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LANDEGGER BARON LAW GROUP, ALC

Exclusively Representing Employers

"2016 LEGAL UPDATE FOR EMPLOYERS"

WHAT EVERY EMPLOYER NEEDS TO KNOW.

KEY LEARNING POINTS:

- AB 304: How do these amendments affect California's paid sick leave law?
- SB 358: California's new fair-pay act….what's changed and how can employers comply?
- SB 588: Employers beware. You may now be personally liable for wage and hour violations.
- AB 622: Are employers prohibited from running e-verify` checks?
- AB 1513: Get the low-down on down-time pay requirements; will "safe-harbor" save you money?
- New twist to arbitration agreements--the good . . . , and reasons to be wary.

This program has been approved for 1.50 hours (California) recertification credit hours toward PHR, SPHR & GPHR through the HR Certification Institute.

"The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit."

San Fernando Valley Location:

Speaker(s): Christopher L. Moriarty, Esq. and Jennifer Raphael Komsky, Esq.

Friday, January 22, 2016
• *RSVP* by January 19th

The Sportsmen's Lodge
12833 Ventura Boulevard
Studio City, CA 91604
"The Waterfall Room"

-or-

Ventura County Location:

Speaker(s): Roxana E. Verano, Esq. Marie D. Davis, Esq.

Friday, January 29, 2016
• *RSVP* by January 25th

Camarillo Courtyard by Marriott
4994 Verdugo Way
Camarillo, CA 93012

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REMINDER! NEW BILL ALERT 2016

Reminder: the California minimum wage will increase to $10 per hour on January 1, 2016, so companies must ensure all nonexempt employees are being paid at least that amount. This change also indirectly affects some overtime-exempt employees, whose monthly salary must be no less than two times the minimum wage. Those exempt employees whose salaries are less than $41,600 annually will need a salary increase to continue to qualify for the overtime exemption.

Also of note, the federal Department of Labor has proposed increasing its minimum salary requirement for exempt employees under the federal Fair Labor Standards Act to $50,440 annually, however, the final regulations have not yet been published, so the change is not in effect, and that figure could change.

All laws listed below take effect January 1, 2016 unless otherwise noted.

Discrimination

SB 358 - The Fair Pay Act, targeting gender pay gaps.

The Fair Pay Act prohibits employers from having sex-based wage differentials amongst all job sites operated by the employer for "substantially similar work" (not necessarily the same job) when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions. The move from "equal work" to "substantially similar work" will greatly expand the number of employees who might be considered "comparators" to establish claims under this law.

Furthermore, the new law will prohibit employers from restricting in any way the ability of their employees to disclose their own wages, to discuss or ask about the wages of others, or to aid or encourage other employees to do the same. However, the bill stops short of requiring employers to divulge the wage rates of other employees, even if the request comes from a female employee trying to determine whether pay discrimination exists.

The new law will also continue to permit exceptions for pay disparities based on a system of seniority, merit, quantity or quality of production, or any other bona fide factor that is not based on sex, provided these are affirmatively established by the employer. The "bona fide factor" exception is significantly limited, however, as employers must now demonstrate that the factor or factors used are related to the specific job and justified by a legitimate business necessity, and that there are no other alternatives that would serve the same business necessity without resulting in a wage gap. See our more comprehensive article on the Fair Pay Act here.

AB 987 – Retaliation for requests for disability or religious accommodations.

This bill makes explicit that employers must not retaliate or discriminate against employees who request disability or religious accommodations, whether or not the request was granted.

AB 1509 – Retaliation against family members of employees who exercise certain rights.

This new law prohibits employers from retaliating against employees who are family members of employees who engage in certain protected activities, including political activities, whistleblowing, filing a complaint with the Labor Commissioner, testifying in a Labor Commissioner hearing, making complaints that he or she is owed wages, or filing a claim or lawsuit under the "Private Attorneys General Act."

Wage and hour

SB 588 – Expanded Labor Commissioner Enforcement and owner/corporate officer liability for nonpayment of wages.

This bill expands liability for payment of minimum wages, payment of overtime wages, violations of the Industrial Wage Orders, unreimbursed business expenses, and other related penalties under the Labor Code, to owners, directors, officers, or managing agents of the employer, which is a significant change in law that puts business owners at risk. The bill also allows companies that purchase or otherwise take control of predecessor companies to be held liable for the former employer's nonpayment of wages, after receiving written notice, if the successor company is sufficiently similar to the former employer, based on factors listed in the law.

Under this bill, the Labor Commissioner is given new ways to collect final Labor Commissioner Judgments. The Labor Commissioner will be able to seek levies against employers, impose liens against the employer's property, and require bonds from delinquent employers as a condition of continuing to do business in the state. Employers in the long-term care industry may be denied licenses if they have unpaid final judgments. Individuals or businesses that contract for services with companies in the property services or long-term care industries can be held jointly liable for the unpaid wages caused by the company, after notice to the contracting party, to the extent the unpaid wages are for services performed under the contract. "Property services" includes janitorial, security guard, valet parking, landscaping, and gardening services.

