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Eye on Washington

State and Local Update

Timely, topical insights on a variety of payroll and reporting issues.

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Leave

California Amends Kin Care Sick Leave Law

Under current California law, an employer who provides sick leave for employees must permit an employee to use the employee's accrued and available sick leave entitlement to attend to the illness of a family member. It also prohibits an employer from denying an employee the right to use sick leave or taking specific discriminatory action against an employee for using, or attempting to exercise the right to use, sick leave to attend to such an illness.

Assembly Bill 2017 amends Section 233 of the California Labor Code to expressly provide that the designation of the sick leave taken to care for an ill family member is at the sole discretion of the employee.

Effective January 1, 2021, Section 233 of the California Labor Code will read as follows: (the added language to the statute is underlined)

233.

(a) Any employer who provides sick leave for employees shall permit an employee to use in any calendar year the employee's accrued and available sick leave entitlement, in an amount not less than the sick leave that would be accrued during six months at the employee's then current rate of entitlement, for the reasons specified in subdivision (a) of Section 246.5. The designation of sick leave taken for these reasons shall be made at the sole discretion of the employee. This section does not extend the maximum period of leave to which an employee is entitled under Section 12945.2 of the Government Code or under the federal Family and Medical Leave Act of 1993 (29 U.S.C. Sec. 2601 et seq.), regardless of whether the employee receives sick leave compensation during that leave.

(b) As used in this section:

(1) "Employer" means any person employing another under any appointment or contract of hire and includes the state, political subdivisions of the state, and municipalities.

(2) "Family member" has the same meaning as defined in Section 245.5.

(3) (A) "Sick leave" means accrued increments of compensated leave provided by an employer to an employee as a benefit of the employment for use by the employee during an absence from the employment for any of the reasons specified in subdivision (a) of Section 246.5.

(B) "Sick leave" does not include any benefit provided under an employee welfare benefit plan subject to the federal Employee Retirement Income Security Act of 1974 (Public Law 93-406, as amended) and does not include any insurance benefit, workers' compensation benefit, unemployment compensation disability benefit, or benefit not payable from the employer's general assets.

(c) An employer shall not deny an employee the right to use sick leave or discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using, or attempting to exercise the right to use, sick leave to attend to an illness or the preventive care of a family member, or for any other reason specified in subdivision (a) of Section 246.5.

(d) Any employee aggrieved by a violation of this section shall be entitled to reinstatement and actual damages or one day's pay, whichever is greater, and to appropriate equitable relief.

(e) Upon the filing of a complaint by an employee, the Labor Commissioner shall enforce this section in accordance with Chapter 4 (commencing with Section 79) of Division 1, including, but not limited to, Sections 92, 96.7, 98, and 98.1 to 98.8, inclusive. Alternatively, an employee may bring a civil action for the remedies provided by this section in a court of competent jurisdiction. If the employee prevails, the court may award reasonable attorney's fees.

(f) The rights and remedies specified in this section are cumulative and nonexclusive and are in addition to any other rights or remedies afforded by contract or under other law.

For a copy of Assembly Bill 2017, click on the link provided below.

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB2017

California Expands Leave Time for Victims of Crime

On September 28, 2020, California Governor Gavin Newsom signed into law Assembly Bill 2992 (AB 2992) that imposes further limitations on employers from discharging, discriminating, or retaliating against an employee who is a victim of crime or abuse. AB 2992, which is effective January 1, 2021, also prohibits an employer from taking actions against an employee when an unscheduled absence occurs if the employee provides certification that they were receiving services for certain injuries, if the documentation is from a victim advocate, or any other certification that reasonably verifies that the crime or abuse occurred.

In addition, AB 2992 revises the activities eligible for time off work under these circumstances to include seeking medical attention for injuries caused by crime or abuse, to obtain services from prescribed entities as a result of crime or abuse, to obtain psychological counseling or mental health services related to an experience of crime or abuse, or to participate in safety planning and take other actions to increase safety from future crime or abuse.

