JONES DAY | One Firm Worldwide℠

WHITE PAPER

November 2015

2015 California Labor and Employment Legislative Update: Newly Enacted Employment Legislation

The California Legislature's efforts to expand the reach and scope of California employment statutes continue unabated. In most instances, its efforts were endorsed by Governor Jerry Brown. In September and October 2015, the governor signed more than a dozen of these bills into law. Most notable is the California Fair Pay Act, which amends the Labor Code to require equal pay for employees performing "substantially similar" work regardless of gender, strengthens anti-retaliation protections for employees seeking wage information, and extends employers' recordkeeping obligations. The California Fair Pay Act goes into effect at the beginning of 2016.

TABLE OF CONTENTS

The California Legislature's efforts to expand the reach and scope of California employment statutes continue unabated. In most instances, its efforts were endorsed by Governor Jerry Brown. In September and October 2015, the governor signed more than a dozen of these bills into law. Most notable is the California Fair Pay Act, which amends the Labor Code to require equal pay for employees performing "substantially similar" work regardless of gender, strengthens anti-retaliation protections for employees seeking wage information, and extends employers' recordkeeping obligations. The California Fair Pay Act goes into effect at the beginning of 2016. Employers should consider a review of their current job titles and positions, assess which of those positions may be deemed "substantially similar," and compare their associated rates of pay. Governor Brown also signed bills, *inter alia,* clarifying California's mandatory sick leave law, establishing an ability to "cure" limited paystub violations, and refining compensation requirements and meal period standards for certain employees.

Unlike last year, Governor Brown did not sign every piece of legislation adopted by the Legislature. He vetoed a proposed prohibition on mandatory arbitration agreements, as well as bills aimed at restricting employers' use of employment status and salary information. It is expected that the Legislature will again seek to adopt these issues in 2016.

CALIFORNIA FAIR PAY ACT

On October 6, 2015, Governor Brown signed into law the California Fair Pay Act, which amends Labor Code section 1197.5. The amendment is designed to strengthen the legal prohibition against differences in compensation based on sex. The Act is effective on January 1, 2016 and does not contain a retroactivity provision.

The text of the Act principally accomplishes three things: (i) it requires employers to provide equal pay to employees of opposite sexes for work that is "substantially similar" (rather than for work that is "equal"); (ii) it strengthens employee protection from retaliation for discussing or seeking wage information; and (iii) it extends certain recordkeeping requirements from two years to three years.

Broader Classification of Comparable Jobs

The Act prohibits paying employees of the opposite sex a lower wage or salary for "substantially similar work, when viewed as a composite of skill, effort, and responsibility." Previously, employers were required to provide equal pay between sexes only for "equal" work. Additionally, the assessment is now made in consideration of work performed under "similar working conditions," eliminating the prior rule that wages be compared only within the "same establishment." Accordingly, employers need to be able to account for, and may potentially be liable for, differences in compensation for work performed in different locations, if such work is nonetheless performed under "similar working conditions."

The law includes a burden-shifting provision. Faced with a *prima facie* showing of wage disparities, the employer may establish that wage differences between sexes are due to a seniority system, merit system, a system that measures the quantity or quality of production, or a "bona fide factor other than sex, such as education, training, or experience." The cited nondiscriminatory factor may not be based on or derived from a sex-based differential in compensation, must be job related, and must be consistent with a "business necessity" that is satisfied by the factor relied upon. An employee also may rebut an employer's justification of "business necessity" simply by demonstrating that an alternative business practice exists that would serve the same business purpose without producing the wage disparity. Each of these factors must be "applied reasonably," and together, the factors must account for the entire wage differential.

Potential liability for a statutory violation of this provision is the amount of wages denied to the employee by virtue of the violation, plus interest, plus that same amount in liquidated damages, plus costs and attorneys' fees. The statute of limitations is generally two years, but it is three years for a "willful" violation.

Anti-Retaliation Provision

The Act prohibits an employer from discharging or otherwise retaliating or discriminating against an employee for "any action taken by the employee to invoke or assist in any manner the enforcement of this section." Specifically, an employer

cannot prohibit an employee from, or retaliate against an employee for: (i) disclosing the employee's own wages; (ii) discussing the wages of others; (iii) "inquiring" about the wages of others; or (iv) assisting others in exercising rights provided by the Act. The employer, however, is not obligated to disclose wage information.