AB 970 – Expanded Labor Commissioner Enforcement.

The Labor Commissioner is now empowered, under this bill, to enforce, via investigations, citations, and penalty assessments, local overtime and minimum wage laws. This bill also empowers the state Labor Commissioner to enforce Labor Code 2802, which requires employers to reimburse employees for all necessary expenses incurred in carrying out their duties.

Because of SB 588 and AB 970, now would be a good time to check again and ensure you are complying with local laws and state laws regarding wages. It remains to be seen if the Labor Commissioner actually has resources to step up its enforcement activity, but these bills give it significant new tools to do so.

AB 1513 – Piece rate wages; pay for down time, wage statement information.

Employers who pay piece rate wages now have more to worry about. This bill requires piece rate workers be paid a separate hourly wage, in addition to their piece rate wages, for time spent taking legally mandated paid rest periods (and "recovery" periods) and for other "nonproductive time," which means work time "that is not directly related to the activity being compensated on a piece-rate basis." The law mandates that rest and recovery periods be paid at an hourly rate that is the higher of (1) an average hourly rate determined by dividing the total compensation for the workweek (less overtime premiums) by the total hours worked during the week (less time for rest and recovery periods) or (2) the highest federal, state, or local minimum wage applicable to the employer. Nonproductive time is paid at the applicable federal, state or local minimum wage, but need not be paid if the company already pays minimum wage (or above) for all hours worked in addition to piece rate wages.

The law requires the total time, rates, and total wages for rest and recovery period pay and nonproductive time pay to be separately listed on employees' wage statements. The law also creates a safe harbor protecting employers from lawsuits for past unpaid piece rate wages if they pay the owed wages and follow the process explained in the statute. See our more comprehensive article on the new piece rate law here.

SB 327 – Meal period waivers in the health care industry.

The legislature has clarified that certain employers in the health care industry can still have certain employees forego their second meal period on shifts longer than 12 hours if they sign a written, voluntary waiver. This specific regulation is in some Wage Orders, but was called into question in a recent appellate court decision, so this bill eliminates the confusion. The law goes into effect immediately and applies retroactively.

AB 202 – Cheerleaders.

AB 202 declares that cheerleaders employed by California based professional sports teams at exhibitions, events, or games, shall be deemed to be employees for all purposes (Labor Code, Unemployment Insurance Code, FEHA, etc.), and not independent contractors.

Prevailing Wage

AB 219 expands prevailing wage laws to include the hauling and delivery of ready-mixed concrete, as defined.

AB 327 extends until January 1, 2024, the law that excludes from prevailing wage laws certain work performed by volunteers or members of the California Conservation Corps or community conservation corps.

AB 852 expands prevailing wage laws to private contracts for most general acute care hospitals paid for by conduit revenue bonds issued after January 1, 2016.

Sick leave/Leaves of absence

SB 579 – Kin Care and time off for children's school activities.

This bill amends two laws regarding specific leaves of absence. It changes Labor Code 230.8, which grants time off to parents (as defined in the law) to attend children's school or day care activities, with reasonable advance notice. The law still only applies to employers of 25 or more employees, and the amount of time that can be taken is still 40 hours per year. However, the reasons employees may take time off are expanded to include not just school activities, but also enrolling children in a school or with a licensed child care provider, picking up children when the school requests it or when school policies prohibit the child from attending (except for holidays), handling behavioral or discipline problems, or when natural disasters strike. "Parent" is expanded to explicitly include stepparents and foster parents, not just parents, grandparents, or guardians.

The Kin Care Law, Labor Code 233, is amended by SB 579 to more closely align with the Healthy Workplaces, Healthy Families Act of 2014. Employers have to allow employees to use up to half of their accrued paid sick leave per year for all the purposes listed in the Healthy Workplaces, Healthy Families Act of 2014. Note that, under the new paid sick leave law itself, employers still have to provide a minimum of three days per year for these uses. Presumably the amended Kin Care Law would be implicated for employees who accrue higher amounts of paid sick leave per year.

AB 304 – Amendments to the "Healthy Workplaces, Healthy Families Act of 2014."

This bill amended the new law regarding paid sick leave, and was effective July 13, 2015. The amendments allow employers to continue to use existing paid sick leave policies that were in effect on January 1, 2015, regardless of the accrual rate of paid sick leave, as long as the policies provide at least one day or eight hours of paid sick leave in each 3 month period of employment, and at least 3 days or 24 hours within the first nine months of each 12 month period. The amendments allow employers to use paid sick leave policies that provide 3 days or 24 hours of paid sick leave by the 120th day of employment in a calendar year or other 12-month period, under certain conditions. The amendments clarify that no accrual or carry over of paid sick leave is required if 3 days or 24 hours of paid sick leave are provided at the beginning of each calendar year, employment year, or 12 month period. See our more comprehensive article on the amendments here.