For a copy of AB 2992, click on the link provided below.

http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2992

Oregon Permanently Amends OFLA for COVID-19-Related School Closings

On September 11, 2020, the Oregon Labor Commissioner issued permanent rules to permit Oregon workers to take up to 12 weeks in a given leave year of Oregon Family Leave Act (OFLA) protected time off to care for children whose school or childcare provider has been closed due to the coronavirus (COVID-19) pandemic by using "sick child leave."

Background:

OFLA requires employers to provide eligible employees up to 12 weeks of job-protected leave during a leave year under the qualifying situations:

- Parental leave (either parent can take time off for the birth, adoption, or foster placement of a child). *If an employee uses all 12 weeks on this, the employee can take up to 12 more weeks for sick-child leave.
- Serious health condition (employee's own, or to care for a spouse, parent, parent-in-law, or child)
- Pregnancy disability leave (before or after birth of a child or for prenatal care). Employee can take up to 12 weeks of this in addition to 12 weeks for any reason listed here.
- Sick child leave (for the employee's child with an illness or injury that requires home care but is not serious)

- Military family leave (up to 14 days if employee's spouse is a service member who has been called to active duty or is on leave from active duty)
- Bereavement leave (up to 2 weeks of leave after the death of a family member)

Oregon workers that work for an employer with at least 25 employees and have been on the job for at least 180 days are eligible for parental leave.

For all other OFLA leave benefits, workers must have been employed for at least 180 days and also work at least an average of 25 hours a week during the 180 days before leave begins.

Under a temporary administrative order, effective March 18, 2020, Oregon employees may be absent for up to 12 weeks, on a continuous or intermittent basis, because the school or place of care of the employee's child has been closed by public authorities, including out of concerns related to the coronavirus (COVID-19) outbreak.

For more information on OFLA, click on the link provided below.

https://www.oregon.gov/boli/workers/Pages/oregon-family-leave.aspx

NOTE: Permanent Rule Change:

Effective September 11, 2020, OFLA permanently permits Oregon workers to take up to 12 weeks in a given leave year of protected time off to care for children whose school or childcare provider has been closed due to the coronavirus (COVID-19) pandemic. The definition of "sick-child leave" has been expanded to included job-protected for an employee if their child's school or childcare provider is closed due to a public health emergency.

Employers may require an employee to provide documentation such as the name of the child being cared for, the name of the school or childcare provider that is closed or unavailable, a statement that no other family member is available to provide care and, for a child over 14 years of age, an additional statement is required explaining the special circumstances that the employee is required to provide care.

A school will be considered closed regardless if online instruction is provided. If a school provides a hybrid schedule (partial in-person instruction, partial remote learning), the worker may take OFLA sick-child leave intermittently.

For a copy of the Permanent Administrative Order, click on the link provided below.

https://www.oregon.gov/boli/about/Documents/BLI%207-2020%20-%20OFLA.pdf

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California's Sacramento County Passes Worker Protection Ordinance

On September 1, 2020, the Sacramento County Board of Supervisors passed the "Sacramento County Worker Protection, Health and Safety Act of 2020." The ordinance is effective from October 1, 2020, through December 31, 2020.
Highlights of the ordinance are as follows:

- The supplemental paid sick leave requirement applies only to those employers located within the unincorporated areas of the County that have 500 or more employees nationally.
- The ordinance requires that employers provide full-time employees working in the unincorporated areas of the County with 80 hours of paid sick leave; part-time employees receive paid time off equal to their average number of hours worked over a two-week period.
- Employees may use this paid sick leave for various reasons related to the coronavirus (COVID-19).
- The work safety requirement requires employers to implement specified social distancing, mitigation, and cleaning protocols and practices in the workplace to protect employees from COVID-19.

For a copy of ordinance, click on the link provided below.

https://www.cityofsacramento.org/-/media/Corporate/Files/EDD/Economic-Relief/Worker-Protection-Ordinance-adopted.pdf?la=en

New York City Amends ESSTA to Better Align with New York State PSL

September 28, 2020, New York City Mayor Bill De Blasio signed legislation amending the City's Earned Safe and Sick Time Act (ESSTA) to align more closely to the New York State Paid Sick Leave law (NYPSL). The changes became effective on September 30, 2020.

