Fenwick Employment Brief

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NEW AMENDMENTS CLARIFY CALIFORNIA PAID SICK LEAVE

This month, the California Legislature enacted AB 304, an urgency measure that became effective on July 13 and provides much needed clarity on various aspects of California's mandatory paid sick leave law (Healthy Workplaces, Healthy Families Act of 2014), which went into effect on July 1. Below are the highlights; the full text of the law is here:

- **Unlimited Sick or Paid Time Off** – In order to comply with the requirement that employees must receive notice of their available leave balances either on their wage statements or a separate writing accompanying payment of wages, employers with unlimited sick or time off policies can simply state "unlimited" on the applicable document.
- **Recordkeeping** – Employers have no obligation to inquire into or record the purpose for which employees use sick leave or paid time off. If a company has a combined or even an unlimited paid time off policy, it need not require employees to code their time off as sick time in order to comply with the recordkeeping section of the statute. This conflicts with prior advice from the Department of Labor Standards Enforcement ("DLSE") in the form of an FAQ stating that employers with unlimited policies must "separately track sick leave accrual and use." The DLSE is reviewing AB 304 and revising its FAQs, which should be posted soon.
- **Alternative Accrual Method** – Employers now have options for calculating accrual of paid leave other than as originally specified in the statute (i.e., one hour for every 30 hours worked), provided the accrual is on a regular basis and the employee will receive no less than 24 hours of accrued sick time (or other paid time off) by the 120th calendar day of employment or each calendar year, or in each 12-month period.
- **Lump Sum** – No accrual or carry over is required if the full amount of leave is provided at the beginning of each year of employment, calendar year, or 12-month period. Alternatively, employers can satisfy the accrual requirement of the statute by providing not less than 24 hours or three days of paid sick time (or other paid time off) that is available to the employee to use by the completion of his or her 120th calendar day of employment.
- **Existing Policy** – If employers already have a paid sick or paid time off policy, they need only make available an amount of leave that may be used for "the same purposes and under the same conditions" as specified in the statute, and the policy must satisfy one of the following:
  - Satisfy the accrual, carry over, and use requirements of the statute; or
  - Have provided paid sick leave or paid time off to employees before January 1, 2015 pursuant to a policy that used an accrual method different than originally provided under the statute (i.e., one hour for every 30 hours worked) if (1) the accrual is on a regular basis so that an employee has no less than one day or eight hours of accrued sick leave or paid time off within three months of employment of each calendar year, or each 12-month period and (2) the employee was eligible to earn at least three days or 24 hours of sick leave or paid time off within nine months of employment. If an employer modifies the accrual method used in the policy it had in place prior to January 1, 2015, it must comply with any of the accrual methods set forth in the statute (Cal. Lab. Code § 246(b)) or provide the full amount of leave at the beginning of each year of employment, calendar year, or 12-month period.
- **Limit on Leave** – Employers can still limit an employee's use of accrued sick leave to 24 hours or three days in each year of employment, calendar year, or 12-month period.
- **Rate of Pay** – Employers can calculate paid leave for non-exempt employees using one of two options:

(1) the regular rate of pay for the workweek in which the employee uses paid sick time or (2) dividing the employee's total wages (excluding overtime premium pay) by the employee's total hours worked in the full pay periods of the prior 90 days of employment. Most employers will likely choose the first option, since most payroll systems already calculate employees' regular rate of pay. Exempt employees should be compensated at the same rate used for other forms of paid leave such as vacation.

- **Same Employer** – Employees must work for the same employer for at least 30 days within a year from the beginning of employment to be eligible to accrue paid sick time with that employer.
- **Rehire** – Employees who are paid out accrued paid time off upon separation and then are rehired within one year are not entitled to have their paid time off reinstated.

In light of these and other changes, employers should consult with counsel and revise their time off policies and procedures accordingly.

DOL PROPOSES EXEMPT CLASSIFICATION RULE

The federal Department of Labor ("DOL") released a proposed rule to amend the Fair Labor Standards Act's white-collar employee exemptions (i.e., executive, administrative, professional, outside sales, and computer professional) and the highly compensated employee exemption. The rule focuses on the salary thresholds for these exemptions, seeking to increase the white-collar salary minimum from $23,660 to $50,440 (the 40th percentile of weekly earnings for full-time salaried workers) and the highly compensated employee salary minimum from $100,000 to $122,148 (the 90th percentile of weekly earnings for full-time salaried workers), with annual adjustments based on the Consumer Price Index or the percentile of weekly earnings for full-time salaried workers.

