Fisher Phillips
2017 Employment Law Update

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Introduction

- Our prior breakfast briefings have typically centered around laws passed by our state legislature and court decisions issued by our state's appellate courts.
- 2016 changed everything in that the only thing that became certain was the "uncertainty" of where the next change in the law would come from.
  - State appellate courts, federal district and appellate courts, or the United States Supreme Court.
  - The introduction of having to track and monitor city and county legislation.
  - Issuance of federal regulations and the legal challenges to them.

Introduction

- Fisher Phillips has been at the forefront of the ever changing legal landscape being on teams that have argued before the United States Supreme Court, Ninth Circuit Court of Appeals and in many state agencies.
- The past year will, more so than in anytime in the past five years, require employers to update handbooks, policies and procedures.
- It also requires us to start thinking more about Human Resources, Payroll and Benefits in a long-term, five-year plan due to all the anticipated wage-hour changes.

Legislative Update 2017

Introduction and Overview

- For the first time in recent history, the “legislative update” requires guidance on legislation passed on a federal and state level, as well as at a county and city level.
- Various statutes and regulations passed in 2016 require material changes to handbooks, policies and data collection for government reporting.
- The important takeaway is not simply the text of the regulation, but the action item of what you need to do next.

Minimum Wage and Paid Sick Leave Laws

California Minimum Wage (SB 3)

- Six-step annual statewide increase of the minimum wage spanning from January 1, 2017 to January 1, 2022.
  - Increases delayed one year for employers of 25 or fewer employees.
- Statewide minimum wages shall be as follows:
  - $10.50 effective January 1, 2017
  - $11.00 effective January 1, 2018
  - $12.00 effective January 1, 2019
  - $13.00 effective January 1, 2020
  - $14.00 effective January 1, 2021
  - $15.00 effective January 1, 2022

California Minimum Wage (SB 3)

- This will impact employers in several ways:
  - Minimum weekly threshold for salary exemption rises from $800 to $840 per week. ($41,600 to $43,680 on an annual basis).
  - Tool rate increases to $21 per hour.
  - Inside sales exemption minimum calculation rises to $15.76 per hour.
  - Rest period premiums and non-sales activity in commissioned based sales plans will need to be increased.

California Minimum Wage (SB 3)

- Increases in an hourly rate of pay do not require an updated Wage Theft Protection Act notice to be protected.
  - Are you ready for what will be law in 2022 and is it time to start planning now?
    - $62,400 annual salary for exempt employees.
    - $22.50 per hour in order to be inside sales exempt

- Practical Pointer: Remember that this state minimum wage rate, not any city or county minimum wage, governs exempt salary, inside sales and tool rate requirements.

City and County Compensation Initiatives

- Berkeley, Cupertino, Emeryville, Los Altos, Mountain View, Oakland, Palo Alto, Richmond, San Francisco, San Jose, San Mateo, Santa Clara and Sunnyvale have all passed minimum wage ordinances.
- These ordinances apply not just to employers who are based in the city, but also to employees who work in the city.
  - Salespeople who have accounts within the cities.
  - Technicians/Repairmen who visit an area within the city.
  - Attendance of work meeting at sites within the city.

City and County Compensation Initiatives

- **Berkeley** saw an increase from $12.53 to **$13.75** on October 1, 2017
- There was an increase in the minimum wage in **Cupertino** from $10.00 to **$12.00** on January 1, 2017
- Smaller employers in **Emeryville** (55 or fewer workers) saw an increase from $13.00 to **$14.00** on July 1, 2017, while the increase for larger employers in **Emeryville** will be announced in 2017 and go into effect on July 1, 2017

City and County Compensation Initiatives

- The minimum wage in **Los Altos** was increased from $10.00 to **$12.00** on January 1, 2017
- **Mountain View** employers faced a minimum increase from $11.00 to **$13.00** on January 1, 2017.
- In **Oakland**, the minimum wage increased from $12.55 to **$12.86** on January 1, 2017

City and County Compensation Initiatives

- There was a minimum wage increase in **Palo Alto** from $11.00 to **$12.00** as of January 1, 2017.
- **Richmond** saw an increase in the minimum wage from $11.52 to **$12.30** on January 1, 2017.
- **San Francisco**'s minimum wage will increase from $13.00 to **$14.00** as of July 1, 2017.

City and County Compensation Initiatives

- The **San Jose** minimum wage increased from $10.30 to **$10.50** as of January 1, 2017.
- The **San Jose** minimum wage increased from $10.30 to **$10.50** as of January 1, 2017.
- There was a minimum wage increase for employers in **San Mateo**, with rates increasing from $10.00 to **$12.00** on January 1, 2017.

City and County Compensation Initiatives

- **Santa Clara** saw a minimum wage increase from $11.00 to **$11.10** as of January 1, 2017.
- Employers in **Sunnyvale** faced a minimum wage increase from $11.00 to **$13.00** on January 1, 2017.

Paid Parental Leave Ordinance

- The City of San Francisco was the first city in the country to pass legislation requiring many employers to provide workers with paid parental leave.
- Beginning in 2017, many businesses in San Francisco will be required to provide up to six weeks of fully paid parental leave to most workers after certain conditions are met.