Important Note:

The amendments to ESSTA require employers to note on employee pay statements or a separate written document provided to the employee each pay period (1) the amount of sick and safe leave accrued and used by an employee during a pay period, and (2) the employee's total balance of sick and safe leave. Previously ESSTA had no such requirement.

New York City has advised via its Consumer Affairs website that "employers that could not operationalize the documentation requirement by September 30, 2020, but are working in good faith on implementation will have up to November 30, 2020, to ensure compliance without a penalty." The Consumer Affairs website can be found at **https://www1.nyc.gov/site/dca/businesses/paid-sick-leave-law-for-employers.page**

The NYPSL legislation does not contain a wage statement or other writing mandate. However, the NYPSL requires that employers provide a summary of leave accrued and used by an employee in the current and/or any previous calendar year, upon the oral or written request of an employee, within three business days of the request. The amendments to ESSTA did not incorporate this provision into the changes effective September 30, 2020.

Background

ESSTA:

ESSTA originally went into effect on April 1, 2014 and gave workers who are employed by an employer with five or more employees up to 40 hours of sick time in a year to recover from physical/mental illness or injury, seek medical treatment, or care for a sick family member.

As of May 5, 2018, an employee's sick time under the law can also be used for "safe time" purposes to address certain non-medical needs that may arise if employees or their family member are victims of domestic violence, a sexual offense, stalking, or human trafficking. For example: to meet with a lawyer or social worker or to relocate for safety.

NYPSL:

On April 2, 2020, Governor Andrew M. Cuomo announced that the Fiscal Year 2021 state budget includes a permanent mandatory paid sick leave program. The State Legislature passed the budget immediately thereafter, and Governor Cuomo signed the bill on April 3, 2020. The legislation took effect 180 days after signing, on September 30, 2020.

Some highlights of the permanent paid sick leave are as follows:

- Employers with fewer than five employees and a net income less than $1 million must provide workers with up to 40 hours of unpaid sick leave a year.
- Employers with five to 99 employees, and those with fewer than five employees and net income of more than $1 million, must provide workers with up to 40 hours paid sick leave annually.
- Employers with 100 or more employees must provide workers with up to 56 hours of paid sick leave per year.
- The paid sick time accrues at a rate of at least one hour per every 30 hours worked.
- The sick leave time is available for use for:
  - o Mental or physical illness.
  - o Injury or health condition of a family member.
  - o Seeking services related to domestic violence, a sexual offense, stalking or human trafficking.

It is important to note that, while covered employers must allow employees to begin accruing sick leave time beginning on September 30, 2020, employees need not be permitted to use accrued time until January 1, 2021. However, employers may permit use of leave before that date if they so choose.

Changes Made to ESSTA

Below is a brief summary of a few of the key changes made to ESSTA effective September 30, 2020.

Covered Employees: Previously, ESSTA required employees be employed in New York City for more than 80 hours in a calendar year in order to fall within the definition of "employee." The amendment removed the more than 80 hours of employment requirement in the City in a calendar year.

Obligation to Provide Paid Leave: Under the previous rules, ESSTA allows 40 hours of unpaid sick leave in a calendar year for all employers with less than five employees and a net income of less than one million dollars during the previous tax year. The ESSTA, as amended, expressly requires employers with four or fewer employees and a net income of one million or more dollars in the previous tax year to provide up to 40 hours of paid sick leave, aligning with NYPSL.

Accrual Rate and Caps: The ESSTA amendment conforms accrual caps with the NYPSL law. Under the old rules, ESSTA required accrual of leave at a rate of one hour of leave for every 30 hours worked as does the NYPSL law. However, ESSTA permitted all employers, regardless of size, to cap annual leave accrual at 40 hours. Now, like the NYPSL law, ESSTA caps accrual at 40 hours for employers with 99 employees or less; however, employers with 100 or more employees will be required to provide accrual of up to 56 hours of leave annually.

