



POINTS & Authorities®

QUARTERLY NEWSLETTER

BUCHALTER NEMER

WINTER 2015/2016

WINTER 2016



“ We had a wellness program meeting once. Wasn't that enough? ”

ATTENTION CALIFORNIA EMPLOYERS: NEW EMPLOYMENT LAWS AFFECTING YOUR BUSINESS TAKE EFFECT ON JANUARY 1, 2016

PAUL BRESSAN AND LOUISE TRUONG

In past years the Governor of California has enacted new laws related to employment that place additional burdens on employers, while granting additional rights to employees. This year is no exception. Although there is some minimal relief to employers, Governor Brown has enacted a number of employee-friendly laws, most of which go into effect on January 1, 2016. This is a brief synopsis of the new employment laws that we believe are the most likely to affect your businesses.

The Fair Pay Act

One of the most notable new laws is an amendment to Section 1197.5 of the California Labor Code by SB 358—the Fair Pay Act (“FPA”). The FPA replaces the current “equal work” standard with a new “substantially similar” standard. Prior to the FPA, Section 1197.5 prohibited an employer from paying an employee of one sex less than an employee of the opposite sex for equal work on jobs requiring equal skill, effort and responsibility, and performed under similar working conditions. Under the FPA, Section 1197.5 now prohibits employers from paying an employee of one sex less than an employee of the opposite sex for “substantially

Continued on page **7**

IN THIS ISSUE

- 1** ATTENTION CALIFORNIA EMPLOYERS: NEW EMPLOYMENT LAWS AFFECTING YOUR BUSINESS TAKE EFFECT ON JANUARY 1, 2016
ANTI-MONEY LAUNDERING AND BANK SECRECY ACT: ARE YOU IN COMPLIANCE?
- 2** POINTS FROM THE PRESIDENT AND NEW FACES
- 3** FEDERAL FORUM SHOPPING TO AVOID CALIFORNIA'S SECTION 2019.210 TRADE SECRET IDENTIFICATION PROCEDURES
- 4** THE COMING BATTLE BETWEEN CONFLICTING CONSTITUTIONAL RIGHTS OF RELIGIOUS FREEDOM AND SAME-SEX COUPLES: HOW WILL THE RELIGIOUS LAND USE AND INSTITUTIONAL PERSONS ACT BE AFFECTED?

ANTI-MONEY LAUNDERING AND BANK SECRECY ACT: ARE YOU IN COMPLIANCE?

CHERYL LOTT

With enforcement actions and consent orders from the various regulatory agencies seemingly on the rise, financial institutions are working hard to revise their Anti Money Laundering (“AML”) and Bank Secrecy Act (“BSA”) procedures to either comply with consent orders or update these procedures to avoid some of the pitfalls where others have fallen victim. Buchalter Nemer attorneys have worked extensively with the firm’s financial institution clients assisting with not only complying with various provisions of consent orders, but also with meeting the requirements of the Customer Due Diligence process, specifically, the Know Your Customer (“KYC”) Process.

Complying with AML Consent Orders: Lessons Learned

With the combination of the decline in the financial markets, terrorism, and drug trafficking, financial institutions have been inundated with the creative methods in which some seek to use financial institutions to launder funds or defraud others. These challenges to the AML and BSA procedures have left many institutions in the position of having to revise their monitoring systems, develop and implement new systems, and train employees on the new procedures and mechanisms for

Continued on page **6**

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Points from the President

ADAM BASS



Happy New Year! I'm pleased to present the Winter 2016 issue of our *Points and Authorities*. This issue covers a range of current topics that impact, and are of interest to, our clients and their businesses, with articles that cover new employment laws that took effect on January 1, the Anti-Money Laundering and Bank Secrecy Act, California's trade secret identification procedures, and conflicting Constitutional rights.

Our cover stories address new California employment laws that are likely to affect your business and how financial institutions are revising their Anti-Money Laundering and Bank Secrecy Act procedures in response to an increase in the number of enforcement actions and consent orders.

Dylan Wiseman and Peter Bales explain why a California plaintiff involved in trade secret litigation must identify with reasonable particularity the trade secrets at issue.

Next, Michael Caspino and Shawn Cowles address how the Religious Land Use and Institutional Persons Act may be affected by the recent U.S. Supreme Court ruling that same-sex couples have a Constitutional right to marry.

With a New Year come new developments at Buchalter Nemer. We are especially thrilled to welcome our new attorneys. With their arrival, we are able to offer new capabilities to better serve our clients, including representation in trade secret litigation, and the creation of our new Japan Practice Group to provide legal, corporate and transactional advice to businesses and individuals conducting business in Japan as well as Japanese businesses conducting business in the United States.