Paid Parental Leave Ordinance

What Has Changed?

- All California employees may receive up to 55% of their pay for six weeks through the California Paid Family Leave Program (PFL) when they are off work to bond with a new baby, newly adopted child, new foster child, or care for a seriously ill family member.
- However, covered San Francisco employers will now be required to pay the 45% remainder not provided by PFL so that workers receive their normal gross weekly pay during absences of six weeks for the purpose of bonding with a new child.

Paid Parental Leave Ordinance

Who is Covered?

- As of January 1, 2017, all employers in San Francisco with 50 or more employees, regardless of their location, are covered by the Ordinance.
- Starting on July 1, 2017, covered employers are those with 35 or more employees.
- Starting on January 1, 2018, covered employers are those with 20 or more employees.
- Even if you do not employ 20 workers within the SF city limits, you have an obligation to provide those employees who work within the City with paid parental leave.
- However, governmental entities, including the City and County of SF, are not covered.

Paid Parental Leave Ordinance

When Will the Law Go Into Effect?

- For businesses with 50 or more employees, the law will take effect January 1, 2017.
- Businesses with between 20 and 49 employees will get a bit of reprieve, as the law will take effect for them on July 1, 2017 or January 1, 2018, depending on their size.

What Events are Impacted?

- The new law will cover absences for new births, adoptions, and fostered children.

Paid Parental Leave Ordinance

Which Employees Are Eligible?

- In order to be eligible, employees must work eight hours or more per week in San Francisco, 40% of their total weekly hours worked for the employer must be worked in San Francisco, and they must already be eligible for California's PFL Program.
- Eligibility only kicks in after that the employee has worked for a company for 180 days prior to the start of the leave period.
- Both mothers and fathers are covered, including same-sex couples.

Paid Parental Leave Ordinance

How much paid parental leave will employers need to provide?

- Employers will need to offer up to six weeks of paid parental leave to eligible employees to cover the portion of their normal weekly pay not provided by PFL.

How Much will Employers Need to Pay?

- The state PFL currently allows eligible workers to receive up to 55% of their pay for family leave purposes.
- This new law requires SF employers to make up the balance and provide employees with the difference between their PFL benefits and normal gross weekly wages or the statutory cap, whichever is lower.
  - Statutory cap for 2017: $2,133
  - Employers will see variations in the supplemental compensation calculation if the covered employee receives gratuities as part of his or her wages, or if the employee has multiple employers.

Paid Parental Leave Ordinance

Can employers be more generous with their leave programs?

- Yes, the law does not prevent companies from providing even greater paid leave benefits, and businesses that provide benefits in excess of the legal requirements will be exempt from San Francisco's new law.

Can employers require that employees use vacation time?

- Yes, businesses can insist their workers use up to two weeks of their accumulated but unused vacation time at the start of their parental leave, somewhat relieving the burden on employers.

Paid Parental Leave Ordinance

Are there any other requirements?

- Employers must post a notice, to be prepared by the City, informing their workers of the law's requirements.
- The notice must be located in a conspicuous place and posted in English, Spanish, Chinese, and any other language spoken by at least 5% of the San Francisco workforce at that particular site.

How might employers run afoul of the law?

- Besides requiring paid parental leave, the law makes it illegal for employers to fire or otherwise discipline an employee in retaliation for receiving the additional pay.
    - For instance, reducing a covered employee's wages within 90 days after receiving notice of an employee's intent to use PFL creates a rebuttable presumption that the decrease was made to reduce the employer's PPLO obligations.

Equal Pay Laws

Wage Discrimination: Prior Salary (AB 1676)

- Prior law prohibited paying employees at different rates for the same work performed under similar conditions because of sex
- Exceptions for bona fide factors other than sex
- Bill adds that prior salary cannot, by itself, justify any disparity in compensation under the bona fide exception

Wage Discrimination: Race/Ethnicity (SB 1063)

- The California Fair Pay Act prohibits pay disparity based on gender/sex
- This Bill prohibits disparities among employees based on race or ethnicity
- Preserves bona fide exception for disparity based on seniority/merit systems, education, training, experience, or other similar reasons

Equal Pay Action Items

- Employers, who are required to file EEO-1 reports will have new data collecting and reporting obligations, now based upon the compensation paid to individual races and national origin.
- California law recommends employers conduct equal pay audits to determine whether employees, of different races and sex, are being paid equally.
- This audit should be conducted by outside counsel or a consultant, depending on the size of the group being examined.

