WAGE AND HOUR DEVELOPMENTS
THAT AFFECT ALL CALIFORNIA EMPLOYERS

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I. MINIMUM WAGE UPDATE

A. Federal and State Requirements

The current federal minimum wage is $7.25 per hour. This has been the federal minimum wage for the last six years, and although there are proposals to increase it, it is not currently scheduled to increase. California's current minimum wage is $9.00 per hour, increasing to $10.00 per hour on January 1, 2016. Because California's minimum wage exceeds the federal standard, California employers must pay no less than the California minimum wage to their employees. In addition, certain California cities and municipalities have established their own higher minimum wages, and those rates will prevail in those jurisdictions. Although there is no current legislation in effect to increase the minimum wage beyond $10.00 per hour in California, there is a proposal known as the Fair Wage Act of 2016 that will likely be on the ballot next year and proposes a gradual increase in the minimum wage to $15.00 per hour.

B. The City of Los Angeles

In June, Mayor Eric Garcetti signed into law a measure which will create a special minimum wage for the first time ever in the City of Los Angeles. The law is estimated to impact 600,000 workers and raises the minimum wage for all employers of 26 or more employees to $10.50 per hour on July 1, 2016, $12.00 per hour on July 1, 2017, $13.25 per hour on July 1, 2018, $14.25 per hour on July 1, 2019 and $15.00 per hour on July 1, 2020. Non-profits (regardless of the number of employees they have) and employers who employ less than 25 employees are given a one year reprieve. As such, their employees will not need to be paid $10.50 per hour until July 1, 2017, $12.00 per hour until July 1, 2018, $13.25 per hour until July 1, 2019, $14.25 per hour until July 1, 2020, and $15.00 per hour until July 1, 2021. Thereafter, regular increases are scheduled to occur and will be tied to the Los Angeles consumer price index. The only exception to this is for non-profits with 25 or fewer employees. They can apply for a waiver if their top executives earn less than five times the wage of their lowest paid worker, they provide traditional job programs, serve as childcare providers, or are primarily funded by city, county, state or federal grants. Certain employees covered by collective bargaining agreements are also exempt from the law.

To be clear, this law only affects employers in the City of Los Angeles. It does not affect the 87 other cities in Los Angeles County, including Beverly Hills, Santa Monica, West Hollywood, Glendale, Pasadena and Long Beach.

Hotel workers in Los Angeles already enjoy increased benefits at significantly higher rates. Specifically, such hotels with 300 or more rooms must currently pay their workers $15.37 per hour. On July 1, 2016, employees who work at Los Angeles hotels with at least 125 guest rooms will also need to be paid $15.37 per hour. This law is broad in scope. In addition to affected hotels, it also protects workers in restaurants, shops and other enterprises that lease space from affected hotels. Hotels that are not in the city proper are excluded from this law, as are otherwise covered employers whose employees are subject to certain collective bargaining agreements.

C. The County of Los Angeles

The Los Angeles County Board of Supervisors voted in July to increase the minimum wage in unincorporated areas of Los Angeles County over five years, to $10.50/hr. on July 1, 2016, $12.00/hr. on July 1, 2017, $13.25/hr. on July 1, 2018, $14.25/hr. on July 1, 2019, and $15.00/hr. on July 1, 2020.

D. Other California Cities

Many other cities in California besides Los Angeles have enacted their own minimum wage obligations. For example, in San Francisco, employees must be paid no less than $12.25 per hour, increasing to $13.00 per hour as of July 1, 2016, $14.00 per hour as of July 1, 2017, and $15.00 per hour as of July 1, 2018. In Oakland, the minimum wage is currently $12.25 per hour, and is to be adjusted each year based on inflation. In Berkeley, employers must pay their workers no less than $11.00 per hour, increasing to $12.53 per hour on October 1, 2016. Proposed legislation in Santa Monica and West Hollywood is also taking on steam. Employers in those and other areas should stay abreast of current proposals to increase the minimum wage in their own jurisdictions.

II. EXEMPT OR NON-EXEMPT?

The wrong answer to this question may result in significant employer liability. If you take away nothing else from this article, please remember the following: Never assume employees are exempt from overtime simply because they are paid on a salary basis or have the word "manager" in their job title. These incorrect assumptions recently cost Halliburton $18.3 million. This error resulted in 28 employee positions and 1,106 employees being incorrectly classified as exempt from overtime, and Halliburton was forced to negotiate with the U.S. Department of Labor and ultimately pay out approximately $18.3 million ($18,000 per worker) in back overtime following the Department of Labor's audit of their practices. If this had been litigation, the stakes would likely have been much higher.