We are also very pleased to announce that 15 of the Firm's attorneys have been selected as 2016 Southern California Super Lawyers. These attorneys have attained a high degree of peer recognition and professional achievement. Buchalter Nemer's 2016 Southern California Super Lawyers include:

William S. Brody
Steven Brower
Harry W.R. Chamberlain, II
Arthur Chinski
Efrat M. Cogan
Mark T. Cramer
Robert M. Dato
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Carol K. Lucas
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George Stephan
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We hope you enjoy this issue of *Points and Authorities*, and as always, we welcome your questions, comments and feedback.

Adam Bass
President and Chief Executive Officer

FEDERAL FORUM SHOPPING TO AVOID CALIFORNIA'S SECTION 2019.210 TRADE SECRET IDENTIFICATION PROCEDURES

DYLAN W. WISEMAN AND PETER BALES



Can a plaintiff avoid California's trade secret identification obligations by filing a claim in federal court? No, according to a recent opinion from the Northern District of California in *Loop AI Labs, Inc. v. Gatti* (N.D. Cal. Dec. 21, 2015) 2015 U.S. Dist. LEXIS 170349.

In litigating a claim under California's Uniform Trade Secrets Act ("CUTSA"), "[i]t is critical [...] that the information claimed to have been misappropriated be clearly identified. Accordingly, a California trade secrets plaintiff must . . . identify the trade secret with reasonable particularity." *Silvaco Data Sys. v. Intel Corp.* (2010) 184 Cal. App. 4th 210, 221 (emphasis supplied). California Code of Civil Procedure section 2019.210 specifically provides that "[i]n any action alleging the misappropriation of a trade secret under the [CUTSA], before commencing discovery relating to the trade secret, the party alleging the misappropriation shall identify the trade secret with reasonable particularity..." Cal. Code Civ. Proc. § 2019.210 (Emphasis supplied). In *Computer Economics, Inc. v. Gartner Grp., Inc.* (S.D. Cal. 1999) 50 F. Supp. 2d 980, 988-92, the Court explained that "the early identification of trade secrets serves four purposes:"

First, it promotes well-investigated claims and dissuades the filing of meritless trade secret complaints. Second, it prevents plaintiffs from using the discovery process as a means to obtain the defendant's trade secrets. Third, the rule assists the court in framing the appropriate scope of discovery and in determining whether plaintiff's discovery requests fall within that scope. Fourth, it enables defendants to form complete and well-reasoned defenses, ensuring that they need not wait until the eve of trial to effectively defend against charges of trade secret misappropriation.

Whether the state procedural rule applies in federal court remains an open question in the Ninth Circuit, but the recent opinion in *Loop AI Labs, Inc.* provides further authority to assert that section 2019.210 applies in federal court. As explained by Magistrate Judge Donna M. Ryu in *Loop AI Labs, Inc.*, her decision "deters forum shopping, for '[a] plaintiff with a weak trade secret claim would have ample reason to choose federal court if it offered a chance to circumvent the requirements of [section 2019.210].'" *Loop AI Labs, Inc. v. Gatti*, 2015 U.S. Dist. LEXIS 170349, *7-8 ; citing *Computer Economics*, 50 F. Supp. 2d at 992.

In *Loop AI Labs, Inc.*, plaintiff asserted a claim for misappropriation of trade secrets against several defendants based upon an alleged violation of the CUTSA. One of the defendants moved to compel plaintiff to comply with section

2019.210 "by identifying its alleged trade secrets with particularity" and also requested that the district court "stay all discovery in th[e] case until Plaintiff provide[d] a proper trade secret disclosure." *Id.* at 4. Plaintiff opposed the motion, in part, "on the ground that section 2019.210 is a state procedural rule that d[id] not apply in this action." *Ibid.* In her opinion, Judge Ryu concluded that the state procedural rule did apply.

After noting that the Ninth Circuit has not decided the issue, the Court agreed "with the reasoning of cases finding that a federal court may properly apply section 2019.210 in federal suits alleging CUTSA claims." *Loop AI Labs, Inc. v. Gatti*, 2015 U.S. Dist. LEXIS 170349, *7-8 citing *SocialApps, LLC v. Zynga, Inc.*, 2012 U.S. Dist. LEXIS 82767 at *2 (N.D. Cal. June 14, 2012); *Computer Economics*, 50 F. Supp. 2d at 988-92; *Lilith Games (Shanghai) Co. Ltd. v. uCool, Inc.* (N.D. Cal. July 9, 2015) 2015 U.S. Dist. LEXIS 89365, 2015 WL 4149066, at *3. The Court further explained that:

Specifically, section 2019.210 does not conflict with Rule 26 (or any other Federal Rule of Civil Procedure), but instead complements and is consistent with "Rule 26's requirements of early disclosure of evidence relevant to the claims at issue and the Court's authority to control the timing and sequence of discovery in the interests of justice." *Social Apps*, 2012 U.S. Dist. LEXIS 82767, 2012 WL 2203063, at *2; see also *Interserve, Inc. v. Fusion Garage PTE, Ltd.*, No. C 09-05812 JW (PVT), 2010 U.S. Dist. LEXIS 46228, 2010 WL 1445553, at *3 (N.D. Cal. Apr. 9, 2010) (ordering plaintiffs to comply with section 2019.210; noting that the court "finds it appropriate to require identification of trade secrets as a case management tool" prior to discovery into "opponents' proprietary information.").

