New California Paycheck Law Aimed at Temp Industry Creates Risk for a Broad Range of Industries

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A new law went into effect as of the first of this year requiring the issuance of weekly paychecks for most workers on temporary assignment with a client or customer. Although initially intended to apply only to the temporary services industry, as enacted, the law extends outside traditional notions of that industry.

Who is a Temporary Services Employer?

Labor Code section 201.3, as enacted, now applies to any "temporary services employer," which is defined generally as any employer that contracts with clients or customers to supply workers to serve these clients or customers. This definition is the same as that used in Unemployment Insurance (UI) Code section 606.5, which has been applied broadly. When UI Code section 606.5 was enacted, it was intended to prevent both the person providing the workers, and the person using the workers' services, from asserting that the workers were not their employees, and as a result having the workers end up as no one's employee. It was not intended to address a situation such as professional employer organizations (PEOs), where the PEO agrees to treat the worker as its employee.

The statutory definition of *temporary services employer* includes *any* employer who does the following:

1. negotiates for the nature of services to be provided, including the time and place, type of work, conditions, quality and price of services;
2. determines the assignments or reassignments of workers;
3. assigns workers to perform services for clients or customers;
4. sets the rates of pay for its workers, whether or not through negotiation;
5. pays workers from its own accounts; and
6. retains the right to hire and fire the workers

Also, the new law's definition of *customer or client* is not limited and includes "a person with whom a temporary services employer has a contractual relationship to provide services of one or more individuals employed by the temporary services employer."[1] The statute does, however, exclude certain non-profits, farm laborer contractors and garment manufacturing employers.

Despite the exclusions, the statute potentially covers a broad swath of employers and industries, including businesses that provide outsourced services for limited periods on a client's site, such as IT services, home health agencies, companies that send workers to perform repairs or installations or provide tutoring or training, and others. Thus, even companies that always treated workers as their own employees may be compelled by Labor Code section 201.3 to pay those workers' wages on a weekly or even daily basis.

How Often Must Temporary Employees Be Paid?

The new law specifies that workers employed to provide services to a client must typically be paid weekly. However, a temporary services employer may be required to pay an employee daily if the employee is assigned to work on a day-to-day basis and reports daily to the temporary service employer's offices, or where the employee is working for a client involved in a trade dispute.

The weekly and/or daily pay requirements do not apply to employees working at a single client site for more than 90 days.

What Constitutes Termination and When Are Final Paychecks Due?

In *Smith v. Superior Court*,[2] the California Supreme Court held that L'Oreal had "discharged" a temporary model at the end of her one-day assignment within the meaning of California Labor Code section 203, and therefore was owed waiting time penalties for the failure to pay her at the end of her one-day assignment. The temporary services industry greatly feared that this case would be used against it and sought legislation to countermand it. Labor Code section 201.3 addresses the industry's concern by noting that an employee need not be paid any more frequently than weekly, "regardless of when the

assignment ends." However, Labor Code section 201.3 also specifies that if the employee quits or is discharged, the final paycheck must still be issued in accordance with Labor Code sections 201 – 202, which require the final paycheck be issues at the time of discharge, or within 72 hours of an employee quitting.

While the language regarding payment of wages within one week of the end of an assignment is helpful, it may not necessarily be dispositive in all cases. It remains unclear whether the end of an assignment qualifies as a discharge. Thus, employers that provide temporary staff to clients should take care to convey whether or not the end of a client assignment also ends the employment relationship.

What Are the Risks for Noncompliance?

The new legislation imposes criminal and civil penalties. In addition, employees may seek to recover damages under the Private Attorneys' General Act. All employers who use temporary staffing or contract for services by another entity should be mindful, as both the agencies and their customers may be susceptible to liability as joint employers.

Best Practices to Avoid Exposure

Employers that assign employees to work off-site for a client or utilize temporary workers provided by another company should take the following steps to protect their organization in light of this newly enacted statute:

- An employer that assigns employees to work off-site for a client for less than 90 days should consider paying those employees either weekly or daily pursuant to new Labor Code section 203.1.
- Despite the language of Labor Code section 201.3 that allows employees who end an assignment to be paid within a week, temporary services employers should confirm, ideally in writing, whether or not the end of an employee's assignment constitutes discharge from employment. For example, employers should eliminate any ambiguity in their practices by clearly stating at the end of the assignment whether the employee will be considered for future assignments unless the employee provides notice of resignation.
- An employer who uses contract or temporary service workers should monitor the entity providing these workers to confirm it is paying them on a weekly or daily basis. Indemnification clauses may not be sufficient , particularly if the vendor goes bankrupt, and the employer is found to be a joint employer.

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[1] Cal. Lab. Code § 201.3(a)(4).

[2] 39 Cal. 4th 77 (2006).

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