EEO-1 Report Format
Prior to Pay Report Change

CO= [redacted]

U= [redacted]

EQUAL EMPLOYMENT OPPORTUNITY

2016 EMPLOYER INFORMATION REPORT

CONSOLIDATED REPORT - TYPE 2

SECTION B - COMPANY IDENTIFICATION

[redacted]

2.a. [redacted]

c. Y

SECTION C - TEST FOR FILING REQUIREMENT

1-Y 2-N 3-Y DUNS NO.: [redacted] EIN [redacted]

SECTION E - ESTABLISHMENT INFORMATION

NAICS: [redacted]

SECTION D - EMPLOYMENT DATA

JOB CATEGORIES	HISPANIC OR LATINO		NOT-HISPANIC OR LATINO												OVERALL TOTALS
			********** MALE **********						********** FEMALE **********						
	MALE	FEMALE	WHITE	BLACK OR AFRICAN AMERICAN	NATIVE HAWAIIAN OR PACIFIC ISLANDER	ASIAN	AMERICAN INDIAN OR ALASKAN NATIVE	TWO OR MORE RACES	WHITE	BLACK OR AFRICAN AMERICAN	NATIVE HAWAIIAN OR PACIFIC ISLANDER	ASIAN	AMERICAN INDIAN OR ALASKAN NATIVE	TWO OR MORE RACES	
EXECUTIVE/SR OFFICIALS & MGRS	0	0	8	0	0	1	0	0	0	0	0	1	0	0	10
FIRST/MID OFFICIALS & MGRS	5	1	92	1	0	38	0	0	13	0	0	9	0	0	159
PROFESSIONALS	21	7	318	5	0	293	1	1	46	6	0	80	0	0	778
TECHNICIANS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
SALES WORKERS	0	0	12	0	0	1	0	0	7	1	0	3	0	0	24
ADMINISTRATIVE SUPPORT	1	3	1	0	0	0	0	0	7	0	0	0	0	0	12
CRAFT WORKERS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
OPERATIVES	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
LABORERS & HELPERS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
SERVICE WORKERS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL	27	11	431	6	0	333	1	1	73	7	0	93	0	0	983
PREVIOUS REPORT TOTAL	14	7	352	6	0	266	1	4	61	6	0	77	0	0	794

SECTION F - REMARKS

DATES OF PAYROLL PERIOD: 08/17/2016 THRU 08/31/2016

SECTION G - CERTIFICATION

CERTIFYING OFFICIAL: [redacted]

EEO-1 REPORT CONTACT PERSON:

EMAIL: [redacted]

TITLE: [redacted]

TITLE:

TELEPHONE NO: [redacted]

CERTIFIED DATE[EST]: 09/22/2016 08:15 AM

New EEO-1 Report Format with Pay Reporting (Pay)

This is the proposed EEO-1 Form to collect pay data.

SECTION D - EMPLOYMENT DATA

Employment at this establishment - Report all permanent full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

Job Categories	Annual Salary in Thousands	Number of Employees (Report employees in only one category)														
		Hispanic or Latino		Non-Hispanic or Latino												Total Col A-N
				Male						Female						
		Male	Female	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races	
		A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
Executive/Senior Level Officials and Managers 1.1	1. $19,239 and under															
	2. $19,240 - $24,439															
	3. $24,440 - $30,679															
	4. $30,680 - $38,999															
	5. $39,000 - $49,019															
	6. $49,920 - $62,919															
	7. $62,920 - $80,079															
	8. $80,080 - $101,919															
	9. $101,920 - $128,959															
	10. $128,960 - $163,799															
	11. $163,800 - $207,999															
	12. $208,000 and over															
	13. $19,239 and under															
	14. $19,240 - $24,439															
	15. $24,440 - $30,679															
	16. $30,680 - $38,999															

SAMPLE

Fair Employment and Access Laws

Victims of Domestic Violence (AB 2337)

- Employers with 25+ employees must give written notice, effective July 1, 2017 of the right to take time off, without threat of termination or retaliation, for domestic violence, sexual assault, or stalking.
- Fisher Phillips handbooks, prepared in the past two years, already include this notice in its handbooks. This notice should be added immediately to all handbooks.

Single-Use Bathrooms (AB 1732)

- Applies to all single-user toilet facilities in any business establishment, place of public accommodation, or government agency
- All such facilities must be identified as all-gender facilities
- Authorizes inspections for compliance
- Law effective March 1, 2017

Wage & Hour Laws

Update on FLSA Regulations

- New FLSA regulations were blocked approximately a week before their implementation.
- The injunction blocking the regulations is currently up on appeal, but remains in force.
- Resolution to come in the next 90 days in the Fifth Circuit and perhaps the underlying case in the Eastern District of Texas.
- In California, this case will be a moot issue beginning in January 2019 when our minimum salary will be even greater than the proposed federal minimum salary.

Private School Teachers: Exemption Requirements (AB 2230)

- Lowers the salary necessary for private school teachers to be exempt
- Must earn the greater of:
  - (1) no less than the lowest salary offered by any school district; or
  - (2) the equivalent of no less than 70% of the lowest salary offered by the school district or county in which the private school is located

Wage Statements (AB 2535)

- Clarifies existing law that itemized wage statements (pay stubs) need not include total hours worked for employees who are exempt from the minimum wage and OT requirements by statute or wage order
- However, if an employee is being paid hours because of insufficient commissions, must still list hours.

Workplace Safety

Prop 64 Effect On Our Workplace

- Legalized the *recreational use* of marijuana in California for adults 21 years and older.
- Legalized growing of up to 6 marijuana plants for personal use

In short…

it is no longer *illegal* to use marijuana recreationally

So…Can Mary Jane Come to Work?

- **What Prop 64 does NOT do:**
  - Does not supersede right of employers to maintain a drug-free workplace.
  - Does not require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace.
- **Takeaways:**
  - Cannot take adverse action or test simply based on display of a medical marijuana card. Need reasonable suspicion at workplace.
  - Assembly Bill 7, also passed last year, discusses prohibition and ban in the workplace of e-cigarettes containing nicotine except in certain locations.