This provision creates a private right of action with a one-year statute of limitations. The remedy for a violation of the retaliation provision is reinstatement, reimbursement of lost wages and/or benefits caused by the retaliation, interest, and other "appropriate equitable relief."

Extended Recordkeeping Obligation

The Act extends an employer's recordkeeping obligation from two years to three years.

Recommendations for Employers

Review Compensation Practices

- Consult with counsel to identify categories of "substantially similar" jobs based on "skill, effort, and responsibility," including across different locations, and identify any wage discrepancies among men and women in those positions.
- Review internal and external job descriptions. First, consider determining how many men and women fit in each description and whether salary/wage differences between comparable jobs are based on distinctions in the work or if the positions might be considered "substantially similar." Second, if those descriptions do not adequately portray the content of those jobs, consider amending them to accurately highlight differences in the skill, effort, or responsibilities associated with each position.
- Review pay discrepancies among opposite-sex employees performing substantially similar jobs. Determine whether any disparities can be attributed to objective systems of seniority, merit, determinations of quality and quantity of production, or another bona fide factor other than sex, and document those determinations as appropriate.
- Review current salaries of employees and ensure that any differences between their salaries and the salaries of members of the opposite sex doing substantially similar work are not based upon factors that could themselves be gender-based considerations.

Revise Policies and Update Training

- Make sure supervisors and managers know they cannot prevent employees from discussing wages or inquiring about wages. Revise employee handbooks and other policy documents to remove policies prohibiting disclosure or discussion of wages.
- Develop a policy regarding whether or how wages should be disclosed upon request, accounting for employee privacy concerns. Remind managers and supervisors that there is *no obligation to disclose information about wages*.
- Train those in charge of compensation decisions regarding the new requirements of the Act. Encourage decision-makers to discuss and record factors supporting compensation differences consistent with the new law.
- Ensure whistleblower and anti-retaliation policies extend to employees asserting rights under the Act.
- Maintain records of wages and wage rates, job classifications, hiring and promotion documentation, time records, and records of other terms and conditions of employment for at least three years.
- Consider creating a system for filing internal complaints and develop a system for addressing the complaints to identify potential concerns quickly.

WAGE STATEMENT VIOLATIONS: THE LEGISLATURE ENACTS A LIMITED RIGHT TO CURE

Governor Jerry Brown signed Assembly Bill 1506 on October 2, 2015, providing employers with a small measure of relief from the stringent requirements of California's wage statement law. Labor Code section 226(a) lists 11 items that must appear on employee wage statements (i.e., "pay stubs"). If one or more of these items is absent or is not accurate, the statute is violated. In addition, an employee suffering injury as a result of a knowing and intentional failure by an employer to comply with Labor Code Section 226(a) will be entitled to statutory penalties. Employees also frequently claim that they are entitled to penalties under the Labor Code Private Attorneys General Act ("PAGA") even in the absence of a showing of actual injury.

Before an employee or former employee can bring suit under PAGA, however, he or she must give both the employer and California's Labor and Workforce Development Agency

("LWDA") written notice of the alleged Labor Code violation. AB 1506 amends PAGA to include a limited right to cure when the violation alleged involves Labor Code sections 226(a)(6) and/or (8), i.e., when the paystubs are allegedly missing the inclusive dates of the payroll period, the employer's name, and/or the employer's address. The amendment does *not* apply to any of the other items required to appear on the wage statements.

Under AB 1506, upon receipt of a written PAGA notice identifying one or both of these alleged violations, the employer may "cure" the alleged violation(s) by issuing fully compliant wage statements to all allegedly aggrieved employees for each pay period for the three-year period preceding the postmark date of the PAGA notice. The employer has 33 days from the postmark date of the PAGA notice to effect this cure and must also give written notice of the cure, via certified mail, to both the complaining employee (or, if he or she is represented by an attorney, to his or her attorney) and the LWDA.

In other words, to take advantage of the right to cure, the employer must reissue correct wage statements to all current and former employees for the past three years who received noncompliant statements within the specified time frame. This will mean that in many cases where the defect in the wage statement was repeated over time, each current or former employee would receive numerous "corrected" wage statements. And of course the employer would have to correct the defects going forward.

Finally, the employer may utilize this right to cure only once within any 12-month period for the same violation alleged in the notice, *regardless of the worksite at issue*.

Because AB 1506 was "urgency" legislation, it was effective upon Governor Brown's signature. Therefore, an employer who receives a PAGA letter alleging one of the two "curable" violations must act promptly, within the 33-day statutory period.