Immigration

AB 622 – Use of e-verify and disclosures to employees.

This bill prohibits employers from using the federal e-verify system to check the employment authorization status of a current employee or an applicant who has not received an offer of employment, except as otherwise required by federal law or by a federal agency or as a condition of receiving federal funds. The bill does not affect an employer's ability to use e-verify in accordance with federal law to check the employment authorization status of a person who is offered employment. Employers who use e-verify and discover the information provided by the employee does not match the system records must provide the affected employee with any notices issued by the Social Security Administration or Department of Homeland Security.

Unemployment Insurance

AB 1245 – Electronic reporting and payment.

Employers will soon be required to use electronic reporting and electronic payment systems for unemployment insurance. The requirement is imposed on employers of 10 or more employees as of January 1, 2017, and all employers as of January 1, 2018. Please consult your payroll company regarding the changes.

Grocery stores: employee retention when there is a change of control.

AB 359 will require operators of grocery stores to retain certain employees when there is a change of control of the grocery store, as defined. The successor company must, from the time of the transfer until 90 days after the grocery store is operational under the successor, hire from a preferential list of "eligible grocery workers," meaning non-managerial and non-supervisory workers employed for longer than 6 months by the prior employer. The new employer must retain each of those employees for a period of 90 days after the employee's start date with the new employer; however, employees can be discharged for cause. Also, if the new employer determines that it needs fewer employees than were employed by the prior employer, employees shall be retained based on seniority within comparable job classifications. After 90 days of employment, the new employer must "consider" offering continued employment to each of the workers. Stores located in federally designated "food deserts" are exempt from the new law under certain conditions. A different bill, AB 897, amends this bill so that it does not apply to grocery stores that ceased operations for six months or more.

Arbitration

It is important to note that a bill banning all use of mandatory arbitration agreements in employment was vetoed by Governor Brown. The Governor's veto statement indicated he was not confident the bill would be upheld by federal courts in light of recent U.S. Supreme Court rulings.

THIS POSTER MUST BE DISPLAYED WHERE EMPLOYEES CAN EASILY READ IT

(Poster may be printed on 8 ½" x 11" letter size paper)

HEALTHY WORKPLACES/HEALTHY FAMILIES ACT OF 2014
PAID SICK LEAVE

Entitlement:

- An employee who, on or after July 1, 2015, works in California for 30 or more days within a year from the beginning of employment is entitled to paid sick leave.
- Paid sick leave accrues at the rate of one hour per every 30 hours worked, paid at the employee's regular wage rate. Accrual shall begin on the first day of employment or July 1, 2015, whichever is later.
- Accrued paid sick leave shall carry over to the following year of employment and may be capped at 48 hours or 6 days. However, subject to specified conditions, if an employer has a paid sick leave, paid leave or paid time off policy (PTO) that provides no less than 24 hours or three days of paid leave or paid time off, no accrual or carry over is required if the full amount of leave is received at the beginning of each year in accordance with the policy.

Usage:

- An employee may use accrued paid sick days beginning on the 90th day of employment.
- An employer shall provide paid sick days upon the oral or written request of an employee for themselves or a family member for the diagnosis, care or treatment of an existing health condition or preventive care, or specified purposes for an employee who is a victim of domestic violence, sexual assault, or stalking.
- An employer may limit the use of paid sick days to 24 hours or three days in each year of employment.

Retaliation or discrimination against an employee who requests paid sick days or uses paid sick days or both is prohibited. An employee can file a complaint with the Labor Commissioner against an employer who retaliates or discriminates against the employee.

For additional information you may contact your employer or the local office of the Labor Commissioner. Locate the office by looking at the list of offices on our website http://www.dir.ca.gov/dlse/DistrictOffices.htm using the alphabetical listing of cities, locations, and communities. Staff is available in person and by telephone.

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HEALTHY WORKPLACE HEALTHY FAMILIES- AB-1522

Amended by AB 304, signed by Governor Brown, July 13th, effective immediately Now that companies have clamored to update their paid sick leave policies to comply with the "The Healthy Workplaces, Healthy Families Act of 2014", the California legislature has graciously amended that law in ways that would have made life easier for employers had the amendments passed months ago. The new bill AB 304, which was signed by Governor Brown very recently on July 13th and goes into effect immediately, amends the paid sick leave law in several ways:

- When non-exempt employees use paid sick time, employers can pay that sick time at the employee's "regular rate of pay." The "regular rate of pay" is the rate that would be used by employers to determine overtime wages for the work week or pay period. Employers can now use the "regular rate of pay" for the work week to pay sick time taken during that week, even if no overtime wages are paid in that week. This simpler method of calculation can be used instead of averaging the last 90 days of wages to determine an hourly rate for paying sick time.
-
- If an employer had a paid sick leave policy that was in effect prior to January 1, 2015, and provided at least 1 day or 8 hours of paid sick leave in each 3 month period of employment, and at least 3 days or 24 hours of paid sick leave within the first 9 months of each 12 month period, the employer is now permitted under AB 304 to continue to use the accrual rates provide by the old policy as long as the accrual rates are unchanged. Companies will still need to ensure the policy and their practices comply with other sections of the law, like allowable uses for paid sick leave, recordkeeping, and calculation of sick time pay.
-
- An employer can have accrual rates that are different than 1 hour for every 30 hours worked, as long as accrual occurs on a "regular basis" (which is not defined) and provides the employee with no less than 24 hours of paid sick time by the 120th calendar day of employment within each calendar year or 12 month period.
-
- The bill clarifies that, under the "front load" method (that allows for no carry over or accrual of paid sick time), 3 days or 24 hours of paid sick leave must be provided at the beginning of each calendar year, employment year, or 12 month period.

- The bill states that when an employee is terminated and rehired within 12 months of termination, an employer does not have to reinstate that employee's prior accrued sick time if it was fully paid to the employee at termination.

We are still analyzing AB 304 and are awaiting further guidance from the California Labor Commissioner on how the new provisions will be enforced and interpreted by it moving forward. Please watch for future alerts from our office and contact us if you have any questions.

NOTICE TO EMPLOYEE

Labor Code section 2810.5

EMPLOYEE

Employee Name: _____

Start Date: _____

EMPLOYER

Legal Name of Hiring Employer: _____

Is hiring employer a staffing agency/business (e.g., Temporary Services Agency; Employee Leasing Company; or Professional Employer Organization [PEO])? □ Yes □ No

Other Names Hiring Employer is "doing business as" (if applicable):

_____

Physical Address of Hiring Employer's Main Office:

_____

Hiring Employer's Mailing Address (if different than above):

_____

Hiring Employer's Telephone Number: _____

If the hiring employer is a staffing agency/business (above box checked "Yes"), the following is the other entity for whom this employee will perform work:

Name: _____

Physical Address of Main Office: _____

Mailing Address: _____

Telephone Number: _____

WAGE INFORMATION

Rate(s) of Pay: _____ Overtime Rate(s) of Pay: _____

Rate by (check box): □ Hour □ Shift □ Day □ Week □ Salary □ Piece rate □ Commission

□ Other (provide specifics): _____

Does a written agreement exist providing the rate(s) of pay? (check box) □ Yes □ No

If yes, are all rate(s) of pay and bases thereof contained in that written agreement? □ Yes □ No

Allowances, if any, claimed as part of minimum wage (including meal or lodging allowances):

_____

(If the employee has signed the acknowledgment of receipt below, it does not constitute a "voluntary written agreement" as required under the law between the employer and employee in order to credit any meals or lodging against the minimum wage. Any such voluntary written agreement must be evidenced by a separate document.)

Regular Payday: _____

WORKER'S COMPENSATION

Insurance Carrier's Name: _____

Address: _____

Telephone Number: _____

Policy No.: _____

□ Self-Insured (Labor Code 3700) and Certificate Number for Consent to Self-Insure: _____

PAID SICK LEAVE

Unless exempt, the employee identified on this notice is entitled to minimum requirements for paid sick leave under state law which provides that an employee:

a. May accrue paid sick leave and may request and use up to 3 days or 24 hours of accrued paid sick leave per year;
b. May not be terminated or retaliated against for using or requesting the use of accrued paid sick leave; and
c. Has the right to file a complaint against an employer who retaliates or discriminates against an employee for
   1. requesting or using accrued sick days;
   2. attempting to exercise the right to use accrued paid sick days;
   3. filing a complaint or alleging a violation of Article 1.5 section 245 et seq. of the California Labor Code;
   4. cooperating in an investigation or prosecution of an alleged violation of this Article or opposing any policy or practice or act that is prohibited by Article 1.5 section 245 et seq. of the California Labor Code.

The following applies to the employee identified on this notice: (Check one box)

□ 1. Accrues paid sick leave only pursuant to the minimum requirements stated in Labor Code §245 et seq. with no other employer policy providing additional or different terms for accrual and use of paid sick leave.

□ 2. Accrues paid sick leave pursuant to the employer's policy which satisfies or exceeds the accrual, carryover, and use requirements of Labor Code §246.

□ 3. Employer provides no less than 24 hours (or 3 days) of paid sick leave at the beginning of each 12-month period.

□ 4. The employee is exempt from paid sick leave protection by Labor Code §245.5. (State exemption and specific subsection for exemption):_____

ACKNOWLEDGEMENT OF RECEIPT
(Optional)

_____ _____
(PRINT NAME of Employer representative) (PRINT NAME of Employee)

_____ _____
(SIGNATURE of Employer Representative) (SIGNATURE of Employee)

_____ _____
(Date) (Date)

The employee's signature on this notice merely constitutes acknowledgement of receipt.