The Court found that plaintiff failed to comply with section 2019.210, and stayed discovery regarding the CUTSA claim until plaintiff filed a statement "identifying with reasonable particularity the trade secrets at issue." *Loop AI Labs, Inc. v. Gatti*, 2015 U.S. Dist. LEXIS 170349, *13-14. The opinion discourages forum shopping and adds clarity to the line of cases which already indicated section 2019.210 applies to federal disputes.

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THE COMING BATTLE BETWEEN CONFLICTING CONSTITUTIONAL RIGHTS OF RELIGIOUS FREEDOM AND SAME-SEX COUPLES: HOW WILL THE RELIGIOUS LAND USE AND INSTITUTIONAL PERSONS ACT BE AFFECTED? SHAWN COWLES AND MICHAEL CASPINO



The U.S. Supreme Court recently ruled in a 5-4 decision that same-sex couples have a Constitutional right to marry. See *Obergefell v. Hodges* (2015) 576 U.S. _____. This Constitutional right of same-sex couples conflicts with the deeply held religious beliefs of Christians, Catholics, Jews and other religions that are protected by the First Amendment to the U.S. Constitution. The outcome of this battle between clashing Constitutional values will have a profound impact on our country, regardless of the result.

One specific area of conflict concerns the right of religious freedom that was codified in the Religious Land Use and Institutional Persons Act (“RLUIPA”). RLUIPA is a Federal civil rights law that protects religious institutions and individuals from discriminatory and excessively burdensome land use regulations, which are defined to include zoning laws and ordinances that limit or restrict someone’s use of land or development of land.¹

RLUIPA is codified in 42 U.S.C. § 2000cc et seq., and it applies to states and all of their subdivisions, including counties, cities, municipalities, planning boards, zoning boards, etc. RLUIPA does not apply to the federal government; however, the Religious Freedom Restoration Act applies in a similar fashion to the federal government.²

RLUIPA was unanimously passed by both the House of Representatives and the Senate, and it was signed into law by President Bill Clinton in 2000.³ When signing RLUIPA into law, President Clinton said: “Religious liberty is a constitutional value of the highest order, and the Framers of the constitution included protection for the free exercise of religion in the very first amendment. This Act recognizes the importance of the free exercise of religion plays in our democratic society.”⁴

Congress found in its hearings leading up to the passage of RLUIPA that churches and other religious institutions faced both subtle and overt discrimination by zoning authorities.⁵ Congress held nine hearings over three years to investigate religious discrimination in land use decisions. The hearings revealed “massive evidence” of widespread discrimination against religious persons and entities in land use decisions.⁶ For example, faith group members constituting nine percent of the population constituted fifty percent of the reported court cases regarding zoning disputes.⁷

RLUIPA’s co-sponsors in the U.S. Senate, Senator Orin Hatch and the late Senator Ted Kennedy issued a joint statement after the law passed: “Zoning codes frequently exclude churches in places where they permit theatres, meeting halls, and other places where large groups of people assemble for secular purposes...Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theatres, and skating rinks—in all sorts of buildings that were permitted when they generated traffic for secular purposes.”⁸

Why would a city’s zoning authority discriminate against a church? There are two primary reasons: (1) churches do not pay taxes like a business; and (2) opposition to a certain religion or denomination.

RLUIPA’s “general rule” is that a state government entity shall not make or implement a land use regulation in a manner that imposes a “substantial burden” on the religious exercise of a person or religious institution.⁹ The exception to the general rule is when the government can demonstrate that the imposition of the burden: (a) furthers a compelling government interest; and (b) is the least restrictive means of furthering the compelling interest.¹⁰

The party alleging a violation of RLUIPA bears the initial burden of demonstrating that a land use regulation imposes a “substantial burden” on the party’s religious exercise. If this initial burden is met, the burden then shifts to the state government entity to demonstrate that the land use regulation furthers a “compelling interest” and is the “least restrictive” means of further its compelling interest.