Recommendations for Employers

An employer who receives a PAGA letter should immediately determine whether the PAGA letter references one or more of the "curable" violations. If so, the employer must act promptly if it wishes to attempt the cure. Even employers who do not receive a PAGA letter should review their wage statements to ensure compliance with California's detailed requirements.

NEW RULES FOR CALIFORNIA PIECE-RATE COMPENSATION

On October 10, 2015, Governor Brown signed Assembly Bill 1513, which imposes additional requirements on employers that compensate employees on a piece-rate basis. These new rules require that such employers compensate employees at an hourly wage, separate from any piece-rate compensation, for rest and recovery periods and "other nonproductive time," which essentially codifies recent court decisions in *Bluford v. Safeway, Inc.*, 216 Cal. App. 4th 864 (2013) and *Gonzalez v. Downtown LA Motors*, 215 Cal. App. 4th 36 (2013). Employers must include information related to these separate payments on employees' itemized wage statements. AB 1513 also includes a safe harbor for employers that may be subject to liability for not separately compensating rest and recovery periods and other nonproductive time, provided the employer meets certain requirements by December 15, 2016. AB 1513 goes into effect on January 1, 2016, and will be codified as California Labor Code section 226.2.

Employers must now compensate employees paid by piece rate for rest and recovery periods and "other nonproductive time" separate from any piece-rate compensation. For rest and recovery periods, employees must be compensated at a regular hourly rate that is not less than the *greater* of (i) an average hourly rate determined by dividing the total compensation for the workweek (exclusive of compensation for rest and recovery periods and overtime premiums) by the total hours worked during the workweek (exclusive of rest and recovery periods); or (ii) the applicable minimum wage. For "other nonproductive time," employees must be compensated at an hourly rate that is not less than the applicable wage.

AB 1513 defines "other nonproductive time" as "time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis." However, the bill does not define what constitutes time "not directly related to" the work being compensated at a piece rate. The amount of "other nonproductive time" may be determined either through actual records or the employer's reasonable estimates. Employers who make a good faith error in determining the total amount of other nonproductive time remain liable for payment of that compensation but under certain circumstances will not be liable for statutory civil penalties.

An itemized wage statement of an employee paid on a piece-rate basis, in addition to the items specified in Labor Code section 226(a), must now also show (i) the total hours of compensable rest and recovery periods, (ii) the rate of compensation for those hours, and (iii) the gross wages paid for those hours during the pay period. Except for employers that already pay an hourly rate of at least the minimum wage in addition to any piece-rate compensation, the itemized statement must now also show (i) the total hours of other nonproductive time, (ii) the rate of compensation for those hours, and (iii) the gross wages earned for those hours during the pay period.

Last, AB 1513 contains a safe harbor that provides an affirmative defense to any claim or cause of action based solely on an employer's failure to timely pay compensation due for rest and recovery periods and other nonproductive time for periods through December 31, 2015. To take advantage of the safe harbor, an employer must comply with all of the following requirements by no later than December 15, 2016: (i) makes payments to each of its employees for previously uncompensated or undercompensated rest and recovery periods and other nonproductive time between July 1, 2012 and December 31, 2015, using one of two formulas specified by the bill; (ii) provides written notice by no later than July 1, 2016, to the Division of Labor Standards Enforcement of its election to make payments to its employees; (iii) completes payments to employees by no later than December 15, 2016; and (iv) provides each employee with a statement that the payment has been made, the formula used for calculating the payment, a detailed accounting for each pay period, and the calculations that were made.

AB 1513 will make it more difficult and expensive for employers to compensate employees on a piece-rate basis. However, through AB 1513's safe harbor, the bill also provides some relief to employers who are currently, or may be in the future, facing claims for not separately compensating rest and recovery periods and other nonproductive time. We expect future litigation on AB 1513 to involve the scope of time "not directly related to the activity being compensated on a piece-rate basis," such nonproductive time that must be compensated at an hourly rate no less than the applicable minimum wage.

Recommendations for Employers

AB 1513 will apply only to employers who compensate employees on a piece-rate basis. Nevertheless, other recent decisions, such as *Bluford v. Safeway, Inc.*, *supra* and *Gonzalez v. Downtown L.A. Motors*, *supra*, create difficult issues for employers who compensate employees based on commissions or other incentive-based methods. Those employers should review their payroll practices to ensure that such employees receive proper pay for "nonproductive" time and for legally required rest periods. Those employers who do compensate employees on a piece-rate basis should analyze the "safe harbor" provision in AB 1513 and utilize that provision if practicable.

