



Contra Costa County EAC Midyear Legal Updates Presentation

July 19, 2016

Presented by
Christin Lawler



Agenda

- Review key legislation that already has gone into effect
 - 2014 and 2015 Update
 - 2016 Update
- Review pending legislation & legislation that failed passage
- Election year reminders



2014 and 2015 Legislation

- SB 3 – Minimum Wages
- Healthy Workplaces, Healthy Families Act



SB 3 – Minimum Wages

July 1, 2014

Minimum Wage Increase

- January 1, 2016 \$10/hr
- Scheduled increases starting January 1, 2017



Healthy Workplaces, Healthy Families Act

July 1, 2015

All employers are required to provide paid sick leave to any employee who works at least 30 days in California for the employer.

- No exemption for small employers or non-profits
- Industry specific exemptions, including airline and public sector



Healthy Workplaces, Healthy Families Act

July 1, 2015

EXAMPLE: You work for a large employer with offices in several states. You have an employee who resides in Texas and works primarily out of the Dallas office. However, the employee works out of the San Francisco office one week per month. Is the employee covered?



Healthy Workplaces, Healthy Families Act

July 1, 2015

- Employees must accrue paid sick leave at the rate of one hour per every 30 hours worked.

OPTION 1: Provide one hour of paid sick leave for every 30 hours worked.

OPTION 2: Provide a lump sum of three days or 24 hours of paid sick leave at the start of every employment year, calendar year or 12-month period.



Healthy Workplaces, Healthy Families Act

July 1, 2015

OPTION 3: Accrual on a regular basis, with no less than 24 hours of paid sick leave provided by the 120th calendar day of employment, calendar year or 12-month period.

OPTION 4: For new hires, accrual that provides no less than three days or 24 hours of paid sick leave by the 120th calendar day of employment.



Healthy Workplaces, Healthy Families Act

July 1, 2015

- Employees may take paid sick leave:
 - To treat their own illness or for purposes related to domestic violence, sexual assault or stalking; or
 - To care for an immediate family member, spouse or domestic partner, sibling, grandparent or grandchild.



Healthy Workplaces, Healthy Families Act

July 1, 2015

- Employees start to accrue leave on their first day, but they cannot use it until their 90th day of employment.
- Unless employers use the lump sum approach, employees may carry over accrued but unused paid sick leave.
- Employers may cap the amount of hours accrued to 48 hours or six days.
- Employers do not need to cash out accrued sick leave at the end of employment.



Healthy Workplaces, Healthy Families Act

July 1, 2015

- Employers must provide notice of paid sick leave laws.
- Employers must keep records for three years.
- San Francisco, Oakland, Emeryville and other cities in Southern California all have their own paid sick leave laws.
- San Francisco Paid Parental Leave (January 1, 2017)



2016 Legislation

- Healthy Workplaces, Healthy Families Act Amendments
- Kin Care & Childcare Activities
- California Fair Pay Act
- Fair Employment & Housing Act Amendments
- Private Attorneys General Act Amendments
- California Labor Code Amendments
- Joint Employer Liability



Healthy Workplaces, Healthy Families Act

2016 Amendments

- Under the existing law, employers who provide in-home supportive services are exempt from providing paid sick leave.
- The 2016 Amendments eliminate this exemption.
- Takes effect on July 1, 2018.



Kin Care & Childcare Activities

2016 Amendments

- Effective January 1, 2016, the Kin Care protections were amended to align with the Healthy Workplaces, Healthy Families Act.
- Kin Care may be taken for any of the reasons provided under the paid sick leave law.



The California Fair Pay Act

January 1, 2016

- Prohibits California employers from paying an employee less than the rate paid to an opposite-sex employee for substantially similar work.
- Creates a private right of action for retaliation and discrimination.
- Shifts the burden onto employers to affirmatively demonstrate that a wage differential is not gender-based.



The California Fair Pay Act

January 1, 2016

Employer's defenses under the Fair Pay Act:

- Seniority System
- Merit System
- System Measuring Earnings by Quality/Quantity
- Bone Fide Factor Other Than Sex



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The Fair Employment & Housing Act

2016 Amendments

Effective April 1, 2016, California employers must have a written:

- (1) Discrimination, harassment and retaliation policy
- (2) Investigation policy

- http://www.dfeh.ca.gov/res/docs/DFEHNews/CAamendedFEHAreqsEmployersApril_1_2016_Final.pdf



The Fair Employment & Housing Act

2016 Amendments

- Investigation Policy Requirements:
 - Investigation procedures, which must include a fair, timely, and thorough investigation that provides all parties appropriate due process
 - Remedial measures
 - Company representatives designated to receive complaints
 - Confidentiality
 - Protections against retaliation
 - File complaints with the DFEH and/or the EEOC



The Fair Employment & Housing Act

2016 Amendments

Additional Amendments to the FEHA

- Training Requirements

Employers must maintain documentation from anti-discrimination, harassment and retaliation trainings for a minimum of two years.