A corollary to RLUIPA’s general rule is the “Equal Terms Provision” of RLUIPA providing that states must treat religious institutions and assemblies on equal terms as non-religious institutions.¹¹ Violations of “Equal Terms Provisions” include where churches were forbidden, but private clubs allowed, and where religious assemblies prohibited, but civic clubs, day care centers, auditoriums, and community centers are allowed.¹²

Who is protected by RLUIPA? RLUIPA has been used to protect churches, religious schools, prayer meetings in an individual’s home, religious retreat centers, and faith-based social services groups such as homeless shelters and group homes.¹³

Continued on page 5

THE COMING BATTLE BETWEEN CONFLICTING CONSTITUTIONAL RIGHTS OF RELIGIOUS FREEDOM AND SAME-SEX COUPLES: HOW WILL THE RELIGIOUS LAND USE AND INSTITUTIONAL PERSONS ACT BE AFFECTED?

SHAWN COWLES AND MICHAEL CASPINO

Continued from page 4

A lawsuit may be filed by the Department of Justice, a State's Attorney General, a religious entity or an individual. RLUIPA contains a "private attorney general" provision which authorizes an award of attorney fees to a party that successfully establishes a violation of RLUIPA.¹⁴ Thus, RLUIPA provides a powerful weapon for a party that has been discriminated against since it may recover the attorney's fees it incurs.

Here are some examples of RLUIPA successfully protecting religious entities:

- \$3.7 million awarded in compensatory damages to a Maryland congregation based upon the county's discrimination against the congregation that was prohibited from building a church.
- The Justice Department filed suit against Davidson County in Nashville, Tennessee to allow a Christian recovery group, Teen Challenge, to move forward with its plans to build a residential treatment center.
- An Orthodox Jewish synagogue located in Hollywood, Florida received a settlement of \$2 million and was allowed to expand its synagogue after a lawsuit was filed.
- A home can be used for religious retreats.
- A prayer meeting was able to be held in a rabbi's home.¹⁵

The U.S. Supreme Court's recent same-sex marriage ruling in *Obergefell* appears in direct conflict with RLUIPA since a church or synagogue's religious freedom right to characterize homosexual activity as a "sin" may be viewed as discrimination by others. For example, a congregation wanting to build a church could run into a conflict with a city that has a hypothetical zoning regulation stating: "No person or entity seeking to develop a property may discriminate on the basis of race, color, national origin, sexual orientation or marital status."

How does RLUIPA's "test" apply to the above hypothetical zoning law? If a congregation were denied a right to build a church because it "discriminates" against "sexual orientation" or same-sex couples based upon the above hypothetical zoning law, the congregation should be able to establish that there has been a "substantial burden" on its religious free exercise rights since it is unable to build a church. However, the city could counter that it has a compelling interest in eliminating "discrimination" against

same-sex couples, and the denial of a permit is the least restrictive means of doing so. Thus, both the congregation and the city would have strong Constitutional arguments about why their side should prevail; however, a court would need to rule in favor of only one side if an accommodation could not be reached.

There appears to be an inevitable legal battle on the horizon between conflicting Constitutional values concerning religious freedoms rights found in the First Amendment which were codified in RLUIPA for land use issues, and the Constitutional right for same-sex couples to marry as established by the U.S. Supreme Court's ruling in *Obergefell v. Hodges*. The outcome of this battle may well be determined by which nine Justices are sitting on the U.S. Supreme Court several years from now when a decision is made to resolve these conflicting Constitutional values.

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1 Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) dated September 22, 2000, page 1.
2 Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) dated September 22, 2000, page 3.
3 Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) dated September 22, 2000, page 1.
4 Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act prepared by the United States Department of Justice, page 2.
5 Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) dated September 22, 2000, page 1.
6 Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act prepared by the United States Department of Justice, page 3.
7 Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act prepared by the United States Department of Justice, page 3.
8 Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) dated September 22, 2000, page 1.
9 42 U.S.C. § 2000cc(a)(1)
10 42 U.S.C. § 2000cc(a)(1)(A) and (B).
11 42 U.S.C. § 2000cc(b)(1).
12 Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) dated September 22, 2000, page 7.
13 Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) dated September 22, 2000, pages 2-3.
14 42 U.S.C. Section 2000cc-2(a).
15 Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act prepared by the United States Department of Justice, page 5.

ANTI-MONEY LAUNDERING AND BANK SECRECY ACT: ARE YOU IN COMPLIANCE?

CHERYL LOTT



Continued from page 1

detection: all while under the watchful eye of the various federal regulators and the Department of Justice.

“Know Your Customer” (“KYC”)

The KYC process is not new, however, the level of corroboration and detail of the source of wealth have come under seemingly increased scrutiny in light of the financial crisis of the recent past, funneling of terrorist and drug trafficking funds, and various fraud schemes, among other things. For this reason, it is important to understand what issues the regulators have placed particular emphasis upon, how to proactively address these issues, and how to modify the AML and BSA procedures to address the ongoing and changing threats that financial institutions face today.

