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## NEWSLETTER

### Re: Recent Developments in Employment Law

Dear Clients and Friends:

We are pleased to provide the following information to you regarding some recent legal developments affecting employers.

#### I. Legislation.

##### A. The Increase in the California Minimum Wage and the Ripple Effects in Other Areas.

The State of California minimum wage increased to \$10.50 an hour for employers with 26 or more employees on January 1, 2017. (For businesses with 25 or fewer employees the increase is delayed to January 1, 2018.) Additional annual increases in California minimum wage will take place each subsequent January 1, until it reaches \$15.00 an hour on January 1, 2022. (For employers with 25 or fewer employees, the minimum wage will reach \$15.00 an hour a year later.)

Whenever the California minimum wage increases, it has significant ripple effects in other wage-hour areas under California law. Below are examples.

*Minimum Salary for Exempt Employees.* The minimum salary an employer must pay overtime-exempt managerial, administrative and professional employees (exempt white-collar employees) is based on twice the minimum wage rate for a 40-hour workweek. The minimum monthly salary increased to \$3,640 (\$840 a week, \$41,680 a year) for 2017, on January 1<sup>st</sup>.

*Rate of Pay for Commission-Paid Exempt Employees.* The “regular rate of pay” for a commission-paid exempt salesperson covered by Wage Order 4 - *Professional Technical, Clerical, Mechanical and Similar Occupations*, and Wage Order 7 - *Mercantile Industry*, is 1.5 times the minimum wage for each hour worked during the workweek. In addition, more than half of the employee’s compensation must be based on commissions. Therefore, the minimum hourly rate under this exemption increased to \$15.75, on January 1, 2017.

*Piece-Rate Employees.* Employees paid based on particular tasks or units of production, such as a piece rate, must receive not less than the minimum wage for each hour worked, and overtime at the applicable rate.

*Meal and Lodging Credits.* The increase in the minimum wage also increased the amount that an employer can apply as a credit for meals and lodging toward satisfying the minimum wage. These new amounts are set forth in Wage Order MW-2017.

Also, various municipalities such as the County of Los Angeles, and the Cities of Los Angeles, San Diego, Santa Monica and Pasadena in Southern California, and local governments in Northern California have enacted their own minimum wage ordinances. Employers with employees working in the geographic boundaries of those municipalities must abide by those ordinances for such employees, which usually have minimum wages higher than California's. However, most local ordinances only apply to nonexempt employees (i.e., employees paid hourly or by piece-rate); they rarely apply to employees exempt from overtime under California law. Therefore, minimum wage increases adopted by municipalities do not affect the minimum salary paid to exempt white-collar employees.

Last, employers must display the most recent version of the minimum wage poster, MW-2017, which includes the increase in the California minimum wage, and the local government posters that apply to their employees.

#### *Employer Best Practices*

- Ensure that management, supervisors and payroll staff are informed of the increases in the minimum wage at both the State of California and the local level, and their impact on exempt and nonexempt employees.
- If appropriate, change payroll practices.
- Ensure the State of California and all local entity minimum wage notices are posted.

#### **B. Requirement to Notify Employees of their Rights if they are Victims of Domestic Violence, Sexual Assault and Stalking.**

A new law, which will take effect by July 1, 2017, imposes a notice requirement on employers, besides the obligations to grant employees time off from work, to accommodate employees and not to discriminate or retaliate against employees who are victims of domestic violence, sexual assault or stalking under California Labor Code 230 and 230.1.

As background, Labor Code 230 prohibits an employer, regardless of size, from discriminating or retaliating against an employee who is a victim of crime for taking time off from work to appear in court to comply with a subpoena or other court order, or to serve as a witness in any judicial proceeding. This same section also bars an employer from discharging an employee, or discriminating or retaliating against an employee, who is the victim of domestic violence, sexual assault or stalking for taking time off from work to obtain or attempt to obtain judicial relief such as a restraining order or other court-ordered relief to help ensure the health, safety or welfare of the victim or his or her child. This section also requires an employer to reasonably accommodate an employee who is a victim of domestic violence, sexual assault or stalking.

Labor Code 230.1 prohibits an employer, with 25 or more employees, from discharging, or discriminating or retaliating against an employee who is a victim of domestic violence, sexual assault or stalking from taking time off from work to: (1) seek medical attention for injuries caused by domestic violence, sexual assault, or stalking; (2) obtain services from a domestic violence shelter, program, or rape crisis center because of domestic violence, sexual assault, or stalking; (3) obtain psychological counseling related to an experience of domestic violence, sexual assault, or stalking or (4) participate in safety planning and take other actions to increase safety from future domestic violence, sexual assault, or stalking, including temporary or permanent relocation.