Start of Accrual: Under the NYPSL law, employees begin earning leave upon commencement of employment or the law's September 30 effective date, whichever is later, and the same commencement of employment or law's effective date standard is currently provided for under ESSTA. The ESSTA amendment provides that accrual begins upon commencement of employment or "the effective date of the local law that created the right to such time, whichever is later."

Eligibility to Begin Using Accrued PSL: Previously ESSTA permitted employers to impose a waiting period of up to 120 calendar days following an employee's commencement of employment before leave can be used. In contrast, the NYPSL law provides that employees need not be permitted to begin using accrued leave until January 1, 2021, and notably does not otherwise appear to permit an employer-imposed usage waiting period on new hires. The ESSTA amendment, conforming with NYPSL, removes the usage waiting periods for newly hired employees and instead provides that employees are entitled to use leave as it is accrued.

Rate of Pay: Previously, ESSTA required that leave be compensated at the same rate as the employee earns from his or her employment at the time it is used. The amendment deletes this language and adopts the NYPSL provision requiring that leave be paid at the employee's regular rate of pay. However, while the NYPSL law provides that employees cannot be paid less than the applicable minimum wage under New York Labor Law (NYLL), the ESSTA amendment provides that the rate of pay "shall not be less than the highest applicable rate of pay to which the employee would be entitled pursuant to [the NYLL] or any other applicable federal, state, or local law."

Notice and Posting: Since ESSTA was amended in 2018, employers have been required to distribute a written notice explaining certain leave rights and providing information regarding the benefit year in English and the primary language of the employee if an agency translation has been made available, within 30 days of the effective date of the 2018 amendment or upon commencement of employment, if later. However, employers were permitted, but not required, to post the notice at their business location. The amendment to ESSTA requires updated notices of rights to be distributed to employees upon commencement of employment, and for employees employed prior to September 30, within 30 days of the effective date of the amendment. Additionally, employers are now required to also post the notice conspicuously at their business location in an area accessible to all employees.

For a copy of the amendments to the New York City ESSTA, click on the link provided below.

https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4624828&GUID=B01A59B0-49DF-413D-85F1-89A2902C9104&Options=&Search=

Payroll

Revised Regulations Released Regarding Connecticut Tip Credit Law

The Connecticut Department of Labor (CTDOL) has issued new and revised regulations regarding the state's tip credit law. Effective September 24, 2020, the purpose of the revised regulations is to clarify some aspects of the existing regulatory language that had led to many class action lawsuits against Connecticut restaurants.

Some of the most significant revisions to the regulations are the following:

- The weekly tip credit attestation does not require an actual written signature by hand. Instead, the attestation may be obtained through an electronic acknowledgment or a Point-of-Sale (POS) system. Moreover, the attestation may be accomplished on a daily, weekly, or biweekly basis. In addition, employers may include the specific "tip credit" amount as a separate item in "a" wage record, meaning any wage record maintained by the employer. Furthermore, clarifying that the tip record regulations are not intended to be a litigation trap, the regulations state that an employer need only provide "substantial evidence" an employee received enough in tips to cover the tip credit.
- The duties "incidental to service" for which a tip credit may be taken have been clarified. The final regulations identify duties such as cleaning drink stations, rolling silverware, stocking side stations, garnishing and decorating dishes in preparation for serving, filling condiment containers and setting up food stations as those "incidental to service" for which the employer may take the tip credit. Previously, the CTDOL website provided a much narrower list of such duties, and although the listed duties were meant to serve only as examples, some courts had construed the examples as being an exhaustive list.
- Segregation of service from non-service work is required only if the employee spends more than two hours per day or 20 percent of their shift (whichever is less) performing non-service work.
- Employers must pay full minimum wage for opening or closing side work duties when the restaurant is closed to patrons.

It is important to note that employers must follow not only these new Connecticut regulations, but also the regulations set forth under the federal Fair Labor Standards Act.

