Employers Labor over New Laws in 2016

By Richard S. Rosenberg

A WAVE OF NEW EMPLOYMENT laws which took effect on January 1 will significantly impact the workplace in 2016. These new regulations will result in higher pay and more time off for California workers, while increasing the burden on employers to comply with the nuances of the new laws.

Equal Pay Act Protections

California's Equal Pay Act is the state law version of a federal law mandating gender wage parity. These laws prohibit an employer from paying an employee less than what it is paying to employees of the opposite sex for equal work (meaning jobs which require equal skill, effort, and responsibility and performed under similar working conditions in the same establishment).

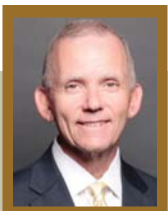
Under the new version of the law, the term "equal" work is replaced by the term "substantially similar" work. So, employers are now required to pay the same to employees of the opposite sex when performing substantially similar work when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions. If disagreements occur as to what all that means, juries will decide whether two jobs are indeed substantially similar.

Notably, the new law eliminated the requirement that the work in question be performed at the same location. As a practical matter, this means that an employee alleging discrimination may compare him/herself to a much larger pool of so-called comparators. Using this new legal standard, an employee suing the company for gender-based pay discrimination may now compare himself/herself with employees holding different job titles and with different responsibilities who are working in different locations of the company.

The new law explains that if a wage differential does exist, the employer will not be in violation of the law only if it is based upon a seniority system; a merit system; a system which measure earnings by quantity or quality of production; or a bona fide factor other than sex, such as education, training or experience.

While the last of these factors appears to provide a welcome defense to employers, the new law makes it clear that the bona fide factor other than sex defense is only available to the employer if the employer can demonstrate that the factor meets all of the following conditions: (1) it is not based on or derived from a sex-based differential in compensation; (2) is job-related with respect to the position in question; and (3) is consistent with business necessity.

In regard to the first item, employers need to know that a deep dive will be made into any employer claim that the wage difference is justified by the market or linked to the prior earnings history of the comparators. That's because the legislators believe that the market may be inherently biased. Even if an employer can meet this heavy burden, an employee can still prove a violation of the new law if the employee can demonstrate that an alternative business practice exists which would serve the same business purpose without



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producing the wage differential. With this new framework fraught with ambiguity, commentators predict a veritable tsunami of new equal pay litigation.

Many legislators felt that the existing wage disparity was due, in part, because there was very little transparency in the workplace when it comes to wages. To change all that, the new law encourages employees to talk openly about their wages and, thus, foment pressure for their companies to restructure wages accordingly.

To that end, the law expands protections currently provided to employees for disclosing or discussing the amount of their wages. The new law expressly prohibits an employer from discriminating or retaliating against any employee who seeks to enforce the provisions of the new law and further makes clear that an employer may not prohibit an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under the new law.

The major implication of this new law is that employers will now have a far greater burden to justify any wage differentials between employees of the opposite sex. It will increase an employer's burden to defend wage decisions based on factors such as local market conditions, cost-of-living in the particular work location, prior pay history, subjective performance factors, the employer's current financial situation, the need to increase wages to retain certain key employees, and/or the need to pay higher wages to recruit a certain employee.

Job one is to proactively examine pay practices to determine whether gender inequities exist as between substantially similar positions, and if so, whether those differences can be legally justified based on one of the factors listed above. Coordination with an expert compensation consultant may be needed in more complex situations. When making this assessment, employers should be expansive when evaluating which positions are substantially similar.

The next step is to proactively address these differences, and do so before a legal claim is mounted unless the wage difference can comfortably be explained under the available excuses permitted in the law.

Increase in Minimum Wage

The California minimum wage rate increased to $10/hour, up from $9. Employees may not waive this right. This increase also impacts who qualifies as an overtime exempt employee. Because of the new minimum wage, exempt employees must now earn an annual salary of no less than $41,600 ($800/week). In addition, employers must be sure that these employees spend at least 51% of their average workweek engaged in what the lawmakers consider truly exempt duties.

Employers should also be aware that there are numerous industry specific, city and county ordinances that have established even higher minimum rates of pay which must be followed if the business is covered by one or more of these rules. For example, businesses operating within the City of Los Angeles, with 25 or more employees, must pay a higher minimum wage of $10.50 per hour beginning July 1, 2016. And larger hotels located within the City of Los Angeles are already obligated to pay a considerably higher minimum wage of $15.37. Businesses that contract with various federal and state governmental agencies also are subject to higher so-called "living wage" or "prevailing wage" obligations.

E-Verify System

A new California law prohibits most California employers from using the federal E-Verify system to check the employment authorization status of any existing employee or any applicant who has not yet received an offer of employment. The only exception is where doing so is required by a federal law or as a condition of receiving federal funds. Employers who use the E-Verify system in violation of this new law are liable for a civil penalty of up to $10,000 per violation.

It is important to note, however, that the new law only applies to applicants that have yet to receive a job offer. It does not affect an employer's right to use the E-Verify system to check the employment authorization status of applicants who have already received a job offer.

The federal E-Verify system is administered by the U.S. Citizenship and Immigration Services, the U.S. Department of Homeland Security, and the U.S. Social Security Administration. E-Verify enables employers to check whether a new employee is eligible to work in the United States. E-Verify compares information from an

employee's Form I-9 to data from Department of Homeland Security and Social Security Administration records.