OSHA Drug Testing Regulations

- To strike the appropriate balance, drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify level of impairment caused by drug use.
- In other words, there should be a reasonable possibility that drug use by the employee was a contributing factor to the injury or illness in order for an employer to require drug testing.
- In addition, drug testing that is designed in a way that may be perceived as punitive or embarrassing to the employee is likely to deter injury reporting and be deemed retaliatory.

OSHA Drug Testing Regulations

- Effect of regulations:
  - Decide under what circumstances you will conduct post-accident drug testing.
  - Evaluate your safety incentive programs.
  - Update your policies accordingly.
  - Train managers, based on Prop 64 and these new regulations, on when drug testing is proper.

Workers' Compensation (AB 2883)

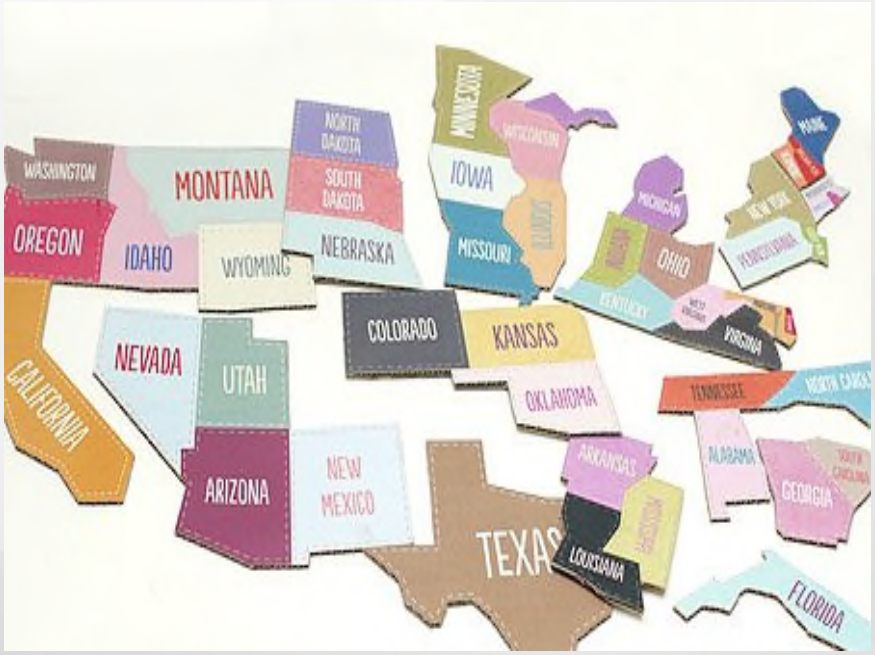
- Previously, officers and directors of a private corporation who were sole shareholders, as well as working members of a partnership or LLC, were excluded from the Workers' Compensation system.
- AB 2883 now provides that only officers and directors of a private corporation who own at least 15% of the stock, or an individual who is a general partner of a partnership or a managing member of an LLC can be excluded from coverage.
- Change applies to all new, renewal, and in-force policies as of January 1, 2017.

Miscellaneous Statutes

Defense of Trade Secret Act

- Federal legislation that provides a private right of action for employers against employees who misappropriate trade secrets or confidential information.
- In order to maintain this right, you have to provide notice to employees in confidentiality/non-disclosure agreements that employees are free to breach the agreement, so long as it is for protected whistleblowing activities.
- Requires one-paragraph insert into your agreements. We recommend that this be done immediately.

Choice of Law & Forum Selection (SB 1241)



- Prohibits employers from requiring employees who primarily reside and work in California to agree to either:
  - Adjudicate outside of California a claim arising in California (forum selection clauses); or
  - Deprive the employee of the substantive protection of California law with respect to a controversy arising in California (choice of law provisions).
- Such a provision is voidable by the employee
- Employees enforcing their rights under this law may seek any remedy available, including attorneys' fees

Earned Income Tax Credit Information (AB 1847)

- Prior law only required employers to notify employees that they may be eligible for the federal earned income tax credit.
- AB 1847 requires an employer to also notify employees that they may be eligible for the California earned income tax credit
- Also updates the content of the notice that must be provided to employees

Work Authorization (SB 1001)

- Prohibits employers from :
  - Requesting work authorization documentation not required by federal law;
  - Refusing to honor documents that reasonably appear to be genuine or documents/ authorizations based upon specific status; or
  - Re-investigating or re-verifying an incumbent employee's authorization to work.
- Applicants and employees can file a complaint for enforcement with penalties up to $10,000.

Paid Family Leave Amendments (AB 908)

- Increases benefits to be given to employees.
- Eliminates 7 day waiting period effective January 1, 2018.
- Will require new version of handout beginning later this year.

Executive Order 13706

- Requires certain employers that enter into contracts with the Federal Government to provide employees with up to 7 days of paid sick leave annually, including paid leave allowing for family care.
- Final Rule effective November 29, 2016 and applicable only to new contracts, meaning the solicitation was issued or contract was awarded on or after January 1, 2017.
- 1:30 hours worked or 56 hours frontloaded, not payable at termination.