Labor Code section 2810.5(b) requires that the employer notify you in writing of any changes to the information set forth in this Notice within seven calendar days after the time of the changes, unless one of the following applies: (a) All changes are reflected on a timely wage statement furnished in accordance with Labor Code section 226; (b) Notice of all changes is provided in another writing required by law within seven days of the changes.

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Bipartisan CA Paycheck Fairness Bill Aims to Enhance Pay Equality and End Salary Secrecy

Wait. Doesn't California already have an equal pay law? Well, yes. In fact, California has prohibited wage discrimination on the basis of sex since 1949, long before pay discrimination was prohibited by federal law. However, as the California Legislature sees it, the current version of the California Fair Pay Act is virtually identical to the federal Equal Pay Act and lacks the "teeth" necessary for potential plaintiffs to establish claims. Both laws prohibit employers from paying an employee a lesser wage rate than the rates paid to employees of the opposite sex in the same job site for the same work for jobs which "require equal skill, effort, and responsibility, and which are performed under similar working conditions." Additionally, the current law allows exceptions where wage rates are set pursuant to a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex.

The new bill, which was recently passed by bipartisan, unanimous votes of the state Senate and Assembly, and signed into law today by Gov. Jerry Brown, amends the state's existing Fair Pay Act and attempts to enlarge the sphere in which the wages of female employees will be compared with the wages of male colleagues. In addition, the bill is intended to end salary secrecy, and increase the burden on the employer to establish a non-discriminatory reason for any pay disparities between the sexes. (Although the bill was intended to address pay discrimination against women, by its

terms it would apply to any pay discrimination based on sex, including discrimination against men.)

Specifically, an employer will be prohibited from having sex-based wage differentials, considering all job sites operated by the employer for "substantially similar work" (not necessarily the same job) when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions. The move from "equal work" to "substantially similar work" will greatly expand the number of employees who might be considered "comparators" to establish claims under this law.

Furthermore, in what seems to be an enhancement to existing salary secrecy laws already on the books, the new law will prohibit employers from restricting in any way the ability of their employees to disclose their own wages, to discuss or ask about the wages of others, or to aid or encourage other employees to do the same. However, the bill stops short of requiring employers to divulge the wage rates of other employees, even if the request comes from a female employee trying to determine whether pay discrimination exists.

The amendment to the Fair Pay Act will also continue to permit exceptions for pay disparities based on a system of seniority, merit, quantity or quality of production, or any other bona fide factor that is not based on sex, provided these are affirmatively established by the employer. The "bona fide factor" exception is significantly limited, however, as employers must now demonstrate that the factor or factors used are related to the specific job and justified by a legitimate business necessity, and that there are no other alternatives that would serve the same business necessity without resulting in a wage gap. The employer must also

demonstrate that any factors relied upon to justify a disparity in wages are applied reasonably and account for the entire wage differential.

The Fair Pay Act is enforced by the California Division of Labor Standards Enforcement. If the Division finds that an employer has violated this section, it may supervise the payment of wages and interest found to be due. The Act also allows the employee (or former employee) to file a complaint with the Division to recover back wages, or for retaliation. The Division may pursue a civil complaint on behalf of the affected employee and similarly situated employees to recover unpaid wages, liquidated damages, and costs of suit.

Alternatively, the employee may file a civil action to recover wages, interest, liquidated damages (which is the amount of unpaid wages), court costs, and attorneys' fees. Punitive damages are not recoverable. The statute of limitations is two years, or three years if the violation is willful.

Given the new law's amplified protections and increased burden on employers to justify wage disparities, employers should examine pay rates for all "similar" positions and formulate company-wide measures for the provision of pay increases, so as to correct or justify any apparent pay disparities. The law will take effect on January 1, 2016.

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New Piece Rate Law Provides Employers Some Relief; But With A Catch

Employers who pay their employees by "piece-rate" instead of paying the typical hourly wages now need to comply with AB 1513. The new law forces costly new requirements on employers who pay piece rate wages, but also provides some needed clarity in light of recent class action litigation in this area. Importantly, the bill also has a safe harbor provision to help companies avoid lawsuits if they make the necessary changes and pay certain back wages owed. The safe harbor is important because courts have already found companies liable for wages and penalties to piece rate employees for the types of down time covered by the new law.

The new law requires that piece rate workers be paid a separate hourly wage, in addition to their piece rate wages, for time spent taking legally mandated paid rest periods (and "recovery" periods) and for other "nonproductive time." Nonproductive time is defined as work time "that is not directly related to the activity being compensated on a piece-rate basis." It remains to be seen how loosely the courts will interpret this language. Inconveniently for employers, these two types of down time are paid in different ways.

