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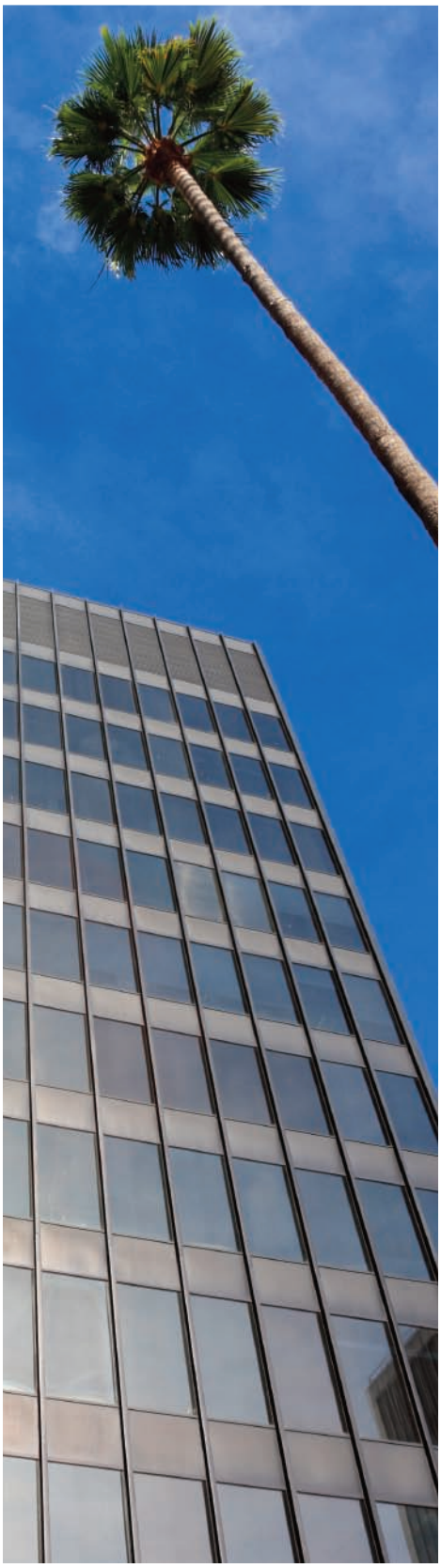

Doing Business in California:

A Guide for the Out-of-State Employer

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Introduction

The allure of doing business in California is undeniable. It is the world's sixth largest economy and a market of more than 36 million people. For employers, however, California presents unique challenges because its laws differ significantly from federal laws and those of other states. California employment laws are the most far-reaching in the nation, usually providing workers significantly greater levels of protection than those offered by other states or by federal laws. These differences can create traps for the unwary out-of-state employer.

Wage and Hour Laws

Currently, wage and hour class actions are a major concern for employers in California. They are costly to litigate and the potential liability can be staggering. They are popular with plaintiffs' lawyers not just because they are easier to maintain in California but also because California's wage and hour laws are more generous to employees than any other state. Following are some aspects of wage and hour laws that are specific to California.

Minimum Wage

For 2009, the minimum hourly wage in California is $8.00. California's minimum wage is the second highest state rate in the nation. The minimum hourly wage for employees working within the city of San Francisco is $9.79 for 2009. On July 24, 2009, the federal minimum wage increased to $7.25 per hour.

Daily Overtime

California law requires that employees be paid overtime, at one and a half times their regular rate of pay, not only for work in excess of 40 hours in one work week but also for work in excess of eight hours in any given workday. Thus, California employees may be entitled to overtime pay even if they do not work more than 40 hours in a work week. Employees are also entitled to overtime,

at one-and-a-half times their regular rate of pay, for the first eight hours on the seventh day of work in any one work week. Any work in excess of 12 hours in one workday, or eight hours on the seventh workday in any one work week, must be compensated at twice the employee's regular rate of pay.

Alternative Workweek Schedules

Hourly employees can vote to have an alternative work week that allows for 10 hours per day of work within a 40-hour work week without the payment of daily overtime. To implement such a schedule, the employer must obtain the consent of two-thirds of the hourly employees in the department or work unit. Specific requirements apply to the manner in which an alternative work week schedule may be implemented and maintained.

