Audit Yourself First: Wage and Hour Issues For 2016
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SD SHRM Law Day 2016

Agenda

• Discuss new and amended CA wage and hour laws and new cases
• Consider exemption audit best practices
• Review the DOL’s 2016 regulatory agenda, including proposed FLSA regulations

What We Know For Sure

• California minimum raise increase
• California Fair Pay Act amendment effective January 1, 2016
• Other wage and hour statutory changes and case updates
What We Don't Know

- FLSA regulatory changes
- San Diego minimum wage increase
- San Diego sick leave

California Minimum Wage Increase

- Increase to $10 January 1, 2016
- Affects:
  - Minimum salary for exemption: $41,600/year
  - Minimum hourly pay for inside sales exemption: exceed $15.00/hour
  - Split shift premium

Increase to Computer Professional Compensation

- Increase January 1, 2016:
  - Minimum hourly rate: $41.85
  - Minimum salary (annual): $87,185.14
  - Minimum salary (monthly): $7,265.43
Audit Checklist

1. Pay of minimum wage employees
2. Split shift premiums?
3. Pay of salaried exempt employees
4. Pay for computer professional employees

California Fair Pay Act

- Amendment effective January 1, 2016
- Deemed “toughest in the United States”
- Goal to eradicate pay gender gap
  - Estimated at 16 cents on the dollar in CA
  - Smaller than national gap of 22 cents

California Fair Pay Act

- Equal pay for *substantially similar work*
- Performed under *similar working conditions*
### California Fair Pay Act

**Requires equal pay:**
- For substantially similar work, when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions.

**Deletes “same establishment” from the law**

**Enumerated exceptions or bona fide factors other than sex proved by employer as a business necessity and narrowly tailored**

### Equal Pay Act

**Compares jobs with:**
- Equal skill
- Equal ability
- Equal responsibility

**Compares pay of employees in the same establishment**

### Title VII

**Does not require equal wages for equal work or “comparable work”**

**Prohibits gender-conscious compensation decisions, except to remedy an existing violation**

**No “same establishment” rule**

**Legitimate, non-discriminatory reason (based on a factor other than sex)**

### “Substantially Similar Work”

**Viewed as a composite of:**
- **Skill**: education and training
- **Effort**: physical/intellectual exertion
- **Responsibility**: direct reports, budget, outcomes

### “Substantially Similar Work”

<table>
<thead>
<tr>
<th>Job A</th>
<th>Job B</th>
<th>Job C</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Long hours</td>
<td>1. Average hours</td>
<td>1. Long hours</td>
</tr>
<tr>
<td>2. No supervisory responsibilities</td>
<td>2. Supervisory responsibility</td>
<td>2. Supervisory responsibility</td>
</tr>
<tr>
<td>3. Excellent technical skills</td>
<td>3. Average technical skills</td>
<td>3. No technical skills</td>
</tr>
</tbody>
</table>
“Substantially Similar Work”

**Job A**
- 10 points
- 4. No budget responsibility

**Job B**
- 8 points
- 4. No budget responsibility

**Job C**
- 10 points
- 4. Budget responsibility

“Performed Under Similar Working Conditions”
- Indoor/Outdoor settings
- Weight lifting
- Heat/Noise
- Cost of living?
- Shift differential?

Exceptions
- Employer affirmative defense (i.e., employer must prove it)
- Each factor must be “applied reasonably”
- Factors relied upon must account for the entire wage differential
Exceptions (The “Easier” Ones)
- Seniority system
- Merit system
- System that measures earnings by quantity or quality of production

Exceptions (The “Difficult” Ones)
- Bona fide factor other than sex
  - Education
  - Training
  - Experience

Exceptions (The “Difficult” Ones)
- Employer must prove:
  - Not “derived” from gender;
  - Job-related, and
  - Consistent with business necessity
- Defense not applicable if employee shows alternative business practice serves business interest without wage differential
Wage Discussion Rights

- May not prohibit employee from:
  - Disclosing own wages
  - Discussing wages of others
  - Inquiring about other employee wages
  - "Aiding or encouraging" others to exercise rights
- No employer obligation to disclose wages

No Retaliation/Discrimination

- Action taken by employee "to invoke or assist in any manner the enforcement" of law is protected