Rest and recovery periods must be paid at an hourly rate that is the **higher** of (1) an average hourly rate determined by dividing the total compensation for the workweek (exclusive of compensation for rest and recovery periods and overtime premiums) by the total hours worked during the week (exclusive of time for rest and recovery periods) or (2) the highest federal, state, or local minimum wage applicable to the employer. This average hourly rate for rest and recovery periods must be calculated over a workweek. For companies who pay semi-monthly, whose pay periods can close before this average hourly rate can be determined for the week, the rest/recovery period time must be paid at the applicable minimum wage, and additional wages owed, if any, based on the average hourly rate calculation must be paid to employees in their next paycheck.

Nonproductive time is simply paid at the applicable federal, state or local minimum wage. However, a company that pays, in addition to piece rate wages, an hourly wage for all hours worked that is at or above the applicable minimum wage is automatically in compliance with this requirement. Employers can determine how much "nonproductive time" employees have accrued by using actual time records, or by calculating reasonable estimates of time for each employee or for particular groupings of employees. An employer who makes errors calculating the amount of nonproductive work time will not be subject to onerous civil penalties as long as it makes good faith efforts to calculate nonproductive time and otherwise complies with this law, and pays employees at least minimum wage for all hours worked and all applicable overtime wages. However, the employer will still have to pay the balance of wages owed for the nonproductive time it erroneously

underpaid. Since this statute is untested, we expect that litigation in this area will involve what constitutes "nonproductive time" and whether or not the employers' "reasonable estimates" of nonproductive time are accurate.

Employers are required by this new law to include certain new information on piece rate workers' paycheck stubs. These employees' wage statements must show, in separate line items, for the pay period: (1) the total hours of compensable rest and recovery periods, the rate of compensation for those periods, and the gross wages paid for those periods, and (2) the total hours of other nonproductive time, the rate of compensation for that time, and gross wages for that time.

The law also provides an affirmative defense to employers against lawsuits seeking to recover unpaid wages and other penalties on behalf of piece rate workers for rest/recovery periods and other nonproductive time. To take advantage of this affirmative defense, the employer must, by December 15, 2016, pay owed wages for rest/recovery periods and nonproductive time, with interest, for the time period from July 1, 2012 to December 31, 2015, using methods specified in the new law. Prior to making the payments, the employer must notify the California Labor Commissioner of its election to make the payments. The new law contains exceptions and additional technical requirements, including reporting requirements to the employees, in order to take advantage of this safe harbor. Therefore, employers must consult with employment counsel to guide them through this process. The employer must, of course, also make the changes required by the statute to avoid liability going forward.

Employers with piece rate employees must take steps now to update their payroll systems and their practices to comply with the law by year's end. Employers who believe they might have significant past unpaid wages for the types of down time covered by the law should consult an attorney to consider the safe harbor provision. If you have any questions about the new law and how it may affect your business, please contact our office.

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Supreme Court Yet Again Upholds the Use of Arbitration Agreements that Waive the Right to Proceed with a Class Action.

The U.S. Supreme Court recently approved, yet again, the use of class action waivers in arbitration agreements. In *DIRECTV, Inc. v. Imburgia* (US 14–462 12/14/15), the Court ruled that a California Court of Appeal improperly invalidated an arbitration agreement that included a class action waiver between a consumer and DIRECTV. Although the legal reasoning in this case is hyper-technical, the takeaways are: (1) arbitration agreements continue to be valid because federal law trumps California's continuing attempts to restrict the use of arbitration agreements and (2) the Court viewed the California Court of Appeal's decision to invalidate DIRECTV's arbitration agreement as an attempt to circumvent federal law and prior court rulings supporting arbitration. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 321.) *DIRECTV* was a consumer class action, but the same general rules are applied by courts in the employment context.

Using arbitration agreements with employees that include properly written class action waivers is a good way for companies to prevent class action lawsuits seeking payments for unpaid overtime, denied meal and rest periods, and penalties for failure to comply with California's strict wage statement requirements. However, employers should carefully weigh the benefits of having an arbitration agreement against the costs and downsides.

One major downside of having your employees execute arbitration agreements is that any lawsuits filed under the Private Attorneys General Act ("PAGA") will not be sent to arbitration and can only be resolved in court; meaning that the employer could face two "actions." (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348.) In an unpaid wages class action lawsuit, an employer with a strong arbitration agreement can successfully petition the court to send most of the claims to arbitration. Then, once the matter is in arbitration, the arbitrator will deny the plaintiff the ability to proceed with the case as a class action if the arbitration agreement that the employee signed has a valid class action waiver. The PAGA portion of the lawsuit, however, cannot be waived by any agreement, so that claim remains in court. The employer in this situation ends up fighting two (or more) separate legal proceedings: one or more claims from individual employees in arbitration and a PAGA lawsuit in court seeking penalties on behalf of all employees who have similar claims to the plaintiff(s). Also, the individual arbitrations can cost a company up to $75,000.00 each just for the arbitrator's fees. This does not include the costs of paying attorneys to defend both proceedings.