For a copy of the revised regulations, click on the link provided below.

https://eregulations.ct.gov/eRegsPortal/Search/getDocument?guid={6037C174-0000-CC14-B3D3-93941FD076BE}

Maine Announces Minimum Wage and Other Threshold Changes for 2021

The Maine Department of Labor (DOL) has announced the state's minimum wage and other threshold changes that will take effect on January 1, 2021.

- The state minimum wage will increase from $12.00 per hour to $12.15 per hour for most workers.
- The cash minimum wage rate for tipped employers increases from $6.00 per hour to $6.08 per hour.
- The minimum salary level for an employee to qualify for exemption from overtime will increase from $36,000 per year ($692.31 per week) to $36,450 per year ($700.97 per week).

For a copy of the announcement, click on the link provided below.

https://www.maine.gov/labor/news_events/article.shtml?id=3321670

New Jersey Minimum Wage to Increase on January 1, 2021

The New Jersey Department of Labor and Workforce Development in a press release announced that the state minimum wage will increase to $12.00 per hour from its current level of $11.00 per hour on January 1, 2021. The cash wage for tipped employees will increase from $3.13 to $4.13 per hour on the same date.

The 2021 minimum hourly wage for employees of a small employer (fewer than six employees) or those engaged in seasonal work will increase to $11.10, while the minimum wage for employees who work on a farm for an hourly or piece-rate wage will increase to $10.44 per hour. The rate for both is currently at $10.30 per hour.

For a copy of the press release, click on the link provided below.

https://www.nj.gov/labor/lwdhome/press/2020/20200930_minimumwage.shtml

Ohio Announces January 1, 2021 Minimum Wage

The state of Ohio has provided a notice stating that, effective January 1, 2021, the minimum wage rate for non-tipped employees will increase from $8.70 per hour to $8.80 per hour and the cash minimum wage rate for tipped employees will increase from $4.35 per hour to $4.40 per hour.

Employees working for employers whose annual gross sales are $323,000 or less beginning January 1, 2021 (currently, $319,000 or less), and employees under the age of 16, only need to be paid the federal minimum wage rate of $7.25 per hour.

For a copy of the notice, click on the link provided below.

http://www.com.ohio.gov/documents/dico_2021MinimumWageposter.pdf

South Dakota Announces 2021 Minimum Wage

South Dakota has announced that the state minimum wage for non-tipped employees will increase from $9.30 per hour to $9.45 per hour effective January 1, 2021. The cash wage that employers must pay tipped employees will increase from $4.65 per hour to $4.725 per hour effective also on January 1, 2021.

Under South Dakota law, the state minimum wage is adjusted on an annual basis, increasing at the same rate as the cost of living, as measured in the Consumer Price Index published by the U.S. Department of Labor. The amount of the increase is rounded to the nearest five cents. The minimum wage cannot decrease. The new adjusted rate must be announced for the following year no later than October 15 of each year.

For a copy of the announcement, click on the link provided below.

https://dlr.sd.gov/employment_laws/minimum_wage.aspx#minimum

Washington State Announces 2021 Minimum Wage

The Washington Department of Labor & Industries (WDOL) has announced that, effective January 1, 2021, the state minimum wage rate will increase from $13.50 per hour to $13.69 per hour. Workers who are 14 or 15 years old may be paid 85 percent of the adult minimum wage which increases from $11.48 per hour to $11.64 per hour. Washington state does not permit the use of a tip credit in paying tipped employees.

In addition, it was announced that the overtime exemption salary thresholds, which are based on the state minimum wage, will also increase. For small businesses with one to 50 employees, an exempt employee must earn a salary of at least 1.5 times the minimum wage, or $821.40 a week ($42,712.80/year). For large businesses with 51 or more employees, an exempt employee must earn a salary of at least 1.75 times the minimum wage, or $958.30 a week ($49,831.60/year).

Finally, the WDOL announced that in order to qualify for the overtime exemption, computer professionals employed by businesses with one to 50 employees must earn a salary of at least 2.75 times the minimum wage ($37.65 per hour). For businesses with 51 or more employees, computer professionals must earn 3.5 times the minimum wage ($47.92 per hour) to qualify for the overtime exemption.