Meal and Rest Periods

California law requires employers to "provide" meal periods and rest breaks to their employees and makes it the employer's affirmative obligation to ensure that employees take them when they are supposed to. Employers are also required to keep records of meal periods. California courts, moreover, have placed the burden of proof on the employer to show that it has complied with these requirements. An employee is entitled to an unpaid, uninterrupted meal period of not less than 30 minutes before five hours of work is completed and must be free to leave the premises. Employees are entitled to a second meal period of 30 minutes if they work more than 10 hours in a day. An employee may voluntarily choose not to take the first meal period if his work schedule for that day is six hours or less. The employee can waive the second meal period if the total hours worked on that workday is not more than 12. Employees are required to take timely meal breaks. Employees are also entitled to a 10-minute paid rest break for every four hours of work. The pay premium for any violation of the meal period and rest break requirements is one hour of pay for each day when the employee missed a meal or rest period.

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Vacation Policies

In California, accrued vacation time is considered a form of earned wages and cannot be forfeited. An employer may therefore not institute a "use-it-or-lose-it" policy. Employees must be allowed to carry over their accrued vacation. If an employee quits or is terminated, he/she must be paid for all unused accrued vacation based on his/her rate of pay when the employment ends. To prevent the uncontrolled increase of vacation days employees may cash out upon departure, an employer may set a cap on the accrual of unused vacation time. The failure to pay an employee for all accrued but unused vacation time can be quite costly. A California Court of Appeals has held that an employer's liability for failure to pay an employee for such unused vacation time is not subject to "a look-back period." The court reasoned that since an employee's right to be paid for such unused vacation time does not arise until the termination of employment, the employer's liability for the amount of unused vacation is not limited by any statute of limitations. Thus for example, a 20-year employee who is terminated and not paid for his unused vacation time can recover his pay for vacation time that was earned as far back as the first year of his employment.

Overtime Exemptions

California law provides exemptions from overtime pay for certain "executive," "administrative," and "professional" employees. For these exemptions to apply, the employees must be "primarily engaged in" the duties that meet the requirements of the particular exemption, customarily and regularly exercise discretion and independent judgment in carrying out those duties and earn a monthly salary equivalent to no less than twice the California minimum wage for full-time employment (40 hours per week). The exemptions are similar to those provided under federal law. Federal law, however, only requires that an employee's "primary duties" meet the test for each exemption. In California, an employee must spend more than half his time (i.e., be "primarily engaged in") on the duties that meet the applicable test. California has also adopted an overtime

exemption for computer software and design professionals earning a high hourly rate. The comparable federal exemption covers computer professionals earning far less.

Deductions From Wages

California law severely restricts the circumstances in which an employer may deduct damages or debts owed by an employee from his or her wages. An employer may not deduct from an employee's wages any amount to compensate the employer for loss or damage caused by an employee's simple negligence. It may deduct an amount sufficient to compensate for loss or damage resulting from an employee's gross negligence, willful misconduct or dishonesty. The burden of proof is on the employer to establish that such deduction is appropriate. In addition, an employer may not deduct any amount from an employee's final paycheck to recover an unpaid debt (such as a loan or cash advance) unless the employee specifically agrees to the deduction in writing at the time of termination.

Itemized Wage Statement and Paycheck Requirements

The California Labor Code requires that specific information be provided on employees' paychecks and itemized wage statements (pay stubs). Violating these provisions can be significant, especially with the growing popularity of class action lawsuits. Violations of seemingly minor technical requirements can expose employers to extraordinary damages. The Labor Code requires the following information be printed on the pay stub:

- Gross wages earned
- Total number of actual hours worked (not required for salaried exempt employees)
- The number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis
- All deductions (all deductions made on written orders of the employee may be aggregated and shown as one item)
- Net wages earned
- The inclusive dates of the period for which the employee is paid
- The name of the employee
- Only the last four digits of the employee's Social Security number or an employee ID number. It is unlawful to include an employee's nine-digit Social Security number.

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- The name and address of the legal entity that is the employer
- All applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee

The Labor Code also requires that the name and address of a business in the state of California where the check can be cashed on demand without a discount be printed on the paycheck. Paychecks must be drawn on banks with at least one branch in California.

Final Paycheck

Most states require that departing employees receive their final paychecks on the next regular payday following the discharge. In California, all wages, including accrued but unused vacation, are due immediately upon an involuntary termination or layoff. Employees who quit with more than 72 hours notice must be paid on the last day of work. For employees who quit with fewer than 72 hours of notice, wages and unused vacation must be paid within 72 hours after notice is given.