Remedies

<table>
<thead>
<tr>
<th>Wage Claim</th>
<th>Retaliation/Wage Discussion Claim</th>
</tr>
</thead>
<tbody>
<tr>
<td>DLSE enforcement and prosecution and employee private right of action</td>
<td>DLSE enforcement and employee private right of action</td>
</tr>
<tr>
<td>Lost wages and benefits</td>
<td>Lost wages and benefits</td>
</tr>
<tr>
<td>Equitable relief</td>
<td>Remedy (Restatement of wages)</td>
</tr>
<tr>
<td>Interest and costs</td>
<td>Interest: costs not clear</td>
</tr>
<tr>
<td>Attorneys’ fees</td>
<td>Not clear</td>
</tr>
<tr>
<td>100% liquidated damages</td>
<td>Not clear</td>
</tr>
<tr>
<td>2 years / 3 years if willful</td>
<td>1 year</td>
</tr>
</tbody>
</table>
Record-Keeping

- Maintain records for three years of:
  - Wages and wage rates
  - Job classifications
  - Other "terms and conditions of employment"

Audit Checklist

1. Compile data to evaluate positions with "substantially similar work" and "similar working conditions"
2. Evaluate wages for those positions based on gender
3. Review job descriptions, including any required education/experience
4. Collect data to prove defenses
5. If using merit, evaluate review process

Right to Cure Wage Statements (AB 1506)

- Employers may cure wage statements that fail to include dates of the pay period and/or do not show correct name or address of employer
- Current or former employee may give notice
- Right to cure limited to once in a 12-month period
| **Piece Rate Worker Hourly Pay**  
**AB 1513** | Requires piece-rate workers to be paid for (1) “rest and recovery periods” and (2) “other non-productive time”  
Statutory wage rate requirements  
Wage statement requirements for hours of paid time, rates of pay and gross pay |
| --- | --- |
| **Expense Reimbursement Enforcement**  
**AB 970** | Authorizes Labor Commissioner to enforce expense reimbursement mandate (Labor Code section 2802) |
| --- | --- |
| **Wage Judgment Enforcement**  
**SB 588** | New procedure for judgment collection:  
Mail notice of levy to all parties with interest in employer property, credit or money  
Employer must appeal, cease business or obtain surety bond for cost of judgment within 30 days of judgment |
Individual Liability For Wage Claims (SB 588)

- Owners, directors, officers and managing agents of the employer are individually liable for willful failures to:
  - Pay wages
  - Provide a pay stub
  - Pay unpaid minimum wage
  - Provide expense reimbursement

Audit Checklist

1. Review content of pay stubs
2. Consider (and reconsider) piece rate pay
3. Review expense reimbursement policy (especially for cell phones)

CA Day-of-Rest Requirements

- CA Supreme Court to clarify the day-of-rest requirements, including:
  - Is it calculated by the workweek or on a rolling basis;
  - Does exemption apply to hours in any one day or in each day of the week; and
  - What does it mean to “cause” an employee to work more than 6 days in 7

“Hours Worked” Issues

- Employer could not exclude sleep time from hours worked for time spent on-site by security guards
  - Mendiola v. CPS Security Solutions, Inc.
- Commute time may be compensable if employee required to drive employer-provided car and respond to calls on company-issued cell phones
  - Alcantar v. Hobart Service

“Hours Worked” Issues

- Unpaid bag checks are not compensable time
  - Friekin v. Apple, Inc.
- Parade of retailers ending on-call scheduling
  - San Francisco Retail Workers Bill of Rights
- When is a text compensable?
  - Department of Labor Request for Information

CA Meal and Rest Break Rules

- CA Supreme Court to decide whether employers are required to relieve employees of all duties during rest breaks
  - Augustus v. ABM Security Services
Class Action CA Rest and Meal Break Issues

- Uniform policies and procedures must be legally-compliant
  - Koval v. Pacific Bell Telephone
  - Mies v. Sephora U.S.A
- Records of missed meals and breaks create a rebuttable presumption employer broke the law
  - Safeway v. Superior Court

Audit Checklist

1. Review “hours worked” policies
2. Examine schedules for “day-of-rest” issues
3. Analyze meal and rest break policies and procedures

Worker Classification

- All workers are presumed employees
- All employees are presumed non-exempt
Worry At Night About ….