For a copy of the WDOL announcements, access the links provided below.

Minimum Wage

https://lni.wa.gov/workers-rights/_docs/FY21-073-2021-Minimum-Wage-Announcement-English.pdf

Overtime Exemption Salary Thresholds

https://lni.wa.gov/forms-publications/F700-207-000.pdf

Computer Professionals

https://www.lni.wa.gov/forms-publications/F700-213-000.pdf

San Diego, California, Announces 2021 Minimum Wage

On September 28, 2020, San Diego, California announced that effective January 1, 2021, the minimum wage in the city will increase to $14.00 per hour from the current level of $13.00 per hour.

Under California law, employers are not allowed to utilize a tip credit when paying tipped employees.

For a copy of the San Diego announcement, click on the link provided below.

https://www.sandiego.gov/treasurer/minimum-wage-program

Seattle, Washington, Announces 2021 Minimum Wage

On October 6, 2020, the Seattle Office of Labor Standards (OLS) announced that the 2021 minimum wage for all large employers (employing 501 or more employees worldwide) will be $16.69 per hour, an increase of 30 cents over the current rate of $16.39 per hour.

The OLS further announced that the 2021 minimum wage for small employers (500 or fewer employees) who do not pay at least $1.69/hour toward the employee's medical benefits and/or where the employee does not earn at least $1.69/hour in tips is $16.69/hour.

Finally, OLS announced that the 2021 minimum wage for small employers who do pay at least $1.69/hour toward the employee's medical benefits and/or where the employee does earn at least $1.69/hour in tips is $15.00/hour.

Washington state does allow the use of a tip credit to meet its minimum wage requirements.

For a copy of the announcement, click on the link provided below:

https://news.seattle.gov/2020/10/06/office-of-labor-standards-announces-seattles-2021-minimum-wage/

Time & Labor

California Enacts New Pay Data Reporting Requirement

On September 30, 2020, California Governor Gavin Newsom signed into law Senate Bill 973, a new pay data reporting requirement. The new California law applies to private employers (a) with 100 or more employees and (b) that are required to file an annual Employer Information Report (EEO-1) pursuant to federal law. Covered employers will have to provide California's Department of Fair Employment and Housing (DFEH) with pay data by specified job categories and by race, ethnicity and sex. The reports will be due on an annual basis, starting March 31, 2021, for calendar year 2020.

The new California pay report largely mirrors the Equal Employment Opportunity Commission's (EEOC's) now-halted EEO-1 Component 2 reporting requirement. Some significant questions remain, however, including how many employees an employer must have in California to be covered, and whether an employer must report on employees who only worked in California for a short time.

Background

The EEOC has been collecting demographic data about employer workforces ("Component 1") since 1966 as part of its mandate to prevent discrimination in employment under Title VII of the Civil Rights Act of 1964.

The requirement to submit Component 2 data, which includes detailed information about employee pay and hours worked, started in 2016 when the EEOC announced that certain employers would be required to provide compensation data with their annual EEO-1 Component 1 reports. In 2017, the federal Office of Management and Budget decided to indefinitely suspend the EEOC's collection of pay data, which led to federal court litigation. Eventually, pursuant to a court order, the EEOC reinstituted the collection. Private employers — including federal contractors and first-tier subcontractors with 100 or more employees — were required to submit 2017 and 2018 Component 2 data to the EEOC by September 30, 2019.

In a September 11, 2019 notice, the EEOC announced that it would complete its collection of 2017 and 2018 reports, but would not seek authorization to collect Component 2 data for future years. The EEOC concluded that the burden on employers "far outweigh[s] the pay data's unproven utility." At this point, employers are no longer required to submit pay data under federal law.

California Legislation

In response to the EEOC's decision to stop pay data collection, California legislation was proposed to ensure that Component 2 pay data will "continue to be compiled and aggregated in California." In the final bill, the Legislature explained the underlying public policy:

(a) Despite significant progress made in California in recent years to strengthen California's equal pay laws, the gender pay gap persists, resulting in billions of dollars in lost wages for women each year in California.