- Requests for Accommodation

The FEHA now expressly prohibits employers from retaliating against employees for requesting an accommodation of a disability or religious belief, regardless of whether the request is granted.



The Fair Employment & Housing Act

2016 Amendments



California courts have expanded the duty to accommodate



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The Fair Employment & Housing Act

2016 Amendments

- Service Animals

Employers may not require training requirements or certifications for assistive animals.



The Fair Employment & Housing Act

2016 Amendments

- Definitions

The FEHA now provides specific definitions for several key terms, including “gender expression,” “gender identity,” and “transgender.”



The Private Attorneys General Act

2016 Amendments

- Effective June 27, 2016, the PAGA now provides the LWDA 60 days to review a plaintiff's notice of claims.
- A plaintiff cannot file a lawsuit alleging a PAGA violation until at least 65 days after sending notice to the LWDA.



The California Labor Code

2016 Amendments

Effective January 1, 2016, Labor Code section 226.2 requires employers to compensate piece-rate workers for mandated rest and recovery periods, as well as other “non-productive time.”

- Piece-rate pay compensates employees for “productive time” only.
- Mandated rest and recovery periods and other non-productive time must be compensated separately at no less than the minimum wage.



The California Labor Code

2016 Amendments

- Employers have a “defense” to claims if they provided back pay for rest periods from July 1, 2012 to December 31, 2015.
- There are two options for providing back pay:
 - (1) Actual amount due based on time records or
 - (2) 4% gross earnings.



The California Labor Code

2016 Amendments

- Effective January 1, 2016, Labor Code section 558.1 provides that any individual who violates or causes violations of certain provisions of the Labor Code may be held personally liable for such a violation.



The California Labor Code

2016 Amendments

Individual defendants may be liable for:

- Minimum wage violations
- Violates related to hours and days of work
- Overtime wage violations
- Meal & rest periods violations
- Failure to provide accurate and itemized wage statements
- Failure to indemnify expenses
- Waiting time penalties



The California Labor Code

2016 Amendments

Additional Amendments to the Labor Code:

- SB 237 Hospital Meal Periods
- AB 359 Retention of Grocery Workers
Following Change of Ownership



Joint Employer Liability

- NLRB: *Browning-Ferris Industries of California, Inc.*
- Guidance from the U.S. Department of Labor
- May not escape even if not a joint employer-
Agency theory (?????)



Pending Legislation

- FLSA Updates
- 2016 Pending Bills



2016 FLSA Regulations Key Highlights

- \$47,476/year new minimum salary threshold
- \$134,004/year new minimum compensation level for highly compensated employees
- Nondiscretionary bonuses, incentive pay or commissions can satisfy up to 10% of salary level
- Compliance deadline is December 1, 2016
- No changes to duties test
- Automatic increase every 3 years



U.S. Department of Labor FLSA Resources

- The Fair Labor Standards Act of 1938, as Amended (<https://www.dol.gov/whd/regs/statutes/FairLaborStandAct.pdf>)
- US DOL Wage & Hour Division 2016 Final Rule: Overtime Webpage (<https://www.dol.gov/whd/overtime/final2016/>)
- Overtime Final Rule Q&A (<https://www.dol.gov/whd/overtime/final2016/faq.htm>)
- Guidance for Higher Education Institutions on Paying Overtime under the FLSA (<https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>)
- Overtime Final Rule and Higher Education Fact Sheet (<https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>)



FLSA Enforcement

- The Department of Labor's Wage and Hour Division (WHD) enforces the FLSA
- *FLSA provides the following methods for recovering unpaid minimum or OT wages:*
 - WHD may supervise payment of back wages.
 - The Secretary of Labor may bring suit for back wages and an equal amount as liquidated damages.
 - An employee may file a private suit for back pay and an equal amount as liquidated damages, plus attorney's fees and court costs.
 - The Secretary of Labor may obtain an injunction to restrain any person from violating the FLSA, including the unlawful withholding of proper minimum wage and overtime pay.
- 2-year SOL applies to recovery of back pay. If willful violation, 3-year SOL applies.
- Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a **civil money penalty** of up to \$1,000 for each such violation.
- Willful violations of the FLSA may result in **criminal** prosecution and the violator fined up to \$10,000. A second conviction may result in imprisonment.