Under both state and federal law, employees are either exempt from overtime pay or are not exempt from overtime laws and therefore are entitled to receive overtime and no less than the minimum wage for an hour's work. The guidelines to determine who is exempt and who is not

exempt are similar under both California and federal law, and, as is true with minimum wage laws, the law that is most favorable to employees will apply.[1] In each instance, a two-part test must be conducted in order to determine whether an employee is exempt from overtime and minimum wage obligations. The first part is known as the "salary" test; the second part is known as the "duties" test. Both tests must be satisfied in order for an employee to be exempt from overtime.

A. Duties Test

This is a highly technical, fact-intensive exercise which requires a case-by-case analysis of how an employee actually spends the majority of his or her time. Although the duties portion of the test is beyond the scope of this article, the most common duties exemptions are the professional, administrative and executive exemptions. The actual duties tests for each of these exemptions are quite lengthy, and these brief summaries should not be relied upon by the reader to determine if employees meet the duties test; rather, they provide a simplified explanation of these three common exemptions:

- Executive Exemption: Employees who are primarily (i.e., spend more than half of their working time) engaged in managing at least one recognized department or subdivision of a business, supervise two or more employees, and have the authority to make significant personnel decisions.

- Professional Exemption: Employees who are licensed or certified by the State of California and are primarily engaged in the practice of one or more of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching or accounting. The professional exemption also includes employees primarily engaged in an occupation commonly recognized as "learned" or "artistic."

- Administrative Exemption. Employees who are primarily (i.e., spend more than half their working time) engaged in performing non-manual work, and not routine clerical duties, relating directly to the business policies or general business operations of the employer.

B. Salary Test

In addition to the duties test, an exempt employee must be paid a minimum weekly salary in order to be exempt from overtime. (Although there are narrow exceptions for some computer professionals and certain physicians, all other exempt employees may not be paid by the hour or the exception is lost, regardless of the amount of compensation paid to employee.)

The minimum weekly salary that an exempt employee must receive under federal law is currently $455 per week ($23,660 annually). In California, in order to be exempt, an employee

[1] All California employers are covered by California's overtime and minimum wage obligations. Employers with an enterprise that has a gross volume of sales made or business done of $500,000 or more are also subject to federal law. There is no exemption for small businesses, nor is there an exemption for non-profits.

must be paid a salary that is at least twice the current state minimum wage for full-time employees. This is currently $720 per week ($37,440 annually), increasing to $800 per week ($41,600 annually) on January 1, 2016, when the minimum wage increases. Because the federal minimum is so low (indeed, the current federal minimum wage is below the poverty threshold for a family of four), the federal minimum has never been relevant for California employers, who have always needed to satisfy the more stringent California requirement. It is likely that this is about to change.

On June 30, 2015, following a directive by President Obama to review and upgrade its minimum weekly salary test to be more consistent with the cost of living, the U.S. Department of Labor announced a proposal to more than double the current federal minimum salary amount for exempt employees from $455 to $970 per week, which is $170 more per week than the 2016 California standard. This increase would ensure that the minimum level equals the 40th percentile of weekly earnings for all salaried workers in the United States, and would result in the following change to the salary portion of the exemption test for most California employers:

Current Federal Salary Level Test 2015	**Current California Salary Test**	**Proposed New FSLA Standard (Expected in 2016)**
$455 per week ($23,660 annually)	$720 per week ($37,440 annually) (2015) $800 per week ($41,600 annually) (2016)	$970 per week ($50,440 annually) (subject to automatic increases)

Thus, on January 1, 2016, in order for a California employee to be exempt from overtime, in addition to meeting the duties test, the employee must earn a minimum salary of $800 per week ($41,600 annually). At some point in 2016, it is likely that the anticipated new federal regulation, which the Department of Labor has not yet issued, would then increase that amount to $970 per week ($50,440 annually). Put simply, at the time the anticipated federal law would take effect, anyone in the United States who earns less than $970 per week ($50,440 on an annualized basis) would be entitled to receive overtime pay, regardless of what that person does. The U.S. Department of Labor intends to thereafter automatically increase the salary minimum test in future increments that will prevent it from becoming outdated, and employers will be expected to anticipate these automatic increases, which will be indexed to the 40th percentile of weekly earnings for full-time salaried workers in the United States.

The U.S. Department of Labor took comments from employers on their proposed legislation from July through September of 2015. They were flooded with hundreds of thousands of comments, and concluded at that time that they had sufficient information to produce a quality regulation. The most common concern expressed about the proposed regulation is that it fails to take into account different industries and different geographic regions. However, based upon the Department of Labor's refusal to extend the comment period, it is anticipated that the new law

will not take into account such contingencies and will take effect at a yet undetermined date in 2016.

