so-called “unproductive time,” even though their effective hourly rate may be far above the minimum wage for all hours worked when considering all of the clocked productive and non-productive time. One of the key conceptual problems with these rulings is the never-ending dispute over what constitutes productive and non-productive time. In the end, employees may lose if employers are forced to eliminate incentive pay.

Historically, fluctuations of productivity could be factored into a piece rate. Employees could agree to enjoy the fruits of high productivity as well as the downside of low periods of productivity (which could be impacted in part by machine breakdowns or problems caused in part by the employees’ skills and efforts). With regard to wages above the minimum wage (which remain protected), the employees, in effect, could agree to experience both the benefit and detriment of productivity in the work place. These new interpretations of the law minimize an employee’s risk of reduced income caused by periods of inefficiency or downtime.

Additionally, these decisions meddle unnecessarily into an employer’s ability to contract freely with its employees for compensation above the minimum wage. In the end, many employers have eliminated piece rates altogether in favor of alternative methods of compensation, including

reverting to an hourly rate methodology with diminished opportunities for an employee to earn incentive pay.

Another consequence of invading an employer's right to contract for incentive pay is that courts have also second-guessed whether employees who are paid by piece rate are actually being paid while taking short rest breaks mandated by California law or whether salespersons paid by commission are actually being compensated separately for non-productive periods. The net effect is an increasing tendency for employers to respond to these rulings by supplementing compensation through various methods to account for what arguably could be considered as "downtime" or "non-productive time." Employers should consult with legal counsel to determine how to comply with these new rulings to avoid exposure for violations of the state minimum wage, among other things.

Increase In The Minimum Wage

The minimum wage itself is also increasing in two stages. Beginning July 1, 2014, the minimum wage for California employees will increase from the current \$8.00 per hour to \$9.00 per hour. On January 1, 2016, the minimum wage will increase to \$10.00 per hour.

There are a number of legal consequences resulting from the increases of the minimum wage, including but not limited to standards for exempting certain employees from overtime or other requirements:

- In order for a commissioned salesperson to be exempt from overtime, one requirement is that the salesperson's total earnings result in an effective hourly rate that is more than one and one-half times the state minimum wage, currently \$12.00 per hour. That rate will increase to \$13.50 per hour in July 2014, then \$15.00 per hour in January 2016.
- One requirement for California's "white collar" overtime exemptions (executive, administrative, or professional) to apply is that the employee receive a monthly salary that is no less than two times the California minimum wage for full-time employment (40 hours per week). The current minimum monthly salary is \$2,774. The minimum salary will increase to \$3,120 in July 2014 and \$3,467 in January 2016.
- The increase of the minimum wage will also impact the meal and lodging credits against the minimum wage permitted by the Industrial Welfare Commission Wage Orders. As the minimum wage increases, these credits are adjusted.
- Employers are required to provide and maintain certain hand tools required for employees to perform their jobs. Employees who furnish their own hand tools must receive at least twice the minimum wage (currently \$16.00 per hour, but increasing to \$18.00, then \$20.00, per hour).
- Employers need to be vigilant in determining whether local laws require higher minimum wage protections. Several municipalities have also increased their minimum wage effective January 1, 2014. For example, San Francisco will increase their minimum wage from \$10.55 per hour to

\$10.74 per hour. In San Jose, the minimum wage will increase from \$10.00 per hour to \$10.15 per hour.

- Employers also need to review their compensation plans and practices and take action to conform to the new minimum wage laws, including amending pay plans and increasing minimum wage thresholds when paying draws against commissions.

Expanded Damages For Violations Of The Minimum Wage Law

The legislature has also expanded remedies against employers for violating minimum wage laws. To remedy minimum wage violations, the previous law allowed an employee to initiate a civil action or administrative hearing before the Division of Labor Standards Enforcement to recover liquidated damages “in an amount equal to the wages unlawfully unpaid and interest there on.”

The penalty and restitution provisions of the law now give the Labor Commission authority to recover liquidated damages as well as the civil penalty assessed and unpaid minimum wages.

Failure To Provide “Recovery Periods”

Existing law requires an employer to pay an employee one additional hour of pay at the employee’s regular rate as a sanction or penalty on any day when an employer requires an employee to work through a meal or rest period that otherwise must be provided. This premium payment is treated as a “wage,” although its effect is to penalize violations of the meal-rest period laws.

Those penalties are now applicable to “recovery periods.” Under this regulation, enforceable by the Division of Occupational Safety and Health, employees working outdoors in temperatures exceeding 85 degrees Fahrenheit are entitled to cool-down periods of at least five minutes in a shaded area, *as needed* by the employee to avoid overheating.

Recovery Of Employers’ Attorneys’ Fees Limited

Currently, reasonable attorneys’ fees and costs are required to be awarded to the prevailing party in any action for the “nonpayment of wages” (other than actions for unpaid overtime or minimum wage), irrespective of whether the prevailing party is an employer or an employee. An amendment to the Labor Code will permit a prevailing employer to recover such fees and costs *only if* the court finds that the employee brought the action in bad faith.

Criminal Sanctions For Failing To Remit Withholdings

California law has a variety of Labor Code statutes that criminalize violations of its wage and hour laws. Existing law makes it a crime for an employer to fail to make payments to health and welfare funds, pension funds, or various benefit plans pursuant to an agreement between the parties. Existing law further provides that the crime be punished as a felony if the amount unpaid exceeds \$500, and as a misdemeanor for all other violations.

Continuing down that path, a recent amendment makes it a felony (if unpaid amount exceeds \$500) or a misdemeanor (if unpaid amount is \$500 or less) for an employer to fail to remit withholdings

from an employee's wages that were made pursuant to state, local or federal law.

Liens For Unpaid Wages

Upon a California Labor Commissioner's order becoming final, the Labor Commissioner is authorized to record a certificate of lien in any county in which the employer's property may be located. This measure no doubt should make it easier for the Labor Commissioner to collect from employers any wages, interest, penalties, and liquidated damages associated with a claim.

Overtime To Personal Attendants

Regarding employers who provide residential care, the law previously provided a complete overtime exemption for personal attendants. Now personal attendants must be paid one and one-half times their regular rate of pay for all hours worked in excess of nine hours in any workday or 45 hours in a workweek. Personal attendants include any persons employed by a private householder or by any third-party employer recognized in the healthcare industry to work in a private household, to supervise, feed, or dress a child, or a person who by reason of advanced age, physical disability, or mental deficiency needs supervision.

The U.S. Labor Department has also announced significant changes to the "companionship" exemption under the federal Fair Labor Standards Act that will take effect January 1, 2015, including the requirement that third-party employers of domestic caregivers pay these employees overtime compensation for all hours worked beyond 40 in a workweek.

Other Requirements Or Penalties For Specialized Industries

Certain employers also need to be aware of the following changes: 1) a civil penalty for any garment manufacturer who fails to display the name, address, and garment manufacturing registration number at the front entrance of the business; 2) an increased bond requirement for the employer's nonpayment of wages from \$15,000 to \$150,000, unless the employer has a collective bargaining agreement in place that meets specified criteria; 3) liability of a farm labor contractor for any wages or penalties owed by a predecessor farm labor contractor, if the successor meets specified criteria; 4) an extended prevailing-wage requirement to private refinery construction projects; and 5) a requirement that employers use skilled workers who have graduated from a state-approved apprenticeship program for work which poses a risk to public health and safety.

If the above seems overwhelming, help is available! Just contact your regular Fisher Phillips attorney with questions regarding any of the above.

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