Additionally, Labor Code 246.5(a) (2) requires an employer to allow an employee to use paid sick leave for reasons covered by the Labor Code sections.

The new law will require companies to provide new employees upon hire and current employees upon request with written notice about their right to take protected time off for reasons covered by Labor Code 230 and 230.1, their right to reasonable accommodation, and protection against discharge, discrimination and retaliation for taking time off for reasons covered by Labor Code 230 and 230.1. The Labor Commission will develop and provide a form, which must be posted on the Labor Commissioner's website by July 1, 2017. Employers need not comply with the notice provisions until the Labor Commissioner provides the form. Employers should periodically check the Labor Commissioner's Internet Web site at <http://www.dir.ca.gov/dlse/> for the form.

#### *Employer Best Practices*

- Ensure that management and supervisors are informed about the protections afforded victims of domestic violence.
- If appropriate, reference these protections in the employee handbook or policies.
- Be prepared to implement the new written notice to employees at time of hire and to other employees on request, when the Labor Commissioner posts a form to its website.
- Consider developing a written notice and implementing it now at the employer's convenience, such as with an employee handbook update.

#### **C. New I-9 Form and California Law.**

Effective January 22, 2017, employers must use only the new version of the Form I-9, Employment Eligibility Verification ("I-9 Form"), dated at the bottom left 11/14/2016, to verify the eligibility of employees to work.

Among the changes in the new version, Section 1 asks the employee to provide "other last names used" rather than "other names used," and streamlines certification for certain foreign nationals.

Additionally, under a newly enacted California Labor Code § 1019.1, employers are prohibited from (i) requesting more or different documents than are required by the I-9 Form, (ii) refusing to honor

documents or work authorization based on the specific status or terms of status (e.g., the future expiration date of a document) that accompanies the authorization to work, and (iii) attempting to reinvestigate or re-verify a current employee's authorization to work using an unfair immigration-related practice. A violation of the statute subjects the employer to a penalty of up to \$10,000 per violation.

*Employer Best Practices*

- Use the new I-9 form
- Ensure both the employee and the employer representative responsible for completing the I-9 form do so correctly including signing and dating it. We have often seen I-9 forms not signed and dated by the employer representative.
- Ensure the company representative responsible for completing the I-9 form do not require the employee to submit a particular document do not reject documents presented by the employee, if they are covered by the I-9 form.

**D. New Traps in Agreements with Employees.**

A new California Labor Code section prohibits an agreement entered as “a condition of employment” with an employee who “primarily resides and works in California” from requiring the employee to litigate in court or arbitrate claims arising in California in a judicial forum outside of California or to forgo the “substantive protections of California law” regarding a dispute arising in California. The new law applies to any contact with a California employee entered, modified, or extended on or after January 1, 2017. A trap for employers under the new law is the prohibition against an agreement containing any provision which has an employee forego “substantive protections of California law.”

The new law does not apply to agreements not entered as a condition of employment. For example, a severance and release agreement under which money or other consideration is paid in exchange for the employee's release of claims, is not entered as a condition of employment.

Also, the law does not apply to employment contracts negotiated by the employee's attorney on behalf of the employee.

The statute does not define phrases such as “primarily reside[] and work[] in California” or “substantive protection of California law.” These terms must await clarification in litigation.

Although the new statute may seem limited to multistate companies with agreements with California employees containing choice-of-law or choice-of-forum provisions, the new law's reach may be much broader. Any agreement with an employee in California that a court finds deprives the employee of the substantive protections of California law, violates the statute, is voidable by the employee and subjects an employer to an award of attorney's fees. For example, employees often challenge employment arbitration agreements, which employees must sign as a condition of employment or continued employment, arguing that such agreements are unconscionable. If a court or

an arbitrator rules the arbitration agreement is unconscionable, the employer may be subject to liability under the statute if the agreement deprived the employee of substantive protections, e.g., the arbitration agreement contains a class action waiver and the agreement is not covered by the Federal Arbitration Act.

### *Employer Best Practices*

- Consider including language in agreements with employees, including employment agreements, expressly stating the employee has consulted a lawyer regarding the negotiation of the agreement.
- Review all agreements with employees entered as a condition of employment, including employment, trade secrets, confidentiality, intellectual property and arbitration agreements to determine if any provisions have employees waive “substantive protections of California law,” and assess the risks if they do.
- Ensure any agreements with employees comply with the statutes’ choice-of-law and choice-of-forum provisions.