Source of Wealth and Corroboration—“Trust but Verify”

The Source of Wealth category in the KYC has long been the source of much debate and disagreement as to how much information is enough. Indeed, there is no bright line rule but rather, whether the institution is comfortable with the amount of information it has on hand. To that end, corroboration is key.

What level of corroboration is necessary to substantiate a customer’s source of wealth? Again, there is no bright line test that says if you have X then you pass all regulatory reviews. However, various enforcement actions and congressional subcommittee testimony have provided guidance. Independent sources of verification are the best types of corroborating documentation, but obtaining such information is often difficult when the institution is dealing with privately held companies or individuals. What we do know, however, is that the institution must make an effort to verify information through the customer and independent sources.

Sources of Wealth, Account Activity Reviews (“AARs”), and Suspicious Activity Reports (“SARs”)

The KYC process can result in AARs and SARs. When the explanation for the source of wealth does not make sense and cannot be corroborated to the institution’s satisfaction, there may be an issue with the customer, employee completing the KYC process, or both. In either event, the institution should be initiating an investigation on both fronts to determine if there is a reportable suspicious activity event.

KYC Auditing

Once the KYC process is completed for a particular periodic review, client profiles are generally sampled by an internal audit team. This internal audit team usually reviews the files in detail and itemizes any deficiencies it finds. These issues can be anything from minor typographical errors, to missed searches, or inconsistent information regarding the source of wealth. Given that there can be substantial issues identified during the audit process; the procedure to remediate identified issues is just as important as the procedure of the audit itself. In short, being able to show a regulator that an institution has a uniform procedure to detect issues and remediate them in a timely manner is essential.

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Thank you very much for your continued interest in *Points & Authorities*.

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Continued from page 1

similar work when viewed as a composite of skill, effort, and responsibility under similar working conditions.” Whereas courts have been able to at least look to the federal Equal Pay Act for assistance in interpreting Section 1197.5 due to the similarity of the language, courts and employers are now left on their own to guess as to what constitutes “substantially similar work when viewed as a composite of skill, effort, and responsibility.”

Moreover, prior to the FPA, employers were only prohibited from paying opposite sex employees differently when they did equal work at the same establishment. The FPA has deleted the “same establishment” requirement, and now prohibits wage differentials for opposite sex employees doing substantially similar work in any of the employer’s establishments.

The FPA did not amend away an employer’s affirmative defenses and ability to protect itself. Section 1197.5 still authorizes employers to pay employees of the opposite sex who do substantially similar work differently where the employer is able to demonstrate that the wage differential is based upon a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or upon a bona fide factor other than sex, such as education, training, or experience. However, the FPA specifically emphasizes that such a bona fide factor (1) may not be based on or derived from a sex-based differential in compensation, (2) must be job related with respect to the position in question, and (3) must be consistent with a “business necessity.” This defense will not apply if the employee is able to show that “an alternative business practice exists that would serve the same business purpose without producing the wage differential.”

The FPA also adds a retaliation provision, prohibiting employers from discharging, discriminating, or retaliating against any employee for bringing or assisting with a claim under Section 1197.5. Further, while employers are not required to disclose the wages of one employee to another employee, they may not prohibit employees from disclosing their 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 Section 1197.5.

Finally, prior to the FPA, employers were required to keep records of the wages and wage rates, job classifications, and other terms and conditions of employment of persons employed for a period of two years. Under the FPA, employers are now required to keep these records for three years.

Piece-Rate Compensation

Existing law prohibits an employer from requiring an employee to work during any meal, rest or recovery period, and requires these periods to be treated as hours worked. Existing law also requires employers to furnish accurate, itemized written pay statements that show specified information, such as gross and net wages

earned, total hours worked, and all deductions. For employees paid on a piece-rate basis, the number of piece-rate units earned and any applicable piece rates also are required.

AB 1513, which adds Section 226.2 to the Labor Code, requires employers to compensate piece-rate employees for rest and recovery periods and “other nonproductive time” separately from any piece-rate compensation. It also requires employers to include additional items on pay statements for piece-rate employees.

Specifically, piece-rate employees must be compensated separately for rest and recovery periods at an hourly rate that is no less than the higher of (1) an average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods, and (2) the applicable minimum wage. (Special payment terms apply to employees who are paid on a semi-monthly basis.) Piece-rate employees must be compensated for other nonproductive time at an hourly rate that is no less than the applicable minimum wage.

With respect to itemized pay statements, Section 226.2 requires employers to state the following items separately: (1) the total hours of compensable rest and recovery periods, the rate of compensation, and the gross wages paid for those rest and recovery periods during the pay period, and (2) the total hours of “other nonproductive time,” the rate of compensation, and the gross wages paid for “other nonproductive time” during the pay period.