Leave Laws

Pregnancy Disability Leave

Employers with five or more employees must provide a Pregnancy Disability Leave (PDL) of up to four months for employees disabled by pregnancy and pregnancy-related conditions from their first day of employment. PDL applies whether an employer is covered by the FMLA or its California equivalent (CFRA). PDL does not run concurrently with CFRA. Thus, an employee could take the maximum four months of PDL and then take another leave of up to 12 weeks under CFRA to bond with the newborn child.

Paid Family Leave

Under Paid Family Leave (PFL), employees in California can receive benefits to replace a portion of wages lost when they are on leave from work to care for a sick family member or to bond with a new child. PFL is funded through employee contributions and is administered by the state. PFL does not create an additional right to a leave of absence. Rather, it is a benefit that runs concurrently with

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FMLA and CFRA. Employers are required to advise employees of their PFL rights by posting the state notice advising employees of these rights, and they must provide newly hired employees with the state-published pamphlet setting forth these rights.

School Issues and Activities

An employer must allow the parent or guardian of a child who has been suspended from school to take time off if he/she needs to appear at the school in connection with that suspension. Employers with 25 or more employees must also allow parents to take up to 40 hours off per year to participate in activities of his or her child's school or day care facility.

Volunteer Civil Service

Employers must allow employees who are volunteer firefighters, reserve peace officers or emergency rescue personnel to take time off to perform emergency rescue duty.

Time Off To Vote

For statewide elections, an employee may, without loss of pay and with prior notice to the employer, take off up to two hours of working time to vote at the beginning or end of the regular working shift. Because California has statewide elections almost every year and often more than once in a year, voting leave may be an issue every March and November and whenever there is a "Special Election."

Participation in Judicial Proceedings

Employers are required to allow employees who are victims of certain felonies or who have an immediate family member (including a domestic partner) who is the victim of such a crime to take time off to attend judicial proceedings. Employers are also required to allow victims of domestic violence or sexual assault to take time off to seek court assistance or for treatment. Employees

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must also be allowed to take time off to serve on a jury or to appear as a witness in a judicial proceeding. This applies to employers with 25 or more employees.

Sick Leave

California law does not require employers to provide sick leave. Employers that do offer that benefit, however, must allow employees to use up to half of their sick leave to care for a sick child, spouse or domestic partner.

San Francisco requires employers to provide all employees who work within the boundaries of the city (even if for only part of their working time) one hour of sick leave for every 30 hours worked. Employees may take paid sick leave for their own illness or to provide care for a sick child, parent, sibling, grandparent, grandchild, spouse, domestic partner or, if the employee is not married or does not have a domestic partner, a person designated by the employee beforehand.

Discrimination and Harassment

Employers face greater risks in employment discrimination cases in California because of the nature of California juries and because, unlike under Title VII, there are no caps on the compensatory or punitive damages a plaintiff employee may recover. Moreover, the anti-discrimination statutes have been drafted and interpreted more broadly than Title VII.

Protected Classes

The California Fair Employment and Housing Act (FEHA) prohibits discrimination based on sex, age, disability, AIDS or HIV-positive status, marital status, medical condition (cancer), genetic characteristics, race or national origin, pregnancy and religion (or lack of one). Employers with five or more employees are covered. To contract with the city of San Francisco, a company must certify that it also does not discriminate on the basis of height or weight ("lookism").

FEHA also prohibits differential treatment based on an employee's "actual or perceived" gender or sexual orientation. This means that the employer cannot discriminate against an employee because he

or she is gay, straight or transgender or based on someone's mistaken belief about the employee's sexual orientation. Employees may dress according to their "self-identified gender" so long as they meet reasonable workplace standards of dress and grooming. Employers are also required to make unpaid time and location accommodations for an employee who is breastfeeding.

Harassment

In addition to prohibiting harassment, California law requires employers to "take all reasonable steps necessary to prevent and correct harassment and discrimination." Employers are strictly liable for hostile environment harassment by a supervisor. Liability arises for harassment based on any protected class. Individual managers and supervisors can be held personally liable for harassment.

Third-Party Harassment

Employers can be liable when non-employees, such as vendors and customers, harass their employees. This liability has been imposed where the employer knew or has been given notice of severe and pervasive conduct and has failed to take steps to prevent the harassment.