Significant 2016 Labor & Employment Law Cases

Supreme Court Cases

Attorneys' Fees in Title VII Cases

- ***CRST Van Expedited, Inc. v. EEOC***
  - In order to obtain attorneys' fees under Title VII of the Civil Rights Act of 1964, a party must first be deemed a prevailing party
  - A favorable ruling on the merits of a case is not a necessary condition for a party to be determined a prevailing party
  - Example: a court dismisses EEOC's lawsuit finding that EEOC failed to adequately conciliate and investigate the charges before filing suit

Employees' Rights

Meal and Rest Breaks

- ***Augustus v. ABM Security Services, Inc.***
  - ABM Security Services employs security guards and required them to remain on-call even while taking their rest breaks.
  - The California Supreme Court concluded that the on-call rest break policy violates California law. The nature of rest breaks requires employees to be relieved of all duties.
  - The mere possibility of being called back does not invalidate breaks.
  - Limited DLSE exemption process for on-duty rest breaks if there would be an undue hardship for employer.

Takeaways

- Rest period policies must be updated to explicitly state that employees are relieved of all duty.
- Need to implement policies and procedures to dissuade inference that field employees, with cell phones or dispatch equipment, are “on-call” on their rest break (i.e. advise them to turn off devices during rest period).
- Increasing importance to have acknowledgement in timekeeping system or timesheets that uninterrupted rest periods have been provided.

Suitable Seating

- ***Kilby v. CVS Pharmacy, Inc.*** (California Supreme Court)
  - Provisions in the California Wage Orders provide that "[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats."
  - "Nature of the work" refers to an employee's actual or expected tasks performed at a given location, rather than a "holistic" consideration of the entire range of an employee's duties anywhere on the jobsite
  - Whether the nature of the work "reasonably permits" sitting is a question to be determined objectively based on the totality of the circumstances
  - Should an employer deny suitable seating, the employer bears the burden of showing no suitable seating exists

Takeaways

- Conduct examinations, and confer with consultant or counsel, as to whether suitable seating is required for various positions at your company. Positions that could likely fall under this:
  - Cashiers
  - Receptionist/Greeter at a hotel or lodging establishment
  - Counter people
  - Any individual who interacts with public/customer and has downtime.

Compensation

- ***Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership*** (9th Cir.)
  - Employer's compensation policy that rounded all employee time stamps to the nearest quarter-hour was neutral and thus passed muster under 29 C.F.R. § 785.48(b), the federal rounding regulation
  - One minute of time that Plaintiff was not compensated for was non-recoverable *de minimis* time
    - "A few seconds or minutes of work beyond the scheduled working hours may be disregarded."

Takeaways

- Many employers have initially viewed this case as one that changes the rounding time rules. Unfortunately, such is not the case in California.
- We must be able to demonstrate that the rounding time system favors employees at least equally to that of the employer such that an employee does not lose out on wages.
- Rounding time practices could lead to class certification and representative action claims under PAGA.

Compensation/Exemption

- ***Navarro v. Encino MotorCars (US Supreme Court)***
  - *Narrow question: Are Service Advisors At Car Dealerships Exempt From Overtime under the FLSA*
  - *Broader questions: Exemptions Are Narrowly Tailored, The Ninth Circuit Is An Activist Jurisdiction, How Much Deference Should We Give To State Or Federal Agency Opinions?*

Compensation

- ***McLean v. State*** (California Supreme Court)
  - Under Labor Code sections 202 and 203, an employer must make prompt payment of the final wages owed to an employee who “quits” his or her employment, or else pay statutory penalties.
  - Retired deputy attorney general alleged that employer violated California Labor Code Section 202 by failing to pay her final wages on her last day of employment or within 72 hours after her last day
  - Sections 202 and 203 apply when an employee "quits to retire."

Discrimination

Disability Discrimination

- ***Castro-Ramirez v. Dependable Highway Express, Inc.*** (California Court of Appeal)
  - Father requested a modified schedule in order to administer dialysis treatment to his son
  - The Court acknowledged that FEHA provides a cause of action for associational disability discrimination
    - The father's association with son's disability could constitute a "physical disability"
  - The Court declined to decide whether FEHA establishes a separate duty to reasonably accommodate employees who associate with a disabled person
  - **Note:** on appeal to California Supreme Court

Disability Discrimination

- ***Mendoza v. The Roman Catholic Archbishop of Los Angeles*** (9th Cir.)
  - During church bookkeeper's sick leave, pastor took over bookkeeping duties. When bookkeeper returned, her full-time position was not available and she declined a part-time offer.
  - Bookkeeper sued under the ADA and the Court held that she failed to raise a triable dispute as to whether the church's legitimate and nondiscriminatory reason for not returning her to full-time work was pretextual.
  - Bookkeeper also failed to establish that a full-time position was available, and thus could not establish that the church failed to provide a reasonable accommodation by only offering her a part-time position.