An employer that pays an hourly rate of at least the applicable minimum wage for all hours worked, in addition to paying any piece-rate compensation, is not required to compensate employees separately for “other nonproductive time,” or to include these separate items for “other nonproductive time” on pay statements.

Moreover, Section 226.2 establishes an affirmative defense to certain claims for recovery of wages, damages, liquidated damages, statutory penalties, civil penalties or premium pay that are based solely on the employer’s failure to pay timely compensation due for rest and recovery periods and other nonproductive time for time periods prior to and including December 31, 2015, if the employer complies with all of the following:

- (1) The employer makes payments to each of its employees (except where valid releases are in place prior to specified dates) for previously uncompensated or undercompensated rest and recovery periods and other nonproductive time from July 1, 2012 to December 31, 2015, inclusive, using one of two prescribed formulas.

Continued on page 8

ATTENTION CALIFORNIA EMPLOYERS: NEW EMPLOYMENT LAWS AFFECTING YOUR BUSINESS TAKE EFFECT ON JANUARY 1, 2016

PAUL BRESSAN AND LOUISE TRUONG

Continued from page 7

(2) By no later than July 1, 2016, the employer provides a specified written notice to the Department of Industrial Relations of the employer's election to make these payments to its current and former employees, which the Department will post on its website until March 31, 2017.

(3) The employer begins making the payments to the affected employees as soon as reasonably feasible after providing the notice to the Department, and completes the payments no later than December 15, 2016.

(4) The employer provides the affected employees with an accompanying statement regarding certain details of the payment.

Meal Periods for Health Care Employees

Section 512 of the Labor Code requires that employers provide two meal periods for work in excess of 10 hours, with employees being allowed to waive the second meal period if their total hours of work are no more than 12 hours. Despite this general rule, Section 11(D) of Wage Order 5 allows employees in the health care industry to waive one of their meal periods on shifts exceeding 8 hours. Employers and employees in the health care industry relied on Section 11(D) to allow these employees to waive one of their two meal periods if their shift exceeded 12 hours.

An appellate court decision in 2015 held that Section 11(D) of Wage Order 5 is invalid because it conflicts with Labor Code Section 512. SB 327, which amends Section 512, effective October 5, 2015, effectively overrules that appellate court decision retroactively and makes it clear that healthcare workers have been able, and continue to be able, to waive one of their meal periods if their shift exceeds 12 hours.

Maximum Wage Garnishments

Under SB 501, which amends Section 706.050 of the Code of Civil Procedure effective July 1, 2016, the maximum amount of disposable earnings of an individual judgment debtor for any workweek that is subject to levy under an earnings withholding order must not exceed the lesser of (1) 25% of the individual's disposable earnings for that week, or (2) 50% of the amount by which the individual's disposable earnings for that week exceed 40 times the state minimum hourly wage in effect at the time the earnings are payable.

Private Attorneys General Act: Additional Rights to Cure

The California Private Attorneys General Act ("PAGA") authorizes an aggrieved employee to bring a civil action to recover specified civil penalties, which otherwise would be assessed and collected by the California Labor and Workforce Development Agency, on behalf of the employee and other current and former employees for the violation of certain provisions of the Labor Code. PAGA

currently provides the employer with the right to cure certain violations before the employee may bring a civil action. For other violations, PAGA does not provide the employer with a right to cure, but only requires the employee to follow specified procedures before bringing a civil action.

Section 226(a) of the Labor Code requires employers to provide certain specific information on the pay statements it provides to its employees with their wages, such as their gross and net wages, total hours worked and deductions. PAGA does not currently provide a cure period with respect to an employer's failure to include any of this required information on the pay statements of its employees.

AB 1506 adds the following two required items of information specified in Section 226(a) to the list of violations that are subject to a cure period: (1) the inclusive dates of the period for which the employee is paid, and (2) the name and address of the legal entity that is the employer. A violation either of these sections is considered to be cured upon a showing that the employer has provided a fully compliant, itemized wage statement to each aggrieved employee. Note that AB 2074 limits this right to cure to once in a 12-month period.

E-Verify System

The federal E-Verify system enables participating employers to use the system, on a voluntary basis, to verify that the employees they hire are authorized to work in the United States. Existing law prohibits states and other government entities from requiring a private employer to use an electronic employment verification system (including E-Verify), except when required by federal law or as a condition of receiving federal funds. Existing law also prohibits an employer (or any other person or entity) from engaging in defined unfair immigration-related practices against any person for the purpose of retaliating against the person for exercising specified rights.