If the information matches, the E-Verify system will confirm almost immediately that an individual is authorized to work in the United States. If the information does not match, the E-Verify system will issue a tentative non-confirmation (TNC) notice. A TNC means that federal government databases cannot confirm whether an individual is eligible for employment.

The new law will prohibit employers from using E-Verify to check on the employment status of existing employees and pre-screening job applicants, except as required by federal law or as a condition of receiving federal funds.

The law also requires employers who use the E-Verify system to furnish affected job applicants and employees with a copy of any notification issued by the Social Security Administration or the United States Department of Homeland Security containing information specific to the employee's E-Verify case or any TNC notice.

Although the Department of Homeland Security states that employer participation in E-Verify is for the most part voluntary, it is estimated that the service is used by more than 600,000 employers across the country.

Parental Time Off

A new revision to the Family-School Partnership Act expands employees' rights to job-protected leave. Under the law, employers with 25 or more employees are required to permit employees with school age children to take up to 40 hours of job protected leave (unpaid) each year to attend to their kid's school activities. The employee must be either the parent or legal guardian of the child, or a grandparent having custody of the child. Children covered are those who are either enrolled in a licensed child day care facility, kindergarten, or grades 1 to 12.

The only restriction is that the business may limit the leave to just 8 hours in any one month and may require the employee to provide reasonable notice of the absence. The law did not define reasonable notice, putting employers at risk of a violation if the employee offered just about any amount of advance notice.

The new law expands these parental time off rights in several material respects. First, the new law no longer requires the child to be in a licensed child day care facility. Leave rights must be offered so long as the child is under the care of a licensed child care provider.

Second, while existing law only permits time off for a parent to participate in school activities, the new law permits employees to also take time off: "to find, enroll, or reenroll the child in a school or with a licensed child care provider."

Third, the new law also expands the definition of "parent" beyond biological parents to include a legal guardian, stepparent, foster parent, or grandparent of the child or any person who stands in loco parentis to the child.

Fourth, in recognition of the exigencies of parenting, the new law also adds a new emergency leave provision to require the employer to grant a covered parent time off to address a so-called "child care provider or school emergency." This term is defined to mean that an employee's child cannot remain in a school or with a child care provider due to any one of the following:

- The school or child care provider has requested that the child be picked up, or has an attendance policy, excluding planned holidays, that prohibits the child from attending or requires the child to be picked up from the school or child care provider
- Behavioral or discipline problems
- Closure or unexpected unavailability of the school or child care provider, excluding planned holidays

- A natural disaster, including, but not limited to, fire, earthquake, or flood

In the case of emergency leave, the usage rules are relaxed so that the employee may use as many of the 40 hours as needed (no 8 hour/month limit) and the employee is relieved of the obligation to give reasonable advance notice due to the unplanned nature of the event precipitating the need for time off.

As written, the law requires a great deal of flexibility on the part of employers. For example, the law will permit covered parents to leave work 20 minutes early for so-called emergency matters over 100 times per year. It seems that a simple request by the child's care provider to pick up the child early would be sufficient, in addition to the several other reasons listed in the new law.

Also, while the new law permits an employer to ask for documentation of the need for the time off, this provision offers little protection to the employer because the new law states that "documentation" means whatever written verification of parental participation the school or licensed child care provider deems appropriate and reasonable. As such, it appears as though the employer is left with no choice but to accept whatever documentation is provided and may not question the reasonableness of the documentation.

Fifth, the new law strengthens the anti-retaliation provisions in the existing law. The new law prohibits employers from terminating, demoting, or in any other manner discriminating against an employee as a result of the employee's exercise of the right to take time off. This means that an employer cannot discipline employees under an attendance policy or otherwise, when arriving late, leaving early or otherwise taking time off for one of the many reasons in the law.

Also, all people managers must be trained to avoid expressing disapproval when employees inform them of the need to be absent for a reason covered by the law. Such comments are in many cases the smoking gun evidence that employees rely upon when asserting that they were victims of unlawful discrimination or retaliation for taking or asking for this leave. The law assumes that employers will shoulder a certain amount of inconvenience without making the employee feel bad for having taken advantage of these new rights.

Employers must review and update all parental leave policies to ensure compliance with these changes. Employers should also review internal procedures for receiving, documenting, recording and tracking employee time off requests and usage under the new law. Be sure that the employee is not accumulating attendance demerits for using the time authorized by law. Given the expansive reasons permitted for time off under the new law, the lack of notice requirements, and the flimsy documentation required, the new law opens the door for potential abuse by employees as well.

Mileage Reimbursement Rates

The new IRS standard mileage reimbursement rate is 54 cents per mile. This number decreased from 57.50 cents per mile set in 2015 due to the lower cost of gasoline. Employers should ensure that employees are tracking expenses and submitting expense reports for actual business mileage.

Remember, the IRS rate is a safe harbor that should suffice in most situations. However, if an employee claims that his or her actual vehicle maintenance costs are higher, the employee has the right to that reimbursement if the employee can prove that his/her maintenance costs are indeed higher. Both California and federal law prohibit any kind of workplace retaliation against employees who assert their right to these wage or expense reimbursement payments.