Disability Discrimination

- ***Moore v. Regents of the University of California*** (California Court of Appeal)
  - Director of Marketing at UCSD diagnosed with heart condition. Director explained to her supervisor that it would not affect her job performance but that she would require further medical treatment.
  - Supervisor wanted to eliminate Director's job despite Director's seniority because of decreased workload. Eventually, Director was terminated and she sued UCSD under FEHA.
  - The Court held that although UCSD offered a legitimate, nondiscriminatory basis for Director's termination, there was still a question as to whether the basis for the termination was pretextual.

Vicarious Liability

Respondeat Superior

- ***Jorge v. Culinary Institute of America*** (California Court of Appeal)
  - "Going and coming rule" → an employee's commute to and from work is ordinarily considered outside the scope of employment
    - Employer not liable for employee's torts committed during the employee's commute
  - **BUT** the "require vehicle exception" → the "going and coming rule" does not apply, and thus an employee acts within the scope of employment during his/her commute, when the employer requires the employee to use his/her personal vehicle to accomplish job duties

Arbitration

What Needs To Be in Arbitration Agreement

- In Baltazar v. Forever 21, Inc., California Supreme Court issued guidance on what needs to be in an agreement in order to uphold it.
  - Rules of arbitration service need not be attached.
  - Injunctive relief carve out is permissible in an arbitration agreement.
  - Confidentiality provision acceptable so long as it is does not limit use of information in arbitration.
  - Listing employee claims, and not employer claims, is not improper.

Class Action Waivers

- ***Morris v. Ernst & Young, LLP*** (9th Cir.)
  - Court decided that class action waiver in arbitration agreement violated the National Labor Relations Act's right to "concerted activity" by employees
    - Concerted activity is a substantive right
    - The FAA requires arbitration contracts to be placed on an equal footing with all other contracts
    - All contracts, including arbitration contracts, are unenforceable when a party's right to pursue a substantive right is waived
  - Petition to the Supreme Court filed, but no decision yet on whether Court will hear the case

Arbitration Determinations

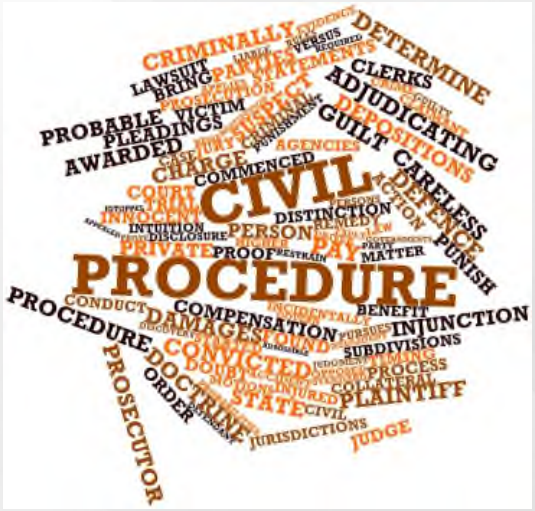
- ***Sandquist v. Lebo Automotive, Inc.*** (California Supreme Court)
  - At issue was whether an employer's arbitration agreement permitted or prohibited class-wide arbitration
  - The Court was faced with determining if an arbitrator or a court should decide the question and stated that the answer depends on the language of the agreement according to California state contract law

Where Are We Going With Arbitration?

- On January 13, the United States Supreme Court granted a petition for review, meaning that a decision on this issue will be provided later this year.
- The major questions for employers are “what is the Supreme Court going to do” and “what should we do in the interim.
- It is recommended that you consider implementing an opt-out provision for your arbitration agreements.

Where Are We Going With Arbitration?

- Opt-outs can come in one of three ways:
  - "Check the box" placed inside the agreement.
  - E-mail in the opt-out.
  - Mail in an opt-out.
- You also need to create a system where the opt-out process is given to employee.
  - Providing signed copy of handbook.
  - Including it in handbook.
  - Posting on intranet or breakroom accessible to employees.


CRIMINALLY
DETERMINE
LAWSUIT
BRING
CLERKS
ADJUDICATING
PROBABLE
PLEADINGS
VICTIM
GUILT
AWARDED
CHARGE
COMMENCED
CIVIL
CARELESS
DISTINCTION
PERSON
PUNISH
PROOF
MATTER
PROCEDURE
CONDUCT
COMPENSATION
BENEFIT
INJUNCTION
PROCEDURE
DOCTRINE
SUBDIVISIONS
CONVICTED
PROCESS
ORDER
PLAINTIFF
STATE
CIVIL
JURISDICTIONS
JUDGE
PROSECUTOR

Procedure

Statute of Limitations

- ***Mitchell v. California Department of Public Health*** (California Court of Appeal)
  - Plaintiff sued former employer for racial discrimination in violation of FEHA
  - The one-year FEHA limitation period is equitably tolled during the period of an EEOC investigation
    - "[T]he one-year period to bring a FEHA action is equitably tolled during the pendency of the EEOC investigation until a right-to-sue letter from the EEOC is received." (quoting *Downs v. Department of Water & Power* (1997) 58 Cal.App.4th 1093, 1097–1098)

Questions?