HEALTH CARE EMPLOYEE MEAL PERIODS—THE LEGISLATURE CONFIRMS HOSPITAL EMPLOYEES MAY WAIVE ONE MEAL PERIOD FOR SHIFTS IN EXCESS OF 12 HOURS

On October 5, 2015, Governor Brown signed Senate Bill 327, which confirms that certain health care employees may voluntarily waive one of two meal periods on shifts exceeding 12 hours, as provided for in Industrial Welfare Commission Wage Orders 4 and 5, section 11(D). Since 1993, the health care industry has enjoyed an exception from the usual meal period rules, permitting "employees in the health care industry" to waive a second meal period on shifts exceeding 12 hours. This exception was memorialized in Wage Orders 4 and 5 and was limited to the "health care industry." The "health care industry" was defined as "hospitals, skilled nursing facilities, intermediate care and residential care facilities, convalescent care institutions, home health agencies, clinics operating 24 hours per day and clinics performing surgery, urgent care, radiology, anesthesiology, pathology, neurology or dialysis."

The Legislature passed SB 327 to resolve uncertainty created by the California Court of Appeal in *Gerard v. Orange Coast Memorial Medical Center*, 234 Cal. App. 4th 285 (2015). In *Gerard*, the court held invalid the provisions in the Wage Orders allowing a health care employee to waive a second meal period. By adopting SB 327, however, the Legislature confirmed the validity of a second meal period waiver for shifts in excess of 12 hours. The provision operates retroactively, as it does not create new law but rather "is declarative of, and clarifies, existing law."

Upon the governor's signature, the statute took immediate effect. This is welcome news to employees in the health care

industry, as it affirms the decades-long practice of allowing employees working long shifts to waive an unpaid second (or third) meal period and return home to their families.

AB 1509—EXPANDING RETALIATION LIABILITY (AGAIN)

Newly enacted Assembly Bill 1509 exposes employers to liability for "retaliation" against family members of employees engaged in "protected conduct." AB 1509 will take effect on January 1, 2016, and will amend three sections of the California Labor Code that currently afford protection to employees engaged in protected activity, such as "whistleblowing" or reporting health code violations. This legislation also amends newly enacted section 2810.3 of the Labor Code (which creates civil liability for both client employers and staffing agencies for labor violations), to exclude household goods carriers (i.e., moving companies) from liability under the statute.

Currently, California law protects employees engaged in protected activity (i.e., whistleblowing) from retaliation by employers. AB 1509 extends that protection to any family members of the employee. For example, if a father and son were employed by the same company, and the father commenced a whistleblower action against the employer, this legislation would prohibit the employer from firing the son in retaliation. As such, AB 1509 significantly expands the number of potential plaintiffs under this statute for employers who hire members of the same family.

This policy will be implemented by amending three portions of the California Labor Code, each designed to protect employees engaged in different types of protected activity: (i) Section 98.6 (complaints to Labor Commissioner), (ii) Section 1102.5 (whistleblower activities), and (iii) Section 1102.5 (reporting health and safety violations).

Also, on a smaller scale, AB 1509 creates an additional exemption to Labor Code Section 2810.3. Section 2810.3 took effect on January 1, 2015, and created joint civil liability for client employers and staffing agencies for work supplied by contract employees. AB 1509 exempts household goods carriers (primarily moving companies) from joint liability under the statute.

Recommendations for Employers

Retaliation claims are now almost always included in any type of discrimination claim and in many wage/hour claims. Employers should carefully consider any discipline against the employee if that employee's family member is involved in any form of arguably "protected conduct." In those cases, the employer should assess the potential for a retaliation claim by one family member if an adverse employment action is taken against another family member.

FURTHER LIMITS ON E-VERIFY USE

Assembly Bill 622 places further limits on employers' use of the federal E-Verify system. Described by its author as an effort to protect immigrants from "abuse" of the system by employers, the bill clarifies reporting obligations for employers who use the system and introduces civil penalties of up to $10,000 for violations of federal E-Verify regulations. AB 622 prohibits employers in California from using the E-Verify system to check the authorization status of an existing employee or to obtain information about immigration status on an applicant who has *not yet* received an offer of employment, among other restrictions. This statute becomes effective January 1, 2016.