Sexual Favoritism

A recent California Supreme Court decision held that an employee may maintain a sexual harassment action by showing that a supervisor's favoritism of employees with whom he was having affairs created a hostile working environment. That employee can also maintain a claim that he or she suffered retaliation after complaining of such favoritism.

Policies and Training as a Defense

Under Title VII, the employer's policies against harassment and the employee's failure to make use of the company's internal procedures to complain of harassment will provide employers with a defense to liability. In California, the employer cannot completely escape liability. Employers can reduce their liability if they can show they took reasonable steps to correct and prevent the harassment. Under this "avoidable consequences doctrine," "a person injured by

another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure." An employer can establish this defense by setting forth evidence that it "took effective steps to encourage victims to come forward with complaints of unwelcome sexual conduct, and to respond effectively to their complaints and to preserve confidentiality." Written policies and training can serve as such evidence.

Harassment Training

California requires that all employers that do business in the state and have 50 or more employees provide at least two hours of classroom or other interactive harassment training to its supervisory employees. There is no requirement that the 50 employees work at the same location or all reside in California. Employers are only required to train their California-based supervisors. The training must be provided every two years or within six months of an employee assuming a supervisory position. There are specific requirements on what subjects must be covered, who may provide the training and the manner in which the training is offered.

Disability Discrimination

FEHA defines disability far more broadly than the Americans with Disabilities Act (ADA). Under the ADA, an employee must show that he or she suffers from a physical or mental impairment that "substantially limits" a major life activity and mitigating measures may prevent a finding of disability. Under FEHA, the employee only needs to show that the physical or mental disability "limits" (not substantially limits) a major life activity. Mitigating measures are not considered in determining whether a condition constitutes a disability. Under FEHA, it is the employee's burden to show that he or she can perform the essential functions of the job. Finally, under FEHA, an employee can establish that he or she is limited in the major life activity of "working" even if he or she is only limited from performing a particular job as opposed to a broad range of jobs.

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Age Discrimination

Under FEHA, it is presumptively unlawful for an employer to use salary as the basis for selecting employees for layoff. The Age Discrimination in Employment Act (ADEA), by contrast, allows employers to take action based on "reasonable factors other than age."

Continuing Violation Doctrine

California courts recognize a continuing violation doctrine for discrimination charges based on a course of conduct that occurred partly outside the time period allowed for filing an administrative charge. Under Title VII, this doctrine is generally only available in cases alleging hostile environment harassment.

Reasonable Accommodation for Drug/Alcohol Rehabilitation

Employers with 25 or more employees must reasonably accommodate any employee who voluntarily enters an alcohol or drug rehabilitation program, provided the reasonable accommodation does not impose an undue hardship on the employer.

Domestic Partners

Insurance

California law imposes no direct requirement on employers to offer benefits for domestic partners. The "California Insurance Equality Act," however, requires that all health care service plans and health insurance policies, as well as all other insurance policies regulated by the California Department of Insurance, provide benefits to registered domestic partners of employees that are equal to those offered to spouses. Insurers are required to make available to employers group policies that would comply with this requirement. An employer would, in theory, only be able to purchase a plan that provides equal coverage for registered domestic partners. These requirements would not affect employers that are self-insured. Employers that do provide benefits for domestic partners, such as medical coverage, may require proof of registered domestic partnership status or termination of that status but only if similar proof is also requested for spouses.

Other Benefits

The CFRA applies to domestic partners on the same terms as it does to spouses. Thus, an employee may take a CFRA leave to care for a domestic partner. Because such a leave is not available under the FMLA, it would not count against the employee's entitlement to leave under FMLA and he or she would also be able to take FMLA leave for another qualifying event (e.g., to care for a parent or child with a serious health condition). A domestic partner may therefore be able to take up to 24 weeks of leave while a spouse would only be eligible for 12 weeks. Registered domestic partners are also qualified beneficiaries under Cal-COBRA (see discussion below).

Government Contracts

Effective January 1, 2007, companies that wish to bid for contracts with the state of California or to renew existing contracts to provide goods or services of $100,000 or more in a fiscal year to the state will have to certify that they do not discriminate in the provision of benefits between married spouses and registered domestic partners. Similar requirements apply to contracts with the cities of Los Angeles, San Francisco, Oakland, Berkeley and the county of San Mateo. A few narrow exceptions apply.