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The Immigration Compliance Problem

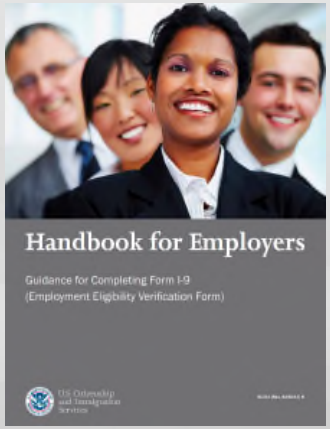
- New administration hostile towards immigration.
- Total U.S. population: 321 million.
- Estimated undocumented: 11-13 million.
- An estimated 6% of our workforce is undocumented.
- States like California with favorable immigration protection create complex questions for employers.
- High tech industry are particularly hard hit for visa compliance.
- Hospitality, retail, construction, and agriculture tend to have riskier employee bases.

Balancing the Need for Global Talent with Compliance

- Record demand for professional workers.
- Continued need for unskilled workers.
- Increased scrutiny on petitions.
- Increased cost for immigration.
- Regular post-approval audits.
- Employers caught in the path of immigration reform.

Changes to the I-9 Form

- New version (11/14/2016) effective 1/22/2017.
- All prior versions no longer valid after 1/21/2017.
- I-9 Handbook for Employers will be updated soon.
- Smart form if completed electronically.
- Might become basis for larger audits.



Immigration Enforcement 2015

- ICE made 452 criminal arrests tied to worksite enforcement investigations –
  - 179 were owners, managers, supervisors or human resources employees.
- Charges included harboring or knowingly hiring illegal aliens.
- Employees arrested for aggravated identity theft and Social Security fraud.

2015 – Record-Breaking Year

- 3,127 Notices of Inspection and 637 Final Orders, totaling $15,808,365.00 in administrative fines.
- ICE debarred 277 businesses and individuals for administrative and criminal violations.
- ICE believes utilizing enforcement, compliance, and outreach is an effective approach to deter illegal employment and create a culture of compliance.
- HSI prioritizes investigations involving critical infrastructure and key resources – No industry, regardless of size, type or location is exempt from complying with the law or being the subject of an ICE investigation.

IRCA Prohibited Acts

CANNOT:

- Knowingly hire an alien who is not authorized to work.
- Hire any individual without verifying identity and work authorization.
- Continue employing person if you know **or should know** person is not authorized to work.

Increased Monetary Penalties

- I-9 substantive/uncorrected technical violations (e.g., missing I-9) range from $216 to $2,156 per violation.
- Knowingly hire/continuing to employ violations range from:
  - $539 - $4,313 (1st violation)
  - $4,313 - $10,781 (2nd violation)
  - $6,469 - $21,563 (Subsequent violation)

Determining Penalty Amounts

- Factors considered for enhancement of fine or mitigation:
  - Good faith effort to comply;
  - Seriousness of violation;
  - Whether the violation involved unauthorized workers;
  - Size of business; and
  - History of previous violations.
- Violation percentage calculated to determine amount of fine for first, second, and subsequent violations.

USDOJ Discrimination Charges

Charges of Discrimination:

- I-9 Violations
  - Citizenship Status
  - Immigration Status
  - National Origin
  - Retaliation
- E-Verify Violations

Why California is Special

- The Election put California squarely in focus as a state which is very pro-immigrant.
- There is a growing battle between states on immigration enforcement that forces different compliance rules on employers.
- Immigration laws in California hit employers in surprising ways.

California Unified Compliance

California Labor Code Section 2811 – 2813

Effective January 1, 2012:

- Prohibits local governments from making E-Verify mandatory for employers within their borders.

California Unified Compliance

- This law prohibits California government agencies from forcing any employer to use E-Verify.
- California employers are free to use E-Verify on a voluntary basis or as required by federal contracts.
- Creates complexity for employers who have locations in multiple states with different rules.

Immigration Discrimination

California Labor Code Section 1019
Effective January 1, 2015:

- Prohibits employers from engaging in “unfair immigration-related practices” against any person/employee to retaliate against any person/employee for exercising their rights under the California Labor Code or other law applicable to employees. Includes threatening to file or filing a false report or compliant with any state or federal agency.

Labor Code Section 1019

- Engaging in “unfair immigration-related practices” within 90 days of an employee “exercising any protected right” raises a rebuttable presumption of retaliation.
- Violations include the suspension of business licenses.
- Employers may face a penalty of up to $10,000 per employee for each instance of retaliation.

Immigration Retaliation

California Labor Code 1024.6

Effective January 1, 2015:

- An employer may not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against an employee because the employee updates or attempts to update his or her personal information. Employer may not take action if an employee updates his or her information based on a lawful change of name, social security number, or federal employment authorization document.

California Labor Code 1024.6

- Do not take adverse action if an employee asks you to change his or her name, social security number, or federal employment authorization document.
- When updating employee's information do not use E-verify as using E-verify when it is not required by federal law will be considered an unfair immigration related practice.
- Employers may face a penalty of up to $10,000 per employee for each instance of retaliation.

Discrimination: Driver's Licensing

California Vehicle Code 12801.9

Update Effective January 1, 2015:

- The DMV must issue a license to people who are not in the country legally if they're otherwise qualified for the license. Those licenses indicate on their face that the holder is allowed to drive, but the license "does not establish eligibility for employment, voter registration, or public benefits."