E-Verify is a computerized system managed jointly by the Department of Homeland Security and the Social Security Administration designed to help employers verify the immigration status of their employees and strengthen immigration control. According to the U.S. Citizenship and Immigration Services, in fiscal year 2015, more than 600,000 employers used E-Verify to check the status of more than 30 million workers. Use is voluntary for most employers, but federal contractors and some recipients of federal funds are required to participate in the program.

Once an employer has offered an applicant a position, the system allows the employer to look up the applicant's immigration status and confirm that he or she is authorized to work in the United States. Use is limited to that narrow post-offer, pre-employment window; employers are prohibited from using E-Verify to pre-screen applicants or monitor current employees' immigration status on an ongoing basis.

While some states, such as Arizona, Mississippi, and North Carolina, have sought to strengthen immigration enforcement by requiring all (or almost all) employers to participate in E-Verify, California has taken the opposite approach. In 2011, the state tried to limit E-Verify use by prohibiting state

agencies, counties, and cities from requiring employers to use E-Verify, unless an employer is already required to perform E-Verify checks by federal law or to qualify for federal funds. *See* AB 1236, *codified at* Cal. Labor Code §§ 2811-2813.

AB 622 goes further than AB 1236. AB 1236 affected employers only indirectly by protecting them from being forced to participate in E-Verify. AB 622, however, will directly regulate employers' E-Verify activity by codifying federal regulations on E-Verify use and by creating a $10,000 civil penalty for each violation. The bill pays special attention to employers' obligations when an E-Verify check returns a "tentative non-confirmation," ("TNC") indicating that a worker may not be authorized to work, and it requires that employers fulfill these obligations "as soon as practicable."

Recommendations for Employers

We recommend that employers who use E-Verify audit their practices to ensure that use is consistent with federal law before AB 622 becomes effective on January 1, 2016. In particular, employers should ensure they are not using E-Verify as a screening tool for applicants who have not received an offer, and update their policies and practices for TNC responses. Employers should also train the employees who conduct E-Verify checks and are responsible for TNC responses to make sure that they understand their duties, and the increased importance of compliance with federal and state E-Verify regulations, in light of AB 622.

RETALIATION CLAIM BASED ON REQUEST FOR REASONABLE ACCOMMODATION

Assembly Bill 987 creates a new claim for retaliation based on an employee's request for reasonable accommodation for a disability. This statute overrules a 2013 Court of Appeal decision, *Rope v Auto Chlor System of Washington Inc.,* 220 Cal. App. 4th 635, in which the Court of Appeal held that "a new request—or even repeated request—for an accommodation, without more [does not constitute] a protected activity" to support a claim for retaliation for violation of the California Fair Employment and Housing Act. ABA 987 permits an employee who requested a reasonable accommodation to sue for retaliation even where the request was granted, if the employee could prove some subsequent adverse employment action resulted from the request.

Recommendations for Employers

In practice, AB 987 merely adds another cause of action to claims where an employee requests but is denied an arguably reasonable accommodation. Employers should continue their practices of initiating and participating in an interactive process with any employee who requests a reasonable accommodation or who is obviously disabled and may need a reasonable accommodation. Additionally, in documenting the interactive process, the employers should carefully avoid any statements or comments that might suggest a retaliatory motive.

EXPANSION OF LABOR COMMISSIONER AUTHORITY AND POSSIBLE LIABILITY FOR INDIVIDUALS

Two different bills, Senate Bill 588 and Assembly Bill 970, expanded the authority of the Labor Commissioner. SB 588 permits the Labor Commissioner to enforce a judgment for unpaid wages entered by a court, with the consent of the aggrieved worker, by mailing a notice of levy to any person or entity that controls credit, money, or property belonging to the employer who is subject to the judgment. Further, this statute potentially makes business owners, officers, directors, and managing agents liable for a failure to pay wages, to provide a wage statement, to provide meal or rest periods, to pay minimum wages or overtime pay, or to indemnify an employee for employment-related expenses under Labor Code section 2802. This portion of the statute may have potentially wide-ranging effects.

A third party (such as a bank or other lender) that receives such a levy from the Labor Commissioner must pay the Labor Commissioner the amount owed within 10 days of service. If a final judgment against an employer for unpaid wages remains unsatisfied for 30 days after the time to appeal the judgment has expired, and no appeal is pending, the Labor Commissioner may order the employer to cease business operations in the state unless the employer has obtained a surety bond to cover the value of the judgment.

