New minimum wage law trap

By Eli Kantor

Gov. Jerry Brown recently signed Assembly Bill 10, which increases California's minimum wage by 25 percent over the next two years in two steps. First, on July 1, 2014, the minimum wage will increase from $8 to $9 per hour. Second, on Jan. 1, 2016, it increases it again to $10 per hour.

With this latest increase, California's minimum wage is among the highest in the nation. It is on track to be perhaps the highest in the nation. The federal minimum wage has been $7.25 per hour since 2009. Employers must comply with the highest applicable rate. In California it is the state minimum wage.

However, what many employers and their counsel may not realize is that the increase in the minimum wage affects more than merely minimum wage workers: It also affects the overtime exemption and the commission pay exemption.

Under California law employees are classified as exempt or nonexempt. There is a two-part test to determine whether an employee is qualified for an exemption that considers salary and duties. Employees who are "primarily engaged" in duties that require the exercise of independent discretion and judgment are not entitled to receive overtime pay even if they work more than eight hours in a day or 40 hours in a week. Such employees usually fit into the professional, executive or administrative exemptions.

However, there is also the salary test. To be exempt an employee must earn a monthly salary equal to twice the equivalent of full-time minimum wage employment. The minimum "salary" required for these exemptions must be a fixed amount. Currently this is $2,773.33 per month or $33,280 per year. However, on July 1, the required salary will increase to $3,120 per month or $37,440 per year, and on Jan. 1, 2016, it will increase to $3,466.67 per month or $41,600 per year. Thus, some employees may lose their exempt status under California law, even if they still qualify under the "duties" test.

Recently, there has been a huge amount of litigation, including several multi-million dollar class actions, concerning whether certain managers or assistant managers qualify as exempt employees. This litigation has focused on the duties test to determine whether the employee is "primarily engaged "in administrative, executive or professional duties. Primarily has been defined as more than 50 percent of the time.

However, now plaintiff's lawyers may find fertile ground for litigation using the salary test. An employee incorrectly classified as exempt will not be paid at all for overtime hours worked In addition to unpaid wages, a minimum wage violation can result in liquidated damages under Labor Code Section 1197.1 equal to the difference between the amount paid and the minimum wage. Thus, an unpaid ninth hour in a day will cost an employer at least $25 at the premium rate of 1.5 the regular minimum wage of $10 (effective Jan. 1, 2016), plus another $10 in liquidated damages. Similarly, penalties for failure to authorize a meal period or a rest period, or failure to pay an employee immediately upon termination are all calculated based upon an employee's wage. For a minimum wage worker, the new law will raise the penalties for such violations by 25 percent.

The minimum wage increase will also impact the inside salesperson exemption from overtime under Wage Orders 4 and 7. That exemption requires that commissions must make up more than half the employee's compensation and that the employee must earn more than one and on-half the minimum wage for all hours worked. Therefore, to still be exempt from overtime, inside salespersons will need to earn at least $13.51 per hour beginning July 1, 2014, and at least $15.01 per hour by Jan. 1, 2016.

The minimum wage increase will not affect the pay thresholds for the computer software professional exemption or the physician employee exemption. The Department of Industrial Relations adjusts these minimums annually based on the rate of inflation.

The higher pay thresholds will apply to all employees who are based in California. In addition, according to the state Supreme Court's decision in *Sullivan v. Oracle*, 127 Cal.Rptr.3d 185 (2011), these requirements may apply to out of state residents working temporarily in California or who regularly travel to California.

Employers must prepare to adjust their compensation levels to comply with the new minimums. While the greatest impact will be on minimum wage workers, employees just above the minimum wage may also receive pay raises as employers attempt to maintain appropriate pay levels. Significantly, employers must analyze all of their exempt positions to determine whether they need to increase their salary in order to be able to maintain the exemption or in the alternative convert them to hourly nonexempt positions. Likewise they must determine whether they need to increase their inside salesperson's wages as well.

This new law illustrates that there may often be hidden consequences of changes in the Labor Code.

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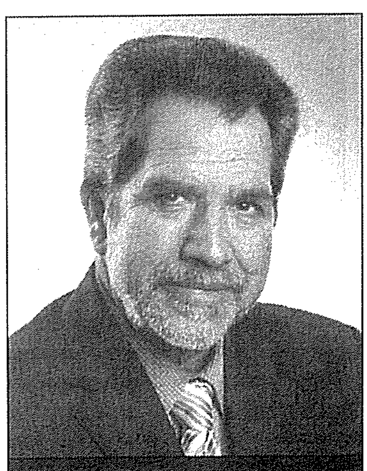

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