Although there are no proposed changes to the duties tests for these exemptions, the DOL has invited public comment regarding what changes (if any) should be made to the duties tests, whether exempt employees should be required to spend a minimum amount of time performing work that is their primary duty, and whether the DOL should look to California law (principally, the requirement that 50 percent of an employee's time be spent on work that is the employee's primary duty), among other questions.

A final rule is expected in 2016. The DOL estimates that nearly five million white-collar exempt workers will lose exempt status and therefore be eligible for overtime within the first year of the rule's implementation. In the interim, employers should assess their workforces and determine which positions may become non-exempt in light of the salary increases alone.

NEWS BITES

Unpaid Interns Subject to Primary Beneficiary Test under Federal Law

In *Glatt v. Fox Searchlight Pictures,* the Second Circuit Court of Appeals (New York, Connecticut, and Vermont) defined and clarified the test under federal law for lawfully engaging unpaid interns.

Three unpaid interns who worked on the *Black Swan* film sued Fox claiming they were owed minimum wage and overtime for their work. At least two interns regularly worked overtime hours, and none received academic credit. In vacating a lower court ruling that the interns should have been treated as employees and that certified a New York class action and conditionally certified a nationwide class action, the Second Circuit held that the lower court applied the wrong test. The court acknowledged the well-established DOL six factor test and its position, to which the lower court adhered, that an employment relationship did not exist only if all six factors applied. However, the court held that the true test is whether the intern or the employer is the primary beneficiary of the relationship.

More specifically, the court articulated a non-exhaustive list of seven factors to consider when deciding whether an employment relationship exists for interns: (1) a clear understanding by the intern and employer that there is no expectation of compensation, (2) the internship provides training similar to what would be given in an educational environment, (3) the internship is tied to the intern's formal education program by integrated coursework

or the receipt of academic credit, (4) the internship accommodates the intern's academic commitments by corresponding to the academic calendar year, (5) the duration is limited to the period in which the internship provides the intern with beneficial learning, (6) the intern's work complements (rather than displaces) the work of paid employees while providing significant educational benefits to the intern, and (7) the intern and employer understand that there is no entitlement to a paid job at the end of the internship. The court stated that no one factor is dispositive, that employers need not meet all of the factors, and that courts must weigh and balance all of the relevant circumstances.

There is no certainty that other circuits will rule in a consistent manner, or that the DOL will adopt this test. Moreover, some states (including California), enforce more worker-friendly tests. Therefore, employers should evaluate legal risk very carefully when considering an unpaid internship engagement.

New York City Limits Credit Checks

New York City joined a growing number of jurisdictions that limit the use of credit checks in employment. The Stop Credit Discrimination in Employment Act (the "Act") becomes effective in New York City on September 2, 2015. The Act prohibits employers with four or more employees from requesting or using for employment purposes the consumer credit history of an applicant or employee, or to otherwise discriminate against an applicant or employee regarding hiring, compensation, or the terms and conditions of employment based on a credit history.

As with the California law enacted in 2011, there are many exceptions. Employers may lawfully condition employment or continued employment on good credit history for positions that involve (i) security clearance required by law; (ii) signatory authority over third party funds or assets of $10,000 or more; (iii) fiduciary responsibility to the employer with the authority to enter into financial agreements of $10,000 or more on behalf of the employer; (iv) regular duties that allow the employee to modify digital security systems established to prevent the unauthorized use of the employer's or client's networks or databases; and (v) for non-clerical positions, regular access to trade secrets (not including general proprietary company information such as handbooks and policies or access to or use of client, customer, or mailing lists). The law recognizes other exemptions – here is a link to the text of the Act.

Federal FMLA Forms Revised

The DOL has issued revised federal Family and Medical Leave Act notices and medical certification forms, which expire on May 31, 2018. Although there are no substantial changes to the notices and forms, they now explicitly state that the employer is not seeking information about genetic tests, genetics services, or the "manifestation of disease or disorder" in an employee's family members.

California employers should continue to use California-specific forms given the differences in information an employer can obtain under California (versus federal) law.

UPCOMING WEBINAR: TOP LEGAL PITFALLS HIRING MANAGERS MAKE IN THE EMPLOYMENT LIFECYCLE

Fenwick partner, Dan McCoy, is speaking tomorrow about the hidden risks in recruiting and onboarding employees. If you're available Tuesday, July 28 at 11 am Pacific, there is still time to register for the webinar through the Society for Human Resource Management. The program will include:

- An overview of discrimination law and how to legally screen candidates
- What red flags to look for when recruiting and onboarding employees
- Interview dos and don'ts

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