In addition, this statute makes individual business owners, directors, officers, and "managing agents" liable where the person "violates or causes to be violated" the minimum wage and overtime rules, as well as rules regarding payment of wages upon termination of employment, meal/rest periods, wage statements, and failures to reimburse employee

business expenses. The ultimate effect of this provision of the statute remains to be determined. Also, the courts will have to determine what conduct is required to hold an individual liable for "violating" or "causing to be violated" the applicable Labor Code and labor standards provisions.

AB 970 expands the Labor Commissioner's authority by authorizing the Labor Commissioner to investigate and pursue violations of city or county overtime and minimum wage laws upon request of the local agency, and to issue citations and penalties for most such violations. Further, AB 970 amends Labor Code section 2802, the statute requiring reimbursement of employee-incurred reasonable business expenses. AB 970 permits the Labor Commissioner to issue citations and impose penalties on employers for violations of section 2802.

Recommendations for Employers

The expanded Labor Commissioner authority to pursue liens creates an even greater incentive for employers to audit or review payroll practices to avoid any significant wage claims. If the employer is involved in litigation with a current or former employee concerning wages, the employer must ensure that, in the event of a judgment, the employer either pays the judgment or properly appeals it. Otherwise, the Labor Commissioner, with the consent of the aggrieved worker, may seek to levy and collect the judgment via third parties (such as banks or lenders). It is even possible that the Labor Commissioner may order the employer to cease business operations in the state unless the employer obtains a surety bond to cover the value of the judgment, if no appeal is pending.

Perhaps more ominously, this statute may make individual business owners, directors, officers, and "managing agents" liable for wage violations if the employing entity is insolvent or otherwise unable to pay a wage claim. Business owners and other senior executives who are involved in the payroll and human resource function should make sure that the company at all times has sufficient assets to pay wages promptly and properly.

LIMITATIONS ON WAGE GARNISHMENT

Senate Bill 501 limits the amount of wages that may be garnished to the lesser of 25 percent of the individual's "disposable earnings" for the week in question, or 50 percent of the amount by which the individual's "disposable earnings" for that week exceed 40 times the state minimum hourly wage. This statute is not effective until July 1, 2016. It is likely to lower the amount of wages that can be garnished, especially for highly paid workers.

PAID SICK LEAVE STATUTE

In July 2015, the Legislature passed, and Governor Brown signed, legislation to clarify and "fix" some of the difficulties or unanticipated issues with the paid sick leave statute (Assembly Bill 1522). This "fix it" legislation became effective on July 1, 2015. The clarifications to the sick leave statute include the following:

- Employers may calculate the rate of pay for paid sick leave using one of three methods. The simplest method for most employers is the "regular rate of pay" for non-exempt employees (as that term is defined for purposes of overtime compensation). The employer may also use the previous statutory method of determining average hourly compensation for the full pay periods in the 90 days previous to the use by the employee of paid sick leave.
- The prior statute stated that the employee must work for 30 or more days within a year of commencement of employment to be eligible for paid sick leave; the new statute clarifies that the employee must work for the *same* employer for those 30 days.
- The new statute authorizes a new, different method of accrual of sick leave for those employers who use the accrual method. Under the new statute, sick leave accrual may be based on pay periods or days or weeks of employment, rather than simply on hours worked. However, whatever accrual system is used must provide for accrual on a "regular basis" and must provide for "no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment or each calendar year, or in each 12 month period."
- The new statute retains the option for an employer to use a "vesting" or pre-accrued method, if the employer vests or grants at least 24 hours or three days of paid sick leave at the beginning of each calendar year or on a 12-month basis at the beginning of each year of employment for the employee based on the employee's date of hire.
- The new statute also revises the "vesting" or "lump sum accrual" method of providing sick leave so that the

employer may satisfy the accrual obligation by providing not less than 24 hours or three days of paid sick leave available to the employee for use by the completion of his or her 120th calendar day of employment. Under this method, the employer may provide three days or 24 hours of paid sick leave at the end of the 120th day of employment; the employer may then thereafter follow the three-day "vesting approach at the end of the employee's first calendar year or first 12 months of employment."