The number of PAGA lawsuits being filed is growing rapidly due, in part, to employers' increased use of class action waivers in arbitration agreements. A PAGA lawsuit seeks only penalties that would normally be collected by the State and only covers a one year period of time prior to the date the lawsuit is filed. As such, the potential amount of money that employees can collect in a PAGA lawsuit

is typically less when compared to the potential amount of money that is at stake in a class action. PAGA lawsuits are currently taking longer to settle, however, because of the lack of statutory and appellate court guidance on key aspects of the law.

Arbitration agreements are not for every employer. If your company is small, the costs and expenses of fighting both an arbitration and a PAGA lawsuit can be daunting. Using a class action waiver in an arbitration agreement may not be financially worthwhile if a class action for unpaid wages is potentially resolvable at a cost that your business can absorb, since being required to defend a separate PAGA lawsuit will likely double your expenses. On the other hand, if your workforce is large, it might be worth fighting two separate "proceedings" – the arbitration and the PAGA lawsuit - to avoid the high cost it will undoubtedly take to resolve a full class action for unpaid wages, either through settlement or through the costs of defense of a trial. Counsel can help you determine if having your employees sign arbitration agreements containing class action waivers is the best course of action for you.

NEW HIRE CHECKLIST

The following items must be signed and contained in every new hire employee packet. If a document does not apply, please write N/A. Please initial that the document has been presented to the employee and signed.

Employment Application (completed, dated and signed by applicant)	**(Optional)**	_____
Labor Code Section 2810.5 for New Hires	**(Mandatory)**	_____
Post-Hire Employee Data Sheet	**(Optional)**	_____
Federal Form W-4 - Employee Withholding Allowance	**(Mandatory)**	_____
California State Form DE-4 Employees Withholding Allowance Certificate	**(Mandatory)**	_____
I-9 Form - (completed by applicant and company representative)	**(Mandatory)**	_____
Voluntary Information Form	**(Optional)**	_____
Authorization to obtain Investigative Report	**(Optional)**	_____
Notification of Request for Investigative Consumer Report	**(Optional)**	_____
Summary of Rights Under the Fair Credit Reporting Act	**(Optional)**	_____
Workers' Compensation Benefits Statement and Physician Election Form (English and Spanish/Acknowledgment)	**(Mandatory)**	_____
State Disability Insurance Booklet-DE 2515 (English/Spanish)	**(Mandatory)**	_____
EDD For Your Benefit Booklet-DE 2320 (English)	**(Mandatory)**	_____
Family Care and Medical Leave and Pregnancy Disability Leave (DFEH Notice B) (State)	**(Optional)**	_____
Family and Medical Leave Act of 1993 (Federal)	**(Optional)**	_____
California Paid Family Leave-DE2511 (English and Spanish)	**(Mandatory)**	_____
Department of Fair Employment and Housing Sexual Harassment Pamphlet (English and Spanish)	**(Mandatory)**	_____
Employee Relations Policy with Acknowledgment (English & Spanish)	**(Mandatory)**	_____
Company's Drug and Alcohol Policy with Acknowledgment	**(Optional)**	_____
Sample Meal and Rest Period Policy	**(Optional)**	_____
Sample Timesheet	**(Optional)**	_____
Employee Handbook (Company handbook)	**(Optional)**	_____
Employee Statement Re: Acknowledgment of Receipt of Handbook	**(Optional)**	_____
Insurance Premium Authorization	**(Optional)**	_____
Unearned Vacation Agreement	**(Optional)**	_____
Supplies/Uniform Cost Authorization	**(Optional)**	_____
Acknowledgment of Receipt of Mandatory Documents	**(Optional)**	_____

Date: _____ By: _____
Supervisor's Signature

Date: _____ By: _____
Employee Signature

MEAL AND REST PERIOD POLICY

Employees that are scheduled to work more than five (5) hours must take a thirty (30) minute uninterrupted meal period, off the clock, no later than the end of the fifth hour of work. Employees are entitled to be relieved of all their duties and free to take care of personal matters during that time. Employees that have a six (6) hour shift may voluntarily waive the meal period if they execute a Six Hour Shift Waiver Form. Please see the Human Resource Department.

The Company provides a paid ten (10) minute rest period for every four (4) hours of work or major fraction thereof. An employee who works between three and a half (3 1/2) to six (6) hours is entitled to one (1) ten minute break, an employee who works over six (6) hours is entitled to a second ten minute break. An employee that works less than three and a half (3 ½) hours is not entitled to receive a paid ten (10) minute rest period. Please check with your supervisor for the appropriate time to take meal and rest breaks.

Meal periods and rest periods may not be waived to leave early nor may they be consolidated for a longer break or meal period.