AB 622, which adds Labor Code Section 2814, expands the definition of an unlawful employment practice to prohibit an employer (or any other person or entity) from using the E-Verify system at a time or in a manner not required by a specified federal law or not authorized by a federal agency memorandum of understanding to check the employment authorization status of an existing employee or an applicant who has not received an offer of employment, except as required by federal law or as a condition of receiving federal funds.

AB 622 also requires an employer that uses the E-Verify system to provide the affected employee with any notification issued by the Social Security Administration or the United States Department of Homeland Security containing information specific to the

Continued on page 9

ATTENTION CALIFORNIA EMPLOYERS: NEW EMPLOYMENT LAWS AFFECTING YOUR BUSINESS TAKE EFFECT ON JANUARY 1, 2016

PAUL BRESSAN AND LOUISE TRUONG

Continued from page 8

employee's E-Verify case or a tentative non-confirmation notice (i.e., a notice indicating that the information submitted into the E-Verify system did not match the information in the federal system). There is a civil penalty of \$10,000 to an employer for each violation.

AB 622 does not affect an employer's right to use E-Verify to verify that an applicant is authorized to work in the United States after the employer has made an offer of employment to the applicant.

Minimum Wage and Related Matters

The minimum wage in California will increase from \$9.00 per hour to \$10.00 per hour on January 1, 2016. In addition, on July 1, 2016, the minimum wage in San Francisco will increase from \$12.25 per hour to \$13.00 per hour, and the minimum wage in Los Angeles will increase to \$10.50 per hour for employers with 26 or more employees. This is important not only to companies that employ lower-wage workers, but also because it affects the standard for exempt status. For example, in order to be exempt from being paid overtime under the executive, administrative and professional exemptions, the employee must be paid at least twice the minimum wage per month. This means that in 2016 the minimum annual salary to be considered an exempt employee in California will rise to \$41,600. With respect to certain computer software employees, their overtime exemption in Labor Code Section 515.5 will require them to receive a minimum of \$41.85 per hour, or a salary of \$87,185.14 per year, effective January 1, 2016. Lastly, employers should take note that the U.S. Department of Labor is scheduled to release its proposed final rule regarding amendments to the federal Fair Labor Standards Act in 2016. It is anticipated that, among other things, the DOL will raise the weekly salary required for exempt status from \$455 to \$970, which equates to an annual salary of \$50,440. This would create the rare exception where federal law is less friendly to employers than California law.

Discrimination and Retaliation Protections Extended to Family Members

Currently, Labor Code Sections 98.6, 1102.5 and 6310 prohibit an employer from discharging, discriminating, retaliating, or taking any adverse action against any employee or applicant because the employee or applicant has engaged in protected conduct, such as filing a complaint with the Labor Commissioner regarding unpaid wages, or disclosing an employer's violation of a statute or regulation to a government agency. Effective January 1, 2016, AB 1509 amends Sections 98.6, 1102.5 and 6310 to extend the protections of these provisions to an employee who is a family member of a person who is engaged in, or who is perceived to be engaged in, conduct protected by these provisions. Thus, both the employee who engaged in the protected category and the family member of the employee will be entitled to reinstatement and reimbursement for lost wages if they were improperly discharged

or suffered an adverse action. Any employer who violates these provisions is subject to a civil penalty of up to \$10,000 per violation and may be charged with a misdemeanor if the employer willfully refuses to reinstate or otherwise restore an employee or the employee's family member.

Employee Time Off

Labor Code Section 230.8 applies to employers with 25 or more employees. Existing law prohibits employers from discharging or discriminating against any employee who is a parent, guardian, or grandparent having custody of a child enrolled in a K-12 school or a "child day care facility" for taking up to 40 hours of unpaid time off each year for the purposes of participating in school activities, subject to specified conditions. SB 579 broadens Labor Code Section 230.8 by revising "child day care facility" to "child care provider," and by defining "parent" to include the following: parents, guardians, stepparents, foster parents, grandparents, or persons standing in loco parentis to, a child. Under SB 579, employees who are "parents" may take unpaid time off to enroll or reenroll their children in a school or with a licensed child care provider.

SB 579 also amends Labor Code Section 233 ("Kin Care") to align with the Healthy Workplaces, Healthy Families Act of 2014 ("HWHFA") (Labor Code Section 245, et seq.). Section 233, which applies to all employers, will now provide that employees may use their paid sick leave for any of the purposes specified in HWHFA, which includes the following: for their own illness or injuries, for the diagnosis, care or treatment of an existing health condition of, or preventive care for, the employee or the employee's family member, or if the employee is a victim of domestic violence, sexual assault, or stalking. In addition, SB 579 redefines "family member" to have the same meaning as defined in HWHFA.