- Under any of the accrual methods, the employer may still limit the employee's sick leave usage to three days or 24 hours per year of employment, calendar year, or 12-month period.
- The new statute provides that no accrual or carryover of paid sick leave is required if the "full amount of leave" is received by the employee at the beginning of each year of employment, calendar year, or 12-month period. The "full amount of sick leave" is three days or 24 hours. This provision, like the "vesting" alternative to hourly accrual, encourages employers to forego the other accrual methods and to use either the three-day pre-accrual vesting alternative or the new alternative requiring the accrual of three days or 24 hours by the 120th day of employment.
- The new statute also "grandfathers" certain preexisting employer sick leave or personal time-off plans, provided that the plan (i) was in effect prior to January 1, 2015, (ii) used an accrual method that permitted accrual on a regular basis so that the employee had no less than one day or eight hours of accrued sick leave or paid time off within three months of employment, and (iii) permitted the employee to be eligible to earn at least three days or 24 hours of paid sick leave or paid time off within nine months of employment.
- The new statute also addressed employers who provide "unlimited" sick leave or unlimited paid time off. The previous version of the statute required employers to provide notice to employees of the amount of paid sick leave or paid time off, either on the employee's itemized wage statement or in a separate writing provided on the designated pay date with the employee's payment of wages. The question then arose as to how an employer who provides *unlimited* sick leave would disclose the amount of paid sick leave or time off available. The new statute permits employers who provide unlimited sick leave or unlimited paid time off to satisfy the notice requirement by indicating "unlimited" on the employee's wage statement or written notice.
- The new statute also clarified that, notwithstanding the recordkeeping rules in the original sick leave statute, an employer has no obligation to inquire into or record the purposes for which an employee used paid leave or paid time off.

Recommendations for Employers

Most employers have previously reviewed their sick leave and personal time off ("PTO") policies after the California paid sick leave legislation went into effect on January 1, 2015. Nevertheless, employers may wish to review their current sick leave and PTO policies, especially with regard to the rate of pay at which paid sick leave is paid, and the new accrual method if the employer does not currently use the "vesting" or "lump sum accrual" method.

MANDATORY RETENTION FOR GROCERY WORKERS UPON SALE OF A GROCERY STORE

The Legislature, in adopting Assembly Bill 359, codified a previously existing ordinance of the City of Los Angeles, which requires the purchaser of a grocery store to retain all "eligible grocery workers" for a period of at least 90 days after the establishment is opened. The new owner must hire from a preferential hiring list provided by the seller and cannot discharge any of the incumbent workers except for "cause" during the 90-day period after the closing of the sale. Even at the end of the 90-day post-closing period, the new employer must prepare a written performance review for each of the workers and "consider offering" continued employment to all who have been rated satisfactory or better. In the view of most knowledgeable labor lawyers, this is an effort to ensure that an incumbent labor union is retained after the closing. This is because the National Labor Relations Act (the "NRLA") imposes on a "successor" the obligation to bargain with the incumbent union if the successor retains in its post-closing work force a majority of employees who were previously represented by the union. There is an unresolved issue regarding whether such statutes are preempted by the NRLA.

VETOED BILLS

GOVERNOR VETOES BILL BARRING MANDATORY ARBITRATION

On October 11, 2015, Governor Brown vetoed Assembly Bill 465, which would have prohibited employers from requiring an employee to sign an agreement to arbitrate employment claims. The bill would have barred employers from requiring any person "to waive any legal right, penalty, remedy, forum, or procedure" for Labor Code violations as a condition of employment, and would have rendered any such waiver "involuntary, unconscionable, against public policy, and unenforceable." AB 465 also included protections against retaliation and discrimination against employees who refused to sign mandatory arbitration agreements.

In his veto message, Governor Brown stated that AB 465 was a "far-reaching step" he was not yet prepared to take, noting the possible conflict with federal law. Governor Brown recognized that "a blanket ban on mandatory arbitration agreements" like the one proposed in AB 465 "has been consistently struck down in other states as violating the Federal Arbitration Act ("FAA")." He also noted that the U.S. Supreme Court is currently considering two cases arising out of California courts involving preemption of state arbitration policies under the FAA and that he would "prefer to see the outcome of those cases" before enacting a law as broad as AB 465.

GOVERNOR VETOES BILLS RELATED TO APPLICANTS' EMPLOYMENT STATUS

On October 10, 2015, Governor Brown vetoed two bills, Assembly Bills 676 and 883, that would have prevented employers from discriminating against applicants based on their current and former employment status. Existing law prohibits various forms of employment discrimination with respect to personal characteristics including race, color, religion, sex, national origin, and numerous others. In addition, various California statutes prohibit discrimination in housing, public accommodation, and services provided by business establishments on the basis of specified personal characteristics such as race, religion, sex, national origin, and numerous others.