Discrimination

California law also provides that domestic partners are entitled to the same rights, protections and benefits granted to spouses. Because FEHA prohibits discrimination based on marital status, the same law prohibits discrimination based on participation in a domestic partnership. The limits of this provision have not been tested in court but should apply to any terms and conditions of employment that do not involve the provision of benefits under plans governed by ERISA. Employers may not impose a "no employment of domestic partners" rule. They can, under certain circumstances, refuse to place one domestic partner under the direct supervision of the other domestic partner, or to place both domestic partners in the same department, division or facility.

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Same-Sex Marriage

In 2008, the California Supreme Court granted same-sex couples the right to marry. This decision was followed by California voters approving a change to the California Constitution to eliminate that right. In 2009, the California Supreme Court upheld the constitutional amendment. Employers are not dramatically affected by these changes because, as discussed above, domestic partners are already protected by law in California.

Other Employment Issues

Covenants Not To Compete

Covenants not to compete are generally unenforceable in California even when they are narrowly drafted. They will be upheld only in the following circumstances:

- Where a person sells the goodwill of a business;
- Where a partner agrees not to conduct a like business in connection with the dissolution of that partnership;
- Where a member of a limited liability company agrees not to conduct a like business in connection with the dissolution of that limited liability company; or
- Where a restrictive covenant is necessary to protect a company's trade secrets.

Independent Contractors

California law is particularly hostile to the independent contractor classification. There is a statutory presumption of employee status, and the employer bears the burden of proving otherwise. The California Labor Code defines an independent contractor as "… any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." California courts have held that this definition establishes the principal test, the "right of control." Other factors the courts consider include:

(1) The principal's right to terminate the relationship at will;
(2) Whether the individual performing services is engaged in a distinct occupation or business;
(3) Whether the type of occupation is one that is performed without supervision;
(4) The skill required in the particular occupation;
(5) Whether the principal supplies the instrumentalities or tools to do the work and the place to work;
(6) The length of time for which the services are to be performed;
(7) Whether payment is by time or job;
(8) Whether the work is part of the regular business of the principal; and
(9) Whether the parties believed they were creating an employer-employee or principal-independent contractor relationship.

The California Supreme Court has held that the individual factors should not be "applied mechanically as separate tests; they are intertwined and their weights depends often on particular combinations." The weight of the individual factors also depends on the context in which the analysis is being applied.

Right of Privacy

In California, the right of privacy is enshrined in the state constitution. Because employees are presumed to have a reasonable expectation of privacy, it is important for the employer to provide advance notice of what employees can and cannot expect to remain private in the workplace. Well-drafted policies addressing privacy and signed acknowledgments from the employees that they understand their work areas, lockers, e-mails, voice mails, etc., may be searched or accessed are recommended.

Drug Testing

California courts have substantially restricted an employer's right to drug test employees based on the right to privacy in the state constitution. An employer may require a suspicion-less drug test as a condition of employment after a job offer is tendered but before the employee goes on the payroll. An employer can test for drugs or alcohol

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based on reasonable suspicion. Random drug testing, however, is only allowed for employees in specific, narrowly defined job classifications that are highly regulated or safety-sensitive, e.g., truck drivers, who are subject to specific federal and state drug testing regulations.

Garment Industry Workers

A person or entity who contracts another to perform garment manufacturing is deemed to have guaranteed payment of the minimum wage and overtime and will be liable to the employee for those wages when he or she is not properly paid.

Cal-WARN

California has adopted its own version of the federal Workers Adjustment and Retraining Notification Act (WARN). Cal-WARN applies to any "industrial or commercial facility" that employs at least 75 full or part-time employees (as opposed to 100 full-time employees under federal law). Cal-WARN requires notice to all employees. Notice to a union will not suffice.

Cal-COBRA

The California Continuation Benefits Replacement Act of 1997 (Cal-COBRA) is an expansion of the federal Consolidated Omnibus Budget Reconciliation Act (COBRA) coverage. It requires that insurance carriers and Health Maintenance Organizations (HMOs) provide COBRA-like coverage to employees of smaller companies (two to 19 employees) in California who are not subject to federal COBRA provisions. The coverage period under Cal-COBRA is 36 months.

