WSGR ALERT

JANUARY 2012

WAGE NOTICE REQUIREMENT EFFECTIVE JANUARY 1, 2012: LABOR COMMISSIONER ISSUES CONTROVERSIAL TEMPLATE

Effective January 1, 2012, Section 2810.5 of the California Labor Code requires employers to provide **very specific** information to every new non-exempt employee in California, including information regarding the employer, the regular pay date, the employee's wage and overtime rate, and the identity of the workers' compensation carrier. The statute also calls for an update to be issued within seven days if the information provided has changed and the change is not reflected already on a timely wage statement. Background on the new law was provided in a previous WSGR Alert that was issued on October 14, 2011.[1]

Template for Employers

On December 29, 2011, just days before the effective date of the new law, the California Labor Commissioner issued a "template" for use by employers as required by the statute. However, the template includes a number of requirements that were not included in the statute and have raised serious compliance concerns among employers. Although the statute indicates that the Labor Commissioner has the authority to add material that the Labor Commissioner deems "material and necessary," there was no indication that such a finding was made with respect to the additional material required by the template. Additionally, rulemaking requirements under the Administrative Procedure Act were not followed.

The template can be obtained at http://www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf.[2] Likewise, the Labor Commissioner's office issued an FAQ document, which was later revised without explanation. A copy of the FAQs can be obtained at http://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html.

Employer Concerns

Employers have raised concerns about the following issues, among many others:

- The requirement that the employer identify "any other business or entity" that the company uses to "hire employees or administer wages or benefits." Employers with multiple benefit providers are concerned about the burden of listing all providers. This is particularly true if a new form were to be required every time the contact information for a benefit vendor changed.
- The fact that the template requires employers to specify whether the employment agreement is oral or written.
- The fact that overtime rates are required (which, if construed as the actual overtime rate, would be virtually impossible to provide given that the overtime rate can fluctuate each week based on the regular rate of pay).

- Technology employers and other employers seeking to be environmentally conscious are troubled despite the indication in the FAQs that the Wage Notice can be provided electronically. In particular, the FAQs state that if the employee refuses to sign the notice, the employer should "still give the notice to the worker and note the worker's refusal on its copy of the notice." Though the result may be unintended, the FAQs imply that actual signatures could be required and that paper copies should be retained.
- The suggestion that employees be notified when information concerning any single item on the template changes, including items such as the policy number of the employer's workers' compensation policy.

While the Labor Commissioner has indicated that the actual template need not be used, the FAQs also indicate that "the notice required under Labor Code 2810.5 must be on its own form" and that it must include all the information contained in the template whether or not that particular information was specified in the statute. Accordingly, many employers are simply including the template as an exhibit to their offer letters or providing it as a stand-alone document with other materials provided at the time that new employees report for duty.

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[1] For additional information, please read the full WSGR Alert at http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert-california-employment-law-changes.htm.

[2] The following URL includes links to the template in additional languages: http://www.dir.ca.gov/dlse/Governor_signs_Wage_Theft_Protection_Act_of_2011.html.

Wage Notice Requirement . . .

Implications

Industry organizations are in the process of petitioning the Labor Commissioner to withdraw the template and the corresponding FAQs. However, absent any further clarification or action by the California Labor Commissioner, California employers do not have the luxury of waiting for all the details to be addressed and the problems created by the template to be sorted out. The statute is in effect, and we have no doubt that the Labor Commissioner and the plaintiffs' bar will be challenging the compliance status of employers who fail to provide the Wage Notice (or a reasonable facsimile of it) to non-exempt employees working in California.

Wilson Sonsini Goodrich & Rosati is actively following the developments with respect to the Labor Commissioner, and the firm is available to assist employers in addressing any of the issues raised by the Wage Notice requirements or the Labor Commissioner's template. For more information, please contact a member of the firm's employment law practice.