Labor Commissioner's Power to Enforce Judgments and Individual Liability

SB 588 bestows on the Labor Commissioner the right to use any of the existing remedies available to a judgment creditor and to act as a levying officer when enforcing a judgment. That is, effective January 1, 2016, a Labor Commissioner can place a lien or levy on an employer's property, bank accounts and/or accounts receivable to collect on wages owed and attorneys' fees. SB 588 also provides that a new business will be considered the "same employer" for purposes of liability if (1) the employees of the successor employer are engaged in "substantially the same work in substantially the same working conditions under substantially the same supervisors," or (2) the new entity "has substantially the same production process or operations, produces substantially the same products or offers substantially the same services, and has substantially the same body of customers."

Continued on page 10

ATTENTION CALIFORNIA EMPLOYERS: NEW EMPLOYMENT LAWS AFFECTING YOUR BUSINESS TAKE EFFECT ON JANUARY 1, 2016

PAUL BRESSAN AND LOUISE TRUONG

Continued from page 9

Moreover, SB 588 adds Labor Code Section 558.1, which states that any “other person acting on behalf of an employer” (defined as a natural person who is an “owner, director, officer, or managing agent of the employer”) who “violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates [certain designated sections of the Labor Code], may be held liable as the employer for such violation.” This new section thus expands the potential liability of the specified individuals beyond the civil penalty described in Labor Code Section 588.

Accommodation Requests for Disability or Religious Purposes

AB 987 is in response to several recent California appellate court decisions holding that the act of requesting an accommodation is not considered to be a protected activity. (See *Nealy v. City of Santa Ana* (2015) 234 Cal.App.4th 359; *Rope v. Auto-Chlor Sys. Of Washington, Inc.* (2013) 220 Cal.App.4th 645). AB 987 is intended to overturn these court decisions by amending the Fair Employment and Housing Act to prohibit an employer or covered entity from retaliating or otherwise discriminating against a person for requesting accommodation for his or her disability or religious beliefs, regardless of whether the accommodation request was granted.

Disability Benefits Waiting Period

Under existing law, a disabled individual is eligible to receive state disability benefits only after a waiting period of seven consecutive days of being unemployed and disabled. If an employee returns to work after a period of temporary disability for more than two weeks before experiencing a reoccurrence of the same condition, the employee is required again to serve a seven consecutive day waiting period before being eligible for benefits. Effective July 1, 2016, SB 667 waives the seven day waiting period for an individual who has already served a seven day waiting period for the initial claim when that person files a subsequent claim for disability benefits for the same or related condition within 60 days after the initial disability benefit. SB 667 further provides that if an individual receives two consecutive periods of disability benefits due to the same or a related cause or condition, and if the periods are not separated by more than 60 days, they are considered as one disability benefit period.

Vetoed Bills

In addition to the above bills that were signed into law, there were a number of bills that were vetoed by Governor Brown, the most notable of which are as follows:

AB 465 would have made it unlawful for an employer to discharge, discriminate, or retaliate against an employee for refusing to sign an arbitration agreement as a condition of employment. Because AB 465 was vetoed, California law still permits an employer to mandate that its employees sign arbitration agreements as a condition of employment.

AB 676 is the California Legislature’s second attempt at making “unemployment status” a protected category. Had AB 676 been signed by Governor Brown, employers would have been prohibited from either (1) posting a job opening stating that unemployed persons are not eligible for the job, or (2) asking applicants to disclose their current employment status. Like he did last year, Governor Brown vetoed the bill because “nothing has changed,” and the bill does “not provide a proper or even effective path to get unemployed people back to work.”

In AB 1017, the California Legislature tried to add a provision to the Labor Code that would prohibit an employer from seeking salary history information from an applicant for employment. Proponents of the bill stated that AB 1017 is meant to combat the effects of past discrimination due to gender or other immutable characteristics. Although Governor Brown vetoed the bill, in so doing, he stated that AB 1017 may not be necessary due to the enactment of the Fair Pay Act, and that there is little evidence that AB 1017 would ensure more equitable wages.

SB 406 is the California Legislature’s attempt to broaden the scope of the California Family Rights Act of 1993 (“CFRA”). Currently, CFRA provides that a qualified employer must allow an eligible employee to take up to 12 weeks of unpaid protected leave to take care of the employee’s parent, spouse, or child who has a serious health condition. SB 406 would have expanded CFRA by also allowing eligible employees to take up to 12 weeks of unpaid leave to care for siblings, grandparents, grandchildren, domestic partners and parents-in-law with serious health conditions. Governor Brown vetoed SB 406 because the bill conflicted with the federal Family and Medical Leave Act and would in certain circumstances unfairly “require employers to provide employees up to 24 weeks of family leave in a 12 month period.”

Employers should audit their current policies and practices, and make any necessary changes to ensure that they are in compliance with these new laws.

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