California Vehicle Code 12801.9

- Employers may use a driver's license to confirm eligibility to work upon hiring but it would be a violation of the law if the employer required a person to present a driver's license, unless possessing a driver's license is required by law or is required by the employer and the employer's requirement is permitted by law.
- Employers need to review under what circumstances they ask California employees or applicants to show their driver's licenses.

E-Verify Abuse

LABOR CODE SECTION 2814

Update Effective January 1, 2016:

- Prohibits employers from using E-Verify to check the status of existing employees or employees who haven't received an offer, unless doing so is required by federal law or as a condition of receiving federal funds. Employer using E-verify must notify the employee as soon as practicable when the employer receives government notice that the information from the employee doesn't match what is in the federal database.

Labor Code Section 2814

- Employers still need to verify the status of workers they hire. But unless required by federal law or as a condition of receiving federal funds, employers can only check the status of applicants who've received an offer but have yet to start work.
- Employer must notify the worker promptly if the E-Verify system doesn't confirm that an individual is authorized to work in the U.S.
- $10,000 penalty for each violation.

Predictions for Immigration Under New Administration

- Mandatory E-Verify nationwide.
- Tightening up/securing the border.
- Increase the size of ICE.
- Increased enforcement actions with focus on employers (e.g., I-9 audits, inspections, and raids).
- Increased removals (aka) deportations.
- Cancellation of DACA.
- Changes in the H-1B Professional Worker Category.

Questions?

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The Affordable Care Act: The *Real Fun* is About to Begin

Affordable Care Act

Today's agenda:

1. Updated "Employer Mandate" Metrics
2. SSN / TIN Mismatches
3. Exchange / Marketplace Notices
4. IRS Penalty Assessments
5. Reminders…

The Affordable Care Act:
The *Real Fun ~~is~~ was [?]* About to Begin

Affordable Care Act

Today's agenda:

1. Repeal / Replace
2. Repeal / Replace
3. Repeal / Replace
4. Repeal / Replace
5. Repeal / Replace

Affordable Care Act

Repeal / Replace

- It's all speculation right now…
- Timing?
- Legislative actions
- Executive Branch actions

Affordable Care Act

WHITE HOUSE EXECUTIVE ORDER (January 20, 2017)

MINIMIZING THE ECONOMIC BURDEN OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT PENDING REPEAL

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. It is the **policy** of my Administration to seek the prompt repeal of the Patient Protection and Affordable Care Act (Public Law 111-148), as amended (the "Act"). **In the meantime, pending such repeal**, it is imperative for the executive branch to ensure that the law is being efficiently implemented, take all actions consistent with law to minimize the unwarranted economic and regulatory burdens of the Act, and prepare to afford the States more flexibility and control to create a more free and open healthcare market.

Sec. 2. **To the maximum extent permitted by law**, the Secretary of Health and Human Services (Secretary) and the heads of all other executive departments and agencies (agencies) with authorities and responsibilities under the Act shall exercise all authority and discretion **available to them** to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Act **that would impose a fiscal burden** on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, **purchasers of health insurance**, or makers of medical devices, products, or medications.

Sec. 3. **To the maximum extent permitted by law**, the Secretary and the heads of all other executive departments and agencies with authorities and responsibilities under the Act, shall exercise all authority and discretion **available to them** to provide greater flexibility to States and cooperate with them in implementing healthcare programs.

Affordable Care Act

WHITE HOUSE EXECUTIVE ORDER (January 20, 2017)

MINIMIZING THE ECONOMIC BURDEN OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT PENDING REPEAL (continued)

Sec. 4. **To the maximum extent permitted by law**, the head of each department or agency with responsibilities relating to healthcare or health insurance shall **encourage** the development of a free and open market in interstate commerce for the offering of healthcare services and health insurance, with the goal of achieving and preserving maximum options for patients and consumers.

Sec. 5. To the extent that carrying out the directives in this order would require revision of regulations issued through notice-and-comment rulemaking, the heads of agencies shall **comply with the Administrative Procedure Act and other applicable statutes** in considering or promulgating such regulatory revisions.

Sec. 6. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) **This order shall be implemented consistent with applicable law** and subject to the availability of appropriations.

(c) **This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person**.

Affordable Care Act

Repeal / Replace

- Some predictions:
  - Repeal timing
  - Targets of repeal
  - Items that may escape repeal (at least initially)
  - Possible replacement concepts
  - What will the states do?

Affordable Care Act

Repeal / Replace

- What employers should do now:
  - Hold steady until there is more certainty
  - Do the 2016 Form 1095 and 1094 furnishing and filing
    - March 2, 2017 deadline for furnishing Form 1095 to employees
    - March 31, 2017 deadline for filing Forms 1095 and 1094 with IRS (if filing electronically; February 28, 2017 if filing by paper)
  - Documentation of compliance in prior years should be retained

Affordable Care Act

Repeal / Replace

- What employers should do now (continued):
  - Any future changes will involve a lot of moving parts:
    - Legal requirements
    - Insurance carrier requirements
    - Employee relations issues
    - Insurance market changes
    - New opportunities
    - *Remember when group health plan design was a business decision*?

Questions?

The Affordable Care Act: The *Real Fun ~~is~~ was [?]* About to Begin

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