(b) Pay discrimination is not just a women's issue, but also harms families and the state's economy. In California, in 2016, women working full time, year-round made a median 88 cents to every dollar earned by men and, for women of color, that gap is far worse.

(c) Although there are legitimate and lawful reasons for paying some employees more than others, pay discrimination continues to exist, is often "hidden from sight," and can be the result of unconscious biases or historic inequities.

Governor Newsom signed the bill on September 30, 2020.

Pay Data Report

The California law is modeled after the EEO-1 Component 2 reporting requirement. Under the new law, private California employers with 100 or more employees that are required to file an annual Employer Information Report (EEO-1) under federal law must submit a pay data report to the DFEH for the prior calendar year (the "Reporting Year"). Employers will be required to report on all full- and part-time employees working during a "workforce snapshot period" — which is any pay period between October 1 and December 31 of the Reporting Year (e.g., between October 1 and December 31, 2020, for the report due March 31, 2021).

The report will include:

- The number of employees by race, ethnicity and sex in the workforce snapshot period, by EEO-1 job category.
- The number of employees by race, ethnicity and sex whose annual earnings fall within each of the pay bands the U.S. Bureau of Labor Statistics uses in the Occupational Employment Statistics survey ($19,239 and under, $19,240-$24,439, $24,440-$30,679, and so on). The earnings are calculated using the total earnings shown in Box 1 of the employee's IRS Form W-2 for the relevant reporting year.
- The total number of hours worked by each employee counted in each pay band during the Reporting Year.

The statute defines an "employee" as an "individual on an employer's payroll, including a part-time individual, whom the employer is required to include in an EEO-1 Report and for whom the employer is required to withhold federal Social Security taxes from that individual's wages."

The law states that employers can comply with the new law by submitting a copy of their federal EEO-1 report containing the same or substantially similar pay information required above, yet pay data must no longer be submitted to the EEOC.

The law states that employers with multiple establishments must submit a report for each establishment as well as a consolidated report that includes all employees. Employers also have the option to provide clarifying remarks concerning the information in the report, should they choose to do so.

Employers must provide the data in a form that allows the DFEH to search and sort the information using readily available software. At this point, the DFEH has not provided a specific form or template for filing the report.

If a covered employer fails to submit a pay data report, the DFEH may seek an order requiring compliance and will be entitled to recover costs associated with seeking the order.

How Will This Data Be Used?

The law states that the pay data reports are intended to allow for the designated state agencies to collect wage data to "more efficiently identify wage patterns and allow for targeted enforcement of equal pay or dissemination laws." The DFEH will make the reports available to the Division of Labor Standards Enforcement (DLSE) upon request and maintain the data for at least 10 years. Both the DFEH and DLSE must keep the data confidential except as necessary for administrative enforcement or through the normal rules of discovery in a civil action.

What's Next?

In the months leading up to the September 30, 2019 Component 2 filings, there were many open questions and employers eagerly awaited technical and substantive details from the EEOC. The California law has answered some of those open questions by referring back to or relying on the Component 2 methodology. The DFEH is expected to issue additional guidance on key questions relating to the filing, including whether employers must provide data for employees temporarily in California, multi-establishment reporting and calculating hours worked.

For a copy of SB 973, click on the link provided below.

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB973

California Meal and Rest Break Requirements for Employees Working Remotely

SB 729 Failed – Would Have Suspended PAGA Enforcement

The California legislature recently failed to pass legislation, which would have limited the legal liability of employers for possible labor code violations related to meal and rest breaks, when employees are working from home due to the COVID-19 pandemic. The failure of this legislation means that California employers will need to be extremely diligent in administering meal and rest breaks, even for employees who are working from home. Employers remain subject to all labor laws, even during the pandemic.