- Independent contractors
- Joint employment relationships (i.e., “perma temps”)
- Exemption classifications

Independent Contractor Rules

- What is an independent contractor?
  - DOL applies “economic realities test,” focusing on worker economic independence
  - July 15, 2015 DOL Administrative Interpretation
  - CA Supreme Court to determine whether employee-favorable control test may be used
    - Dynamex Operations West, Inc. v. Superior Court

Independent Contractor Classification

- Class actions on the rise
  - O’Connor v. Uber Technologies, Inc.
  - Cottor v. Lyft, Inc.
- Joint employers can be held liable for employee/independent contractor misclassification under Labor Code section 226.8
  - Noe v. Superior Court
Joint Employer Status

- NLRB finds joint employer status where entities share or codetermine matters governing the essential terms and conditions of employment
- Browning-Ferris Industries of California

Exemption Audit Process

- Mark documents, emails and communications "confidential and privileged"
- Keep it confidential (don't "share" attorney advice except within the privilege)
- Beware of non-attorney, third-party consultants

Determine Scope

- Compliance with which laws (state/local/federal)?
- Review of which positions?
- Include non-employee positions (interns, independent contractors, students)?
- Job descriptions and/or postings
- Supervisor interviews or worksheets
- Employee interviews or worksheets
- Time studies/other?

Source of Information?

- Confirm exempt employee salary
- Review policies/practices on wage deduction
- Implement "window of correction" policy if not already in place

Review Employer Data

- Spreadsheet showing analysis for all applicable exemptions
- Consider text for decision-makers
- Color code conclusions
- Statute of limitations 2 to 4 years, depending

Form of Audit Report

- Overtime, rest & meal breaks, applicable penalties and attorneys' fees

Exposure Assessment

Reclassification

Timing
- Correspond with policy revamp, performance reviews or other initiatives
- Make it make sense

Pay Decisions
- Establish new hourly pay
- Divide hours by 2080 and/or consider expected OT
- Pay for prior OT worked?

Communication
- No admissions
- Consider written memo/email
- Provide CA wage notice
- Update pay policies

Training
- For affected employees and their managers
- Timekeeping, rest/meal & OT rules, among others
DOL Wage and Hour 2016 Regulatory Agenda

- Federal contractor paid sick leave proposed rule expected February 2016
- RFI regarding impact of non-exempt employee use of electronic devices issued February 2016
- Final FLSA exemption rule expected July 2016

FLSA Proposed Rule

- Where we are now:
  - Only a proposal
  - No requirement to do anything
  - No need to panic, but do engage in some limited planning

The Political Process

- President Obama directed the DOL to update the FLSA regulations March 2014 (last update in 2004)
- Issued July 6, 2015
- Notice and comment period ended September 4, 2015
Wage and Hour Issues for 2016

<table>
<thead>
<tr>
<th>Current FLSA</th>
<th>Proposed FLSA</th>
<th>Current California</th>
</tr>
</thead>
<tbody>
<tr>
<td>- $23,660/year</td>
<td>- $50,440/year</td>
<td>- $37,440/year</td>
</tr>
<tr>
<td>- $455/week</td>
<td>- $970/week</td>
<td>- $870/week</td>
</tr>
<tr>
<td>Highly compensated employee exemption:</td>
<td>Highly compensated employee exemption:</td>
<td>Highly compensated employee exemption:</td>
</tr>
<tr>
<td>- $109,000/year</td>
<td>- $122,148/year</td>
<td>- $122,148/year</td>
</tr>
<tr>
<td>Salary basis rules do not apply to teachers, doctors, lawyers, computer professional exemption or outside sales</td>
<td>Salary basis rules do not apply to teachers, doctors, lawyers, computer professional exemption or outside sales</td>
<td>Salary basis rules do not apply to outside sales, computer professional exemption or physicians</td>
</tr>
<tr>
<td>No automatic update</td>
<td>Updated automatically each year</td>
<td>Updated with minimum wage changes, except computer professional and physician pay change annually</td>
</tr>
</tbody>
</table>

Questions Asked By The DOL

- What, if any, changes to the duties test?
- Adopt the 50% rule for percentage of exempt duties?
- Modify long test/short test structure?
- Should concurrent test for executive duties be modified?

Audit Checklist

1. Review salary of exempt employees
2. Budget for salary increase and OT expenses in 2016
3. Consider a duties exemption audit for “troublesome” positions
San Diego Update

- Minimum wage and sick pay proposal on the June 7, 2016 election ballot
- Minimum wage
  - $10.60/hour January 1, 2016
  - $11.50/hour January 1, 2017
- Sick pay up to 40 hours used per year

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