AB 676, introduced by Assemblyman Ian Calderon, D-Whittier, would have prohibited employers from advertising any job as being available only to someone who is currently employed. It also would have barred employers from asking applicants, either orally or in writing, about their current employment status, at least until they determined whether an applicant met the minimum qualifications for the position. The bill would have subjected an employer who violated this bill to civil penalties that escalated with the number of violations.

AB 883 would have prohibited a state or local agency from publishing or posting a job advertisement or announcement that indicates that an individual's status as a current or former public employee disqualifies such an individual from eligibility for employment. It would have also prohibited a state or local agency from asking an applicant to specifically disclose, orally or in writing, the applicant's status as a current or former public employee until the employer had determined that the applicant met the minimum employment qualifications for the job. In addition, it would have prohibited employers from making an adverse employment decision based on an applicant's current or former employment as a public employee. The proposed version of the bill removed private employers from its scope and removed damages and penalty recovery provisions.

GOVERNOR VETOES PROHIBITION ON ASKING ABOUT SALARIES

Governor Brown vetoed Assembly Bill 1017 on October 11, 2015. If enacted, AB 1017 would have prohibited employers from seeking salary information from employment applicants. According to its sponsor, Assembly Member Nora Campos, the bill was intended to address gender-related pay inequity. Citing historically lower rates of pay for women performing jobs comparable to their male counterparts, the bill, by prohibiting employers from requesting an applicant's salary history, was intended to prevent a history of low pay from becoming a justification for continuing to underpay women.

In his veto message, Governor Brown, while acknowledging the need to ensure that all workers are paid equally, concluded that AB 1017 "broadly prohibits employers from obtaining

relevant information with little evidence that this would assure more equitable wages." He also noted the recent signing of SB 358, discussed elsewhere in this *White Paper*, which he touted as "the strongest equal pay law in the nation."

GOVERNOR VETOES "NONDISCRIMINATION" BILL

On October 11, 2015, Governor Brown vetoed Assembly Bill 1354, which would have added new nondiscrimination requirements for state contractors. Existing law requires current and prospective state contractors to develop and implement a "nondiscrimination program." Under current law, the program must include "specific and result-oriented procedures to which a contractor or subcontractor commits itself for the purpose of insuring equal employment opportunity for all employees or applicants for employment." (Title 2, California Code of Regulations, Section 11103(a).) AB 1354 would have expanded existing requirements by requiring existing and prospective state contractors to submit an additional "income inequality program" to the state. The income inequality program would have been required to include data on the compensation paid to employees, sorted by gender and race, and policies designed to prevent income inequality and unlawful discrimination.

In his veto message, Governor Brown reasoned that AB 1354 was not necessary at this time, given the existing requirements for state contractors and the current protections against discriminatory practices.

CONCLUSION

While the California Legislature was not successful in getting its full slate of initiatives signed into law, there are still a number of new statutes for employers to consider and address. Depending upon the nature of the workforce, and the industry involved, many or all of the statues detailed above will affect employers operating in the state. Considerations will include conducting reviews of their positions and pay rates to ensure parity across genders. Employers in the grocery and health care industries should carefully review the new employee retention and meal waiver statutes and consider adjusting their policies and practices appropriately going forward. In all instances, employers would be advised to consult with counsel as they consider implementing any internal reviews, audits, or policy changes in response to the new statutory regime.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

Aaron L. Agenbroad
San Francisco
+1.415.875.5808
alagenbroad@jonesday.com

Fred W. Alvarez
Silicon Valley
+1.650.739.3977
falvarez@jonesday.com

George S. Howard, Jr.
San Diego
+1.858.314.1166
gshoward@jonesday.com

Rick Bergstrom
San Diego
+1.858.314.1118
rjbergstrom@jonesday.com

Michael J. Gray
Chicago
+1.312.269.4096
mjgray@jonesday.com

F. Curt Kirschner, Jr.
San Francisco
+1.415.875.5769
ckirschner@jonesday.com

Robert A. Naeve
Irvine
+1.949.553.7507
rnaeve@jonesday.com

Catherine S. Nasser
San Francisco
+1.415.875.5829
cnasser@jonesday.com

Cindi L. Ritchey
San Diego
+1.858.314.1200
critchey@jonesday.com

Steven M. Zadravecz
Irvine
+1.949.553.7508
Los Angeles
+1.213.243.2195
szadravecz@jonesday.com

Mhairi L. Whitton, an associate in the San Diego Office, assisted in the preparation of this White Paper.