As background, under California law, when an employee works for a work period of more than five hours, a meal period of not less than 30 minutes must be provided no later than the end of the employee's fifth hour of work; and when an employee works for a period of more than 10 hours, a second meal period must be provided no later than the end of the employee's tenth hour of work. The employee must be relieved of all duty during his or her meal period or the meal period is considered to be an "on duty" meal period that is counted as hours worked and compensated at the employee's regular rate of pay. Additionally, meal period premium pay is required for each workday that the meal period is not provided. Meal period rules are subject to certain waivers by mutual consent, and different rules may apply to employees under certain Industrial Welfare Commission Wage Orders (Wage Orders).

Wage Orders also require that employers must authorize and permit nonexempt employees to take a rest period that must, insofar as practicable, be taken in the middle of each work period. The rest period is based on the total hours worked daily and must be at the minimum rate of a net 10 consecutive minutes for each four-hour work period, or major fraction thereof. If an employer does not authorize or permit the required rest period, the employer must pay the employee one hour of pay at the employee's regular rate of pay for each workday that rest period is not provided.

California labor law is somewhat unique in that it permits enforcement of meal and rest break requirements, as well as other wage and hour requirements, through private civil suits. The Labor Code Private Attorneys General Act of 2003 (PAGA) authorizes employees to bring civil actions to recover penalties that would normally be collected by the Office of the Labor Commissioner. Employees can also pursue lawsuits on behalf of other employees for violations. Consequently, California employers can be subject to civil lawsuits related to labor code violations, which are normally enforced by the Office of the Labor Commissioner.

SB 729 would have prohibited employees from recovering civil penalties from an employer under the Private Attorneys General Act (PAGA) for violations related to the employer's obligation to provide meal and rest breaks, if both of the following are true:

1. After March 18, 2020, the employee began to work from the employee's home or elsewhere at the employer's direction, related to the COVID-19 pandemic.

2. The alleged violations occurred after March 18, 2020, and before 2023, and are for meal or rest breaks the employer failed to provide to an employee while that employee was working for the employer from home or other place of residence. This prohibition would only apply if the employee does not reside on property owned by the employer or provided by the employer to the employee.

California legislation enacted last year found that employers are experiencing a high volume of PAGA claims related to labor code violations, such as incomplete or incorrect pay statements. AB 1654 (Chapter 529, Statutes of 2018), signed into law on September 19, 2018, now exempts employers and employees in the construction industry and covered by a collective bargaining agreement from PAGA. According to the bill sponsor, "PAGA … has led to the unintended consequence of significant legal abuse. PAGA, in effect, encourages class action type lawsuits over minor employment issues … The threat of extended litigation … on behalf of an entire class of workers provides enormous pressure on employers to settle claims regardless of the validity of those claims."

The legislative analysis for AB 1654 reported that the California agency receives approximately 6,000 new PAGA claim notices annually. Many such suits address relatively minor technical violations of the law, since it is unnecessary to establish harm to prevail in a PAGA suit.

Employers have raised concerns about the proliferation of PAGA lawsuits involving inadvertent technical errors on wage statements, when employees are paid correctly. However, recent efforts to reform PAGA have failed, with the exception of AB 1654, which only exempts the construction industry under collective bargaining agreements from PAGA.

Similarly, AB 443 and AB 789/SB 1129 failed to progress in the California legislature this year. AB 443 would have limited attorney's fees related to wage statement requirements and private (PAGA) enforcement. AB 789/SB 1129 would have improved an employers' ability to "cure" any violation of wage statement requirements under Labor Code 226(a) by using a specified cure procedure; and would have extended the deadline for corrections ("cure period") from 33 days to 65 days. These bills were not enacted.

In short, even in this COVID-19 environment, California employers must exercise careful diligence and control in administering accurate and complete wage statements, required meal and rest periods, and other wage and hour requirements. California employers should consult with legal counsel and carefully review their wage statements and meal and rest break policies; e.g., taking action as appropriate to document compliance with meal and rest break requirements, specifically with respect to employees working from home, as well as all other aspects of California labor law.

For additional information, see:

www.dir.ca.gov/dlse/faq_mealperiods.htm
www.dir.ca.gov/dlse/faq_restperiods.htm

ADP Compliance Resources

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