BRYAN CAVE
A Broader Perspective

Alert

Labor and Employment Client Service Group

To: Our Clients and Friends December 15, 2014

Get Ready for New California Employment Laws

Once again California employers should add to their holiday to-do lists a pre-new year review of employment practices to ensure compliance in 2015. The California State Legislature had another busy year amending existing employment laws or adding new laws in a wide variety of areas, including wage and hour and anti-discrimination. California courts also issued decisions that impact the interpretation and exposure arising from common employer practices. Employers should review these developments to see if their policies or record-keeping practices need updating before the new year.

Paid Sick Leave (AB 1522)

As detailed in our September 19, 2014 Alert, beginning July 1, 2015, the Healthy Workplaces, Healthy Families Act of 2014 (AB 1522) will require almost all California employers to provide paid sick leave to employees working in California. In addition to the newly legislated benefit, the Act imposes burdensome recordkeeping and notice requirements on employers and provides substantial penalties for non-compliance. While the effective date for the paid sick leave accrual requirement is not until July 1, 2015, the California Division of Labor Standards Enforcement (DLSE) has indicated that employers must comply with certain posting and notice requirements as of January 1, 2015. Click here to view the DLSE's recent interpretive guidance. The DLSE has published a poster to notify employees of their rights under the Act and amended the existing Labor Code section 2810.5 "Notice to Employee" form that must be provided to newly hired non-exempt employees, to include information on the employer's paid sick leave policy. You may click on the following links to download a copy of the Paid Sick Leave Poster or the Notice to Employee form from the DLSE's website. Employers should be aware that the Notice to Employee is particularly confusing. First, it does not provide space for the employer to indicate that paid sick leave may not begin to accrue until as late as July 1, 2015. Second, it does not provide employers with the flexibility to clarify that they have not yet determined how they will address the Act's requirements. As with prior versions of the Notice, employers may add clarifying information to the template, as long as the required information is included.

To-do: As of January 1, 2015, post the DLSE Poster and begin using the revised Notice to Employee, as clarified to reflect the employer's practice. Make plans for how existing sick leave and/or PTO policies should be modified or how to implement new compliant policies. Be particularly careful in identifying segments of the employee population that may be excluded from existing plans, but that must be provided paid sick time under the Act. For example, many employers exclude part-time employees from certain benefits, including

paid time off. While you do not necessarily have to offer the same paid sick time benefits to full and part-time employees, arrangements will need to be made to, at a minimum, meet the requirements of the Act for each segment of the employee population. Employers should also be aware that several California cities have their own sick leave laws. For employers operating in those cities, to the extent the local law provides greater benefits than the new state law, employers are required to provide the greater benefits.

Intern/Volunteer Protection From Harassment (AB 1443)

Effective January 1, 2015, AB 1443 amends California Government Code section 12940 to extend workplace harassment and discrimination protections under the California Fair Employment and Housing Act ("FEHA") to unpaid interns, volunteers, and individuals in apprenticeship training programs. AB 1443 makes it an unlawful employment practice to discriminate or harass an unpaid intern on the basis of a protected classification delineated in the FEHA. Further, employers are now prohibited from discrimination based on a protected classification in the "selection, termination, training or other terms or treatment" of unpaid interns, volunteers, or individuals in apprenticeship training programs. Employers should not consider AB 1443 as an endorsement of unpaid work experience programs. Unpaid internship programs continue to be the subject of wage and hour litigation and the parameters of what is permissible are unsettled. AB 1443 simply makes clear that unpaid interns, volunteers, and participants in training programs have the same rights under the FEHA as employees.

To-do: Review anti-discrimination/harassment policies and training materials to make sure they reflect AB 1443's amendment to the FEHA. Employers with unpaid internship, volunteer, or training programs should provide participants with notice of the employers' anti-discrimination/harassment policies and complaint procedures.

Prevention of Abusive Conduct Training (AB 2053)

Effective January 1, 2015, AB 2053 amends California Government Code section 12950.1 to include prevention of abusive conduct as a component of the anti-harassment supervisory training already mandated by the statute. Currently, section 12950.1 requires that employers with 50 or more employees provide to supervisory employees every two years two hours of interactive training concerning sexual harassment prohibition, prevention, correction, and remedies. AB-2053 effectively expands section 12950.1, requiring these same employers to include "prevention of abusive conduct as a component of the training." The bill defines "abusive conduct" as conduct "with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests." The broad language of the law, however, does not specify the content of the training or how much time out of the two hours of sexual harassment training must be allocated toward addressing "abusive conduct." While there is ambiguity in the new law, it does provide examples of conduct that could be considered abusive. For instance, abusive conduct may include "repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance." Employers who fail to comply with the new law may face penalties from the Department of Fair Employment and Housing, the state agency charged with enforcing California's discrimination and harassment laws. The law does not, however, create a civil claim for abusive conduct itself.

To-do: Modify current supervisor anti-harassment training programs to ensure that they include a segment dedicated to abusive conduct.