## **II. Court Decisions.**

### **A. Employers Must Carefully Monitor the Timing of Rest Periods and Must Relinquish Control of Employees during Rest Periods.**

California law requires employers to authorize and permit nonexempt employees rest periods, if the employee’s total daily working time is at least 3½ hours. The mandated rest breaks must be provided at the rate of 10 minutes “net” for every 4 hours or major fraction thereof worked, which means anything over two hours. The California agency that enforces employment laws takes the position that 10 minutes “net” rest period means the actual time the employee can take a rest from work. It does not include the time to walk or otherwise travel to a place of rest. Thus, as a practical matter most rest periods rest are longer than 10 minutes.

Also, the employer must authorize and permit employees to take rest periods in the middle of each work period “insofar as practicable.” Employers must consider rest periods as hours worked, for which the employee must be paid.

If an employer does not provide an employee with the required rest periods, or satisfy the required timing of the rest period, it must pay the employee an additional 1 hour of pay at the employee’s regular rate of pay each day for the missed rest periods.

In April 2016, a California Appellate Court explained the meaning of “insofar as practicable” by holding that if an employer deviates from providing rest periods in the middle of the 4-hour work period (the preferred schedule), the employer must satisfy two tests:

- The departure will not unduly affect employee welfare; and
- The departure is tailored to alleviate a material burden that would be imposed on the employer by implementing the preferred schedule for rest periods.

The court noted that a departure from the preferred schedule that is merely advantageous to the employer does not satisfy the required test, because the existence of such an advantage does not, by itself, show that the preferred schedule is not capable of being put into practice.

In December 2016, the California Supreme Court ruled that employers must permit their employees to take off-duty rest periods and cannot require employees to remain “on call” during rest periods. During the required rest periods, employers must relieve their staff of all duties and “relinquish control” over how employees spend their break time. Also, employees must be free to take care of personal matters such as taking a brief walk or engaging in a personal phone call during rest periods. According to the court’s reasoning, employers cannot compel “employees to remain at the ready, tethered by time and policy to particular locations or communications devices, with the requirement to relieve employees of all work duties and employer control during 10-minute rest periods.”

Liability for violation of the rest period requirements can be substantial. In the decision noted above, the Court upheld an award of \$90 million against the employer.

Some handbook policies require employees to remain on premises during rest periods. The Supreme Court’s decision recognized that because rest periods are 10 minutes in length, they impose practical limitations on an employee’s movement during the rest period. These practical limitations mean that employees must ordinarily remain onsite or nearby, but are not sufficient to establish employer control.

The Supreme Court identified options employers can take if it is burdensome to relieve employees of all duties during rest periods, including the obligation to remain on call. Employers can provide employees with another rest period to replace the one interrupted or pay the additional hour of compensation. The Supreme Court noted, however, that such options must be the exception and not the rule. If the employer needs to be excused from the rest period requirements, an employer can apply for an exemption from the State.

#### *Employer Best Practices*

- Review policies and practices regarding rest (and meal) breaks) to ensure they follow California law.
- Do not require employees to carry a pager or a cell phone, remain vigilant and respond to the employer during rest periods.
- Schedule rest periods in the middle of work periods, whenever possible.

- Review employee handbooks and personnel policies, and remove provisions prohibiting employees from leaving the premises during rest periods.
- Include provisions in handbooks and policies requiring supervisors and employees to report to management if an employee does not take a rest period and/or a meal period, regardless of the reason.
- If the employer causes the employee to miss a rest period, ensure the employee is paid the additional hour of compensation required by law.
- If the employer causes the employee to miss the meal period, ensure the employee is paid the additional hour of compensation required by law.
- Consider whether to apply to the State of California for an exemption from having to provide employees with rest breaks.

**B. Employers Must Include Cash Payments Given to Employees In Lieu of Health and Other Benefits When Determining the Overtime Rate of Pay.**

Under federal and California law, overtime pay for nonexempt employees is based on either 1½ times (California and federal law) or 2 times (California law) the employee's "regular rate of pay." The regular rate of pay is the hourly rate equivalent the employee is paid per hour for non-overtime hours worked. The regular rate of pay under federal and California law includes all forms of remuneration an employee receives from his or her employer, except those items expressly excluded under the federal Fair Labor Standards Act (FLSA).

For example, production bonuses and commissions, must be included in the regular rate of pay with an employee's hourly pay. Payments made for occasional periods when no work is performed (e.g., holiday pay, paid vacations, paid sick leave) and similar payments (e.g., loans and pay advances) are not considered compensation for hours worked and therefore can be excluded from the regular rate of pay. Similarly, employer payments for health, dental and vision insurance made on the employee's behalf to an insurance company or a trust fund, and payments to bona fide pension and profit sharing plans are excludable from the regular rate of pay.