Now What?

- **Raise salaries** to meet salary level (\$913/week or \$47,476 annually)
- **Evaluate and realign employee workloads** to minimize possibility of OT and to ensure staffing levels are appropriate for the workload
- **Reclassify as non-exempt and pay OT for any hours worked in excess of 40 hours/week above a salary** for newly OT-eligible employees who are currently paid on a salary basis
- **Adjust employees' base pay and pay OT** to reallocate the amount of an employee's earnings between regular wages and OT pay
- **Reductions in force or nonrenewal of positions** if/when vacated



FLSA “White Collar Exemption”

For an employee to be considered an “exempt” employee:

- (1) Their job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (“duties test”);
- (2) They must be paid on a salary basis not subject to reduction based on quality or quantity of work (“salary basis test”); AND
- (3) Their salary must meet a minimum salary level, which the final rule just increased to \$47,476 annually for a full-year worker (“salary level test”).



2016 Pending Bills

- Update on employment related bills that have been introduced and passed their house of origination and are moving forward
- Each house has until August 31, 2016 to pass bills.
- Thereafter, the Governor has until September 30, 2016 to sign or veto bills that were passed by both houses.
- For full text of bills, see <http://www.leginfo.ca.gov/bilinfo.html>



AB 67 (Double Time on Thanksgiving)

- Requires specified retail and grocery establishment employers to pay double time to employees who work on Thanksgiving.
- Not applicable to exempt employees or to employees covered by collective bargaining agreements meeting specified conditions.



AB 1676 (inquiries regarding salary history)

- Prohibits employers from making oral or written inquiries about an applicant's salary history.
- Requires private employers to provide an applicant with the pay scale for a position upon request.
- Note: Governor Brown vetoed a similar bill last year.



AB 2337 (notice of Labor Code 230.1 rights)

- Currently, California law prohibits employers with 25 or more employees from discriminating or retaliating against employees who take time off work for specified purposes related to being the victim of domestic violence, sexual assault, or stalking.
- Amends Labor Code section 230.1 to require that employers provide written notice of these rights to all new hires and, upon request, to current employees.



AB 2261 (Expanded Labor Commissioner Power)

- Adds section 98.74 to the Labor Code to allow the Labor Commissioner to conduct an investigation, issue citations, or bring a civil action against an employer for Labor Code violations, even if no employee has filed a complaint with the Labor Commissioner against the employer.



SB 1001 (Expanding FEHA to Cover Employment Eligibility Verification Practices)

- Amends FEHA to add a new category of unlawful employment practices based on an employer:
 - § requesting more or different documents than required under federal law for verification purposes,
 - § refusing to honor documents that appear reasonably genuine,
 - § discriminating against an immigrant with authorization to work based on having the status of immigrant, or
 - § attempting to reinvestigate or re-verify an incumbent employee's authorization to work where not legally required to do so



SB 1063 (Expanding Equal Pay Act to Preclude Race/ Ethnicity Based Disparities)

- Bill further expands last year's Equal Pay Act (strengthening prohibitions on gender-based pay differentials by adding a new Labor Code provision precluding wage differentials based on race or ethnicity).



SB 1166 (Parental Leave)

- Requires all California employers with 10 or more employees to provide up to 12 weeks of unpaid leave to an employee (with at least 12 months of service and who has worked at least 1250 hours in the 12 months preceding the request for leave) for purposes of bonding with a new child within the first year of the child's birth, adoption, or foster care placement. (as opposed to just employers with 50 or more employees)
- Employer also required to maintain the employee's health benefits (on the same terms as if the employee was actively reporting to work) for up to 12 weeks.



Bills that Failed Passage

AB 1948 (limiting recovery for meal and rest break claims)

- Made the one hour premium for a missed meal or rest break a penalty for statute of limitations (ie 1 year vs. 3/ 4 years) and would be the sole penalty for violations
- This bill died in committee in the Assembly

AB 2405 (pay for school activities leave)

- Required school activities leave to be paid
- This bill failed passage in the Assembly



Failed....

AB 2461-2465 (PAGA reforms):

- These bills would have provided limited but much needed PAGA reform and would have but helpful reform.
 - § Included caps on penalties
 - § Broadened exhaustion requirements
 - § Broadened cure right
- These bills died in committee in the Assembly



Failed....

SB 878 (Fair Scheduling Act)

- Required retail, restaurant, and grocery employers to provide 7-day advance notice of work schedules and to provide modification pay to employees in the event of cancelled or changed shifts
- This bill failed passage in the Senate