Workplace Safety

California's Division of Occupational Safety and Health, commonly referred to as Cal-OSHA, acts to regulate and protect workers and the public from safety hazards. Cal-OSHA has jurisdiction over every employment and place of employment in California. It enforces and administers all occupational safety and health standards and regulations. Cal-OSHA will conduct inspections of California workplaces in response to a report of an industrial accident, a

complaint about an occupational safety and health hazard or as part of an inspection program targeting industries that have a high rate of occupational hazards, fatalities, injuries or illnesses. Employers in the state have a legal obligation to provide and maintain a safe and healthy workplace for employees, and every employer in California must have a written, effective injury and illness prevention program.

Health Care

San Francisco requires medium and large employers to spend a minimum amount per hour on health care services for their employees. In 2009, companies with 100 or more employees are required to spend a minimum of $1.85 per hour per employee. Companies with 20 to 99 workers are required to spend a minimum of $1.23 per hour per employee. These rates are adjusted annually. Employers can meet their spending obligation by purchasing insurance, paying into public programs for the uninsured, contributing to health savings accounts or by direct reimbursement to employees for their health care expenses. Companies that already offer insurance will be required to pay into a health care plan the city has established for uninsured adults within the city if their cost per employee per hour is less than the mandated minimum.

Litigation

Not only are California laws more favorable to employees than those of almost any other U.S. jurisdiction, litigating employment cases presents unique challenges as well.

Summary Judgment

A motion for summary judgment in California state court must be filed and served at least 75 days before the date of the hearing. Since any motion must be heard at least 30 days before the initially scheduled trial date, this means that the motion must be filed and served at least 105 days before trial. California also requires that cases ordinarily be tried within one year of the filing of the complaint (not its service). Defendants thus have precious little

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time to conduct all necessary discovery and file for summary judgment. The standard for summary judgment is also less favorable to defendants. While California's summary judgment standard was amended in the 1990s, purportedly to bring it in line with the federal standard, California courts have held that there are still significant differences. To obtain summary judgment, a defendant must present evidence of non-liability and not simply point out that the plaintiff does not have the evidence to prove his or her case.

Choice of Law Provisions in Employment Contracts

California courts will give effect to choice of law provisions in employment contracts only to the extent that the other provisions of the contract are valid under California law. Thus, for instance, an employee who is terminated for refusing to sign an employment agreement containing an illegal covenant not to compete can maintain a claim for wrongful termination in violation of public policy, even though that covenant would be enforceable under the laws of the state specified by the choice of law provision.

Wage and Hour Class Actions

The wage and hour provisions of the federal Fair Labor Standards Act (FLSA) are not enforced by class action but rather by collective action. Collective actions are permitted only on behalf of employees who affirmatively "opt in" to a lawsuit. In California, however, one or more employees can file a class action to enforce California's wage and hour laws on behalf of all purportedly affected employees, and all of those employees will be part of the class unless they affirmatively request exclusion. Thus, one or a handful of disgruntled employees can engage the company in costly litigation on behalf of all similarly situated employees whether or not any of the other employees is unhappy with his or her compensation. These class actions are costly to litigate and because of the aggregation of allegedly unpaid wages and penalties involved, the potential liability is great. Plaintiffs' lawyers who prevail on any part of the action can recover attorneys' fees and costs. These awards are often quite substantial.

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Unfair Competition: Business and Professions Code Section 17200

Section 17200 of the Business and Professions Code prohibits any unlawful, unfair or fraudulent business act or practice. A business practice is considered unlawful if it violates other state laws, such as wage and hour regulations. California courts have held that an employee can recover unpaid wages, such as overtime, under this theory. Plaintiffs sue under this theory because it provides a longer statute of limitations than a plain claim for wages under the Labor Code. The statute of limitations for a claim for unpaid wages is three years, whereas the statute of limitations for a Section 17200 claim is four years. Claims under this section are often alleged in wage and hour class actions so as to extend the class period.

Private Attorney General Act

The Private Attorney General Act of 2004 allows employees claiming violations of wage and hour laws to bring civil actions directly against their employers for penalties rather than having to rely upon state agencies to do so. It is an additional weapon for employee plaintiffs to use against their employers.

What Employers Can Do To Protect Themselves

Because of the many significant differences between California law and those of most other states, employers must be keenly aware of the differences when administering a workforce that includes employees both inside and outside the state. Many employers have chosen to draft different policies or separate employee handbooks for their California operations. Fox Rothschild can assist in drafting and implementing policies that comply with California law, in maintaining compliance with California's employee-friendly laws and in defending employers before government agencies and in the courts. We also offer training in a variety of subjects, including harassment. Training for employees is available in both English and Spanish.

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