Some employers provide flexible benefits plans for their employees under which the company furnishes a designated monetary amount each month to each employee to purchase of medical, dental and vision insurance or other types of benefits from a benefit provider. Some plans also permit employees to take all or part of the monthly flexible benefit amount as cash-in-lieu of benefits.

The United States Court of Appeals for the 9<sup>th</sup> Circuit, which includes California, ruled that an employer with a flexible benefit plan which permitted employees to take cash-in-lieu of payments had to include the cash-in-lieu of benefit payments in the regular rate of pay to calculate overtime. The payments did not qualify for exclusion from the regular rate of pay under the FLSA because the employer paid the money directly to the employees and not to a trustee or third person.

The decision goes even further, however. The court ruled that the employer's flex benefit plan was not bona fide under the FLSA, even though it was under the tax law, because employer's cash-in-lieu payments to employees was too great a percentage of the employer's total amount of flexible benefits to qualify as excludable from the regular rate determination.

There is substantial uncertainty regarding what the future holds regarding this issue. The employer has asked the U.S. Supreme Court to review the 9<sup>th</sup> Circuit Court's decision, but we don't know if such review will be granted, and if granted, when the Supreme Court will decide. Also, we do not know the position the Trump administration could take in the litigation, or regarding any changes to the law. What is certain is that the court's holding is the current law in the 9<sup>th</sup> Circuit.

#### *Employer Best Practices*

- If the employer has a flexible benefit plan, review the plan to determine if it gives employees the option to receive cash in lieu of payments to third-party employee benefit providers.
- If the flexible benefit plan offers a pay-in-lieu of benefits option, determine what impact including cash payments to nonexempt employees has the employer's overtime pay obligations and liability.
- If the flexible benefit plan offers a cash-in-lieu of benefits option, determine if the plan is "bona fide" as defined under the Fair Labor Standards Act and corresponding California law, including calculating the percentage of the total dollar amount of the flexible benefits provided to employees represented by the dollar amount of the cash in lieu of benefit payments to employees.
- Evaluate what course of action to take based on the 9<sup>th</sup> Circuit Court of Appeals' decision and the pending writ of certiorari with the U.S. Supreme Court. The options include (1) doing nothing and waiting for further developments from the U.S. Supreme Court or the present administration in Washington and potentially incurring liability, (2) changing pay practices to include cash in lieu of benefits in determining the regular rate for overtime pay purposes, or (3) consulting with an employee benefits professional about changing the flexible benefit plan to eliminate the pay-in-lieu of benefits option.

#### **C. The Implementation of New Federal Overtime Regulations Have Been Stymied (aka "Trumped").**

New overtime regulations issued by the U.S. Department of Labor ("DOL") under the Fair Labor Standards Act ("FLSA"), which were scheduled to go into effect December 1, 2016, would have more than doubled the minimum salary requirements for exempt executive, administrative and professional employees from \$455 a week (\$1,971.67 a month; \$23,660 a year) to \$913 a week (\$3,956.33 a month; \$47,476 a year). However, because of a lawsuit challenging the revised DOL regulations, on November 22, 2016, a federal judge in Texas issued a nationwide injunction blocking new rules from going into



effect. After an unsuccessful attempt to have the judge lift the injunction, the DOL filed an appeal with the U.S. Court of Appeals for the 5<sup>th</sup> Circuit and asked for the appellate proceedings to be expedited. Labor unions and members of Congress filed briefs supporting the revised regulations. Various states and business associations filed briefs opposing the regulations and supporting the injunction.

Additionally, on January 20, 2017, the new Presidential administration issued a *Memorandum for the Heads of Executive Departments and Agencies* instructing the agencies to postpone the implementation of any new regulations that have not gone into effect for 60 days from January 20, 2017.

The DOL has obtained several extensions of the deadline for filing its brief, which is now due May 1, 2017. In one of the DOL's extension requests it stated: "The requested extension is necessary to allow incoming leadership personnel adequate time to consider the issues."

Stay tuned to learn what happens next.

**III. Examples of Laws You May Not Know About (Or Perhaps Don't Want to Know About).**

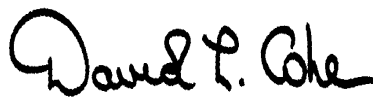
In California it is illegal to eat a frog that dies during a frog-jumping contest. Also, the California Vehicle Code forbids a woman from wearing a house coat when operating a motor vehicle.

A city in California makes it unlawful to detonate a nuclear weapon within the city's limit. If the offender survives, they may be fined \$500.

Finally, another city's ordinance reads: "No dog shall be in a public place without its master on a leash."

If you have questions about any employment-related matters, please do not hesitate to contact me.

Sincerely,



David L. Cohen