National Origin Discrimination Expanded (AB 1522)

Effective January 1, 2015, the FEHA is amended to provide that national origin discrimination includes, but is not limited to, discrimination on the basis of possessing a driver's license granted under section 12801.9 of the Vehicle Code. Section 12801.9, is the provision enacted last year that requires the DMV to issue a license to people who are not in the country legally if they are otherwise qualified for the license. These licenses indicate that the person is allowed to drive, but the license "does not establish eligibility for employment, voter registration, or public benefits." The amendment to the FEHA makes it unlawful for employers to discriminate against employees because they hold such licenses or even to ask to see the license unless required by law or a legally permissible employer requirement (for example, a valid driver's license is a legitimate job requirement). The California DMV will begin issuing driver's licenses under the new law on January 1, 2015. These licenses will be marked with the term "federal limits apply" on the front of the license. Employers must be aware that these licenses cannot be used to establish eligibility to work when completing the Form I-9, but if the employee otherwise provides appropriate documentation of authorization to work, the possession of the driver's license under section 12801.9 may not be the basis of adverse action and employees should not be required to show their driver license, unless driving is a legitimate job requirement.

To-do: Train those responsible for completing I-9s regarding the different licenses and which licenses can be used to verify eligibility to work in the U.S. when completing the I-9. In addition, train personnel to prohibit discrimination against employees who present these licenses for other employment purposes and to maintain driver license information obtained by the employer as "private and confidential."

Joint Liability for Employer and Contractor (AB 1897)

Existing law prohibits a person or entity from entering into a contract for labor or services with a contractor if the person or entity knows or should know that the contract or agreement does not include sufficient funds for the contractor to comply with laws or regulations governing the labor or services to be provided. Vastly expanding the liability of employers that contract with staffing agencies for contingent workers, AB 1897 adds section 2810.3 to the California Labor Code to make an employer automatically jointly liable with a labor contractor, such as a staffing agency, for all civil legal responsibility and civil liability for all workers supplied by the labor contractor for the payment of wages and the failure to obtain valid workers' compensation coverage. The law exempts some companies from this joint liability, such as companies with fewer than 25 employees, or businesses with five or fewer workers supplied by a labor contractor. It prohibits the person or entity contracting for the labor services from shifting to the contractor legal duties or liabilities under workplace safety provisions with respect to the workers provided by the labor contractor. It does, however, permit companies and labor contractors to mutually contract for otherwise lawful remedies for violations of its provisions by the other party, such as indemnification provisions.

To-do: Carefully review any arrangements with contractors who provide workers to your organization. While the contractor and employer cannot contract around the provisions of the new law, employers can seek indemnification agreements with the staffing agencies to mitigate some of the risk. Companies should audit the staffing agencies they work with to insure they are compliant with the law and financially sound and should negotiate for indemnification from the staffing agency should there be any wage and hour violations.

Reimbursement of Cell Phone Bills

On August 12, 2014, a California appellate court ruled that employers must reimburse employees a reasonable percentage of their bills when they are required to use their personal cell phones for work. (*Cochran v. Schwan's*

Home Services Inc., 228 Cal. App. 4th 1137 (August 12, 2014)). The Court held "to show liability under section 2802, an employee need only show that he or she was required to use a personal cell phone to make work-related calls, and he or she was not reimbursed." *Id.* at 1144-45. While the court did not provide any guidance on what a "reasonable reimbursement" might be, it would likely be reasonable to calculate the time the employee used their cell phone for business and reimburse the employee for the business-related percentage of the monthly bill. This calculation would be difficult, tedious, and hard to enforce. Alternatively, employers can offer employees a lump-sum payment, rather than reimbursing for itemized expenses. In this case, employers should have a procedure for employees to seek reimbursement of any costs that exceed this amount. To completely avoid the question of what is "reasonable," employers can completely reimburse employees for the phone and cost of a data plan. Employers who want more control over the information on an employee's cell phone, can require employees to use only company-issued devices. Section 2802 only requires employers to reimburse employees for "necessary" work-related expenditures. Accordingly, if an employee uses a personal device for work-related purposes that is entirely voluntary (*i.e.* it is not "necessary"), an employer may not need to reimburse the employee for these activities.

To-do: Assess whether employees' use of mobile devices is required for their jobs. Review business expense reimbursement policies to ensure they reimburse employees for "required" use of personal mobile devices. Consider reimbursement or payment allowances in the context of usage restrictions and work-time policies. A non-exempt employee who uses a personal phone for work-related purposes outside of work-time is likely entitled to pay for time worked and reimbursement for expenses.

Increase in California Minimum Wage

Effective July 1, 2014, the minimum wage in California increased from $8.00 to $9.00 per hour. Effective January 1, 2016, the minimum wage in California will increase to $10.00 per hour. The effect of these increases extend beyond hourly workers. For example, a requirement to meet the California executive, administrative or professional exemptions from overtime is that the employee receive a monthly salary that is no less than two times minimum wage for full-time employment (40 hours). As of July 1, 2014, the current monthly minimum is $3,120 ($37,440 annualized) and $3,467 ($41,600 annualized) in January 2016. In addition to the statewide requirements, a number of jurisdictions have implemented their own minimum wage requirements. This November voters in Oakland, California approved a measure to increase its minimum wage from $9 to $12.25 effective March 2, 2015. Subsequent increases will be tied to the Consumer Price Index. Effective January 1, 2014, the City and County of San Francisco increased its minimum wage for all employees working in San Francisco to $10.74 per hour. In November 2014 voters approved a further increase to $11.05 on January 1, 2015; $12.25 on May 1, 2015; with incremental increases up to $15.00 on July 1, 2018. Other municipalities are considering or have implemented minimum wage increases.

To-do: Verify compliance with the July 1, 2014 state-wide increase in minimum wage and make plans for the increase in January 2016. Consider and monitor any local minimum wage requirements that have been implemented or are planned.

For questions or further information on this Alert, please contact Pamela Calvet at +1 310 576 2390 or a member of our Labor and Employment Client Service Group.