It is against Company policy for any employee to perform work during meal or rest periods. It is against Company policy to return to work before the end of a 30 minute meal period or ten minute rest break. It is also against Company policy for employees to work "off the clock," that is, perform work without recording it as time worked on their timesheets.

Employees working more than ten (10) hours are entitled to a second meal period before end of the tenth hour of work, unless the employee voluntarily executes a Twelve Hour Shift Waiver Agreement and has taken the first meal period.

The undersigned acknowledges that he or she has read and understands the foregoing Meal and Rest Period Policy.

_____ _____

Employee Signature Date

Política para Descansos y Períodos de Comida

Los empleados que están programados a trabajar mas de (5) horas deben tomar un descanso ininterrumpido de treinta (30) minutos para comer, fuera del horario de trabajo, y no mas tarde que al final de la quinta hora de trabajo. Los empleados tienen derecho a ser relevados de todas sus funciones laborales y son libres para atender sus asuntos personales durante ese tiempo. Los empleados que tienen un turno de seis (6) horas pueden renunciar voluntariamente al período de comida si ejecutan el formulario para OMITIR EL PERIODO DE COMIDA (Turno de 6 Horas). Por favor consulte con el Departamento de Recursos Humanos.

La compañía proporciona un período de descanso de diez (10) minutos pagados por cada cuatro (4) horas de trabajo o fracción mayor de la misma. Un empleado que trabaja entre tres y media (3 1/2) a seis (6) horas tiene derecho a un (1) descanso de diez minutos. Un empleado que trabaja más de seis (6) horas, tiene derecho a un segundo descanso de diez minutos. Un empleado que trabaja menos de tres horas y media (3 ½ horas) no tiene derecho a recibir un período de descanso de diez (10) minutos pagados. Por favor consulte con su supervisor(a) para el momento adecuado para tomar las comidas y los descansos.

Los períodos de descansos y de comida no pueden ser omitidos para poder salir temprano del trabajo, y tampoco pueden ser combinados para recibir un período para comer o descanso más largo.

Va en contra a la política de la empresa que algún empleado trabaje durante los períodos de descanso o durante el descanso para comer. Va en contra a la política de la empresa el regresar a trabajar antes de cumplirse los treinta (30) minutos del período de la comida, o los diez (10) minutos requeridos para el período de descanso. También va en contra a la política de la empresa que los empleados trabajen "fuera de horario", es decir, realizar funciones laborales sin registrar el tiempo como tiempo trabajado en sus hojas de horario.

Los empleados que trabajen más de diez (10) horas tienen derecho a un segundo período de comida antes del final de la décima hora de trabajo, a menos que el empleado ejecute voluntariamente el formulario para OMITIR EL PERIODO DE COMIDA (Turno de 10-12 Horas) y haya tomado su primer período de comida.

El abajo firmante reconoce que él o ella ha leído y ha entendido la Política para Descansos y Períodos de Comida precedente.

_____ _____

Firma del Empleado Fecha

SEMI-MONTHLY TIME SHEET FOR:

Full Name: _____
Address: _____
_____
Phone No.: _____

Pay Period _____, 20____ through _____, 20____
Soc. Sec. No.: _____

REGULAR TIME (FILL IN TIME IN & OUT)					OVERTIME (FILL IN TIME IN & OUT)		BREAKS (CHECK OFF EACH)		TOTAL HOURS	
Date	**In**	**Out**	**In**	**Out**	**In**	**Out**	**✓**	**✓**	**Regular**	**O.T.**

OT Approval:

TOTALS		
I certify that I have provided complete and accurate information in completing this time sheet. I understand that it is against company policy to provide false or incomplete information on time sheets. I further certify that I have had the opportunity to take my required rest period(s) according to company policy and have taken the required meal period(s) according to company policy.	**Regular/OT Hours**	
	Vacation Hours	
	Holiday Hours	
	Sick Pay Hours	
	TOTAL	

_____ _____
Signature Date

SEMI-MONTHLY TIME SHEET FOR:

Full Name: _____
Address: _____
_____
Phone No.: _____

Pay Period _____, 20____ through _____, 20____
Soc. Sec. No.: _____

REGULAR TIME (FILL IN TIME IN & OUT)					OVERTIME (FILL IN TIME IN & OUT)		TOTAL HOURS	
Date	**In**	**Out**	**In**	**Out**	**In**	**Out**	**Regular**	**O.T.**

OT Approval:

TOTALS			
Yo declaro que he entregado información completa y precisa al llenar este formulario de horas de trabajo. Yo entiendo que el entregar información falsa o incompleta en este formulario va contra la política de la compañía. Yo también declaro que he tenido la oportunidad de tomar mis periodos de descanso de acuerdo a la política de la compañía, y he tomado el tiempo de almuerzo requerido bajo la política de la compañía.	**Regular/OT Hours**		
	Vacation Hours		
	Holiday Hours		
	Sick Pay Hours		
	TOTAL		

_____ _____
Signature Date