We recommend that in light of the increased focus by the DOL and state agencies on the issue of classification – in addition to continuing litigation by the workers themselves – employers take a renewed look at their workforce to ensure that they have correctly identified workers who should be on payroll.

CALIFORNIA FAIR PAY ACT: AMENDMENTS TO THE EXISTING EQUAL PAY ACT MAKE IT EASIER FOR EMPLOYEES TO PROVE UNLAWFUL WAGE DIFFERENTIALS BASED ON GENDER.

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Effective January 1, 2016, California Employers of all sizes are required to comply with the Fair Pay Act, which requires that employers provide equal pay to male and female employees who perform "substantially similar" work.

The Act amends California Labor Code Section 1197.5 (known as the California Equal Pay Act) which generally prohibits employers from paying lower wages to employees of one gender as compared to employees of the opposite gender when those employees (a) work at the same establishment, and (b) perform "equal work" on jobs requiring "equal" skill, effort and responsibility and which are performed under similar working conditions in the same establishment.

The new law eliminates the "equal work" requirement and will now bar employers from paying disparate wage rates to employees of one sex as compared to the opposite sex where the employees perform "*substantially similar* work when viewed as a composite of skill, effort, and responsibility and performed under similar working conditions." The Fair Pay Act will also eliminate the current Section 1197.5 requirement that the wage differential be in the "same establishment." Now, employers must be mindful of paying equal wages to employees who perform substantially similar work throughout their entire company and not just at any given location.

The law, as amended, still excuses equal pay requirements where a wage differential is justified by (1) seniority, (2) merit, and/or (3) quantity or quality of production. However, employers will soon have a much higher burden in proving a pay differential falls under the fourth currently-available defense of a "*bona fide* factor other than sex." Beginning January 1, 2016, an employer cannot invoke that defense unless it can also prove that the factor is (1) not based on or derived from a sex based differential in compensation; (2) job-related with respect to the position in question; (3) consistent with a "business necessity;" and (4) applied reasonably and accounts for the entire wage differential.

Under the new law, "business necessity" is defined as "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve." However, the employee can defeat this defense by showing that another business practice would serve the same business purpose without causing pay inequality.

Finally, because the legislature made clear that it believes the gender wage gap is due to secrecy regarding wages that has, until now, prevented employees from knowing when wage discrimination is in effect, the law is now amended to prohibit discrimination or retaliation (including termination) against employees who seek to enforce or obtain assistance in enforcing the new law. Moreover, employers cannot prohibit employees from disclosing their own wages, discussing the wages of others, inquiring about another employee's wages, or helping another employee to exercise his or her rights under the Fair Pay Act.

The law explicitly states that it does not create an obligation for the employer or any employee to disclose wages. However, as a practical matter, that provision will have no effect in the event that an employee files a complaint with the Court or with the Division of Labor Standards Enforcement ("DSLE") which is charged with administering and enforcing the Act. In such a case, the DLSE or employee's attorney will undoubtedly conduct discovery requiring disclosure of other employees' wages. In fact, to assist with such discovery, the Act requires employers to maintain and to keep on file for three years the records of wages and wage rates, job classifications, and other terms and conditions of employment for all of its employees.

An employer who violates the Act may face severe consequences. An employee whose wages are negatively affected in violation of the law can recover not only the balance of wages that should have been paid, but also an equal amount as liquidated damages, plus interest, costs of suit, and attorney's fees. Moreover, there is no requirement that an employee exhaust administrative remedies with the DLSE before filing a lawsuit in court.

To avoid such a costly result, employers should carefully review their records and be mindful of apparent gender-related disparities in wages paid to employees who perform substantially similar work, regardless of their title or geographic location in the organization. We also encourage employers to implement the following best practices:

- Consider the wages of all employees already performing similar work when setting wages for a new employee, especially with respect to employees who have similar skills and responsibilities.

- Consider creating formal levels of job classification and wage tiers that account for varying levels of skill, experience and seniority.

- Make merit-based decisions about pay according to objectively measurable criteria when possible and document those factors underlying the decisions.

- Document when higher wages are set for an employee due to higher levels of skill, experience, or higher quality or quantity of production.

- Make sure that company confidentiality agreements, handbooks, and policies do not prohibit employees from discussing wages. Revise handbooks and written policies to emphasize the bar on retaliation against employees who invoke their rights under the Act.

- Provide training to supervisors and all employees involved in deciding wages and other compensation regarding the Act, including the anti-retaliation provisions.

- Consider engaging an attorney to assist in the evaluation of wage practices to shield communications and analyses under the attorney-client privilege.

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