

California's Myriad New Employment Laws: Complying With Significant Changes to Discrimination, Leave and Wage Laws

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California's Myriad New Employment Laws

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AB 1522 – Healthy Workplaces, Healthy Families Act of 2014



- Requires employers to provide paid sick leave to any employee who worked in California for 30 days at an accrual rate of one hour for every 30 hours worked.
- Employers can limit an employee's use of accrued sick leave to 24 hours in each year of employment, and limit an employee's accrual to 48 hours.

AB 1660 – Prohibits discrimination against an individual holding a driver's license issued to undocumented persons



- AB 1660 makes it a violation of FEHA for an employer to discriminate against an individual because he/she holds or presents a driver's license issued to undocumented persons who can submit satisfactory proof of identity and California residency. Such discriminatory actions will constitute national origin discrimination under FEHA.



AB 2751 – Expands the definition of an unfair immigration-related practice

- AB 2751 expands the definition of an unfair immigration-related practice to include threatening to file or filing a false report or complaint with any state or federal agency. Current law extended the protection only to reports filed with the police.
- AB 2751 also clarifies that an employer can't discriminate against or retaliate against an employee who updates his/ her personal information “based on a lawful change of name, [S]ocial [S]ecurity number, or federal employment authorization document.”

AB 1792 – Prohibits discrimination and retaliation against employees receiving Medi-Cal



- AB 1792 prohibits discrimination and retaliation against employees receiving public assistance; which is defined as meaning the Medi-Cal program.



AB 2053 – New harassment prevention training requirements

- AB 2053 requires all employers subject to the mandatory sexual harassment prevention training requirement for supervisors include a component within the training concerning the prevention of "abusive conduct," as defined under the new law, beginning January 1, 2015.



AB1443– Adds unpaid interns and volunteers to the list of individuals protected under FEHA

- Prohibits employers from discriminating against individuals in an unpaid internship or another limited duration program to provide unpaid work experience for that person;
- Extends religious belief protections and religious accommodation requirements to anyone in an apprenticeship training program, an unpaid internship or any other program to provide unpaid experience for a person in the workplace or industry.

AB 2751 – Labor code penalties to employee



- Clarifies that the \$10,000 penalty against an employer who discriminates or retaliates against an employee who complains of Labor Code violations will be awarded to the employee or employees who “suffered the violation.”



ORRICK

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2015 SF & Oakland Ordinances

April 8, 2015

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SF "Retail Workers Bill of Rights" Overview



When?

- Effective Jan. 4, 2015
- Operative July 3, 2015

Enforcement Agency?

- San Francisco Office of Labor Standards Enforcement (OLSE)

2 Ordinances:

1. "Hours and Retention Protections for Formula Retail Employees" Ordinance
2. "Fair Scheduling and Treatment of Formula Retail Employees" Ordinance

SF "Retail Workers Bill of Rights" Covered Employers – Formula Retail



Employer is covered if "Formula Retail":

- Has at least 20 retail sales establishments worldwide, and
- Employs 20 or more people in San Francisco, and
- Is "Formula Retail Establishment":
 - » retail sale or service establishment that maintains at least two of the following features:
 - a standardized array of merchandise
 - a standardized façade
 - a standardized décor and color scheme
 - uniform apparel
 - standardized signage, and
 - a trademark or servicemark

(SF Planning Code § 703.3(b))

Employees are covered if:

- Qualify as "employees" under the City's Minimum Wage Ordinance;
- Are any individual who, in a particular week, is scheduled for an on-call shift of at least two hours for any employer within the geographic boundaries of the City, regardless of whether the person is required to report to work for such shift.

SF "Retail Workers Bill of Rights"

Key Provisions



1. Work Schedules – Notice

- » New Employees: Employer must provide new employees with “good faith estimate in writing” of “expected minimum number of shifts per month, and the days and hours of those shifts”. Estimates not binding.
- » Current Employees: Employer must provide 2 weeks’ advance notice of work schedules, by:
 - Posting schedule in conspicuous place, or
 - Transmitting electronically

SF "Retail Workers Bill of Rights"

Key Provisions



1. Work Schedules - Changes

- » Changes - Notice: Employer must provide notice of changes to schedule by:
 - Conversation, phone, email, text, other electronic
 - No notice required for employee-requested changes

- » Changes - Pay: If employer changes schedule
 - < 7 days but \geq 24 hrs notice: 1 hr of pay
 - < 24 hrs notice: 2 hrs of pay if shift 4 hrs or less
 - < 24 hrs notice: 4 hrs of pay if shift > 4 hrs
- » If change is to come into work, this pay is in addition to pay for work
- » All pay at employee's "regular hourly rate"

SF "Retail Workers Bill of Rights"

Key Provisions



1. Work Schedules – On-Call Shifts

- » On-Call Shifts: If employer requires employee to be available but does not have employee come in to work, employer shall pay:
 - On-call shift of 4 hrs or less: 2 hours of pay
 - On-call shift of > 4 hrs: 4 hours of pay
- » No additional pay if employer provides at least 24 hours notice of cancellation or change of on-call shift to another date/time
- » All pay at employee's "regular hourly rate"

SF "Retail Workers Bill of Rights"

Key Provisions



1. Work Schedules - Exceptions

- » Exceptions to Pay Requirements for Schedule Changes and On-Call Shifts: No additional pay required if cause of change is:
 - Threats, public utility failures, Acts of God
 - Another employee previously scheduled to work shift unable to do so due to illness, vacation, or employer-provided paid or unpaid time off, if employer did not receive at least 7 days' notice of absence
 - Another employee previously scheduled to work shift did not report to work on time, fired, or sent home/stayed home as discipline
 - Mandatory overtime
 - Employee trades shifts or requests change

SF "Retail Workers Bill of Rights"

Key Provisions



2. **Must Offer Extra Hours to Part-Time Employees First**

Employers must offer any extra work hours to current part-time employees before hiring new employees or using contractors or temp employees if (a) employer reasonably determines part-time employee qualified to do the work, and (b) work is same or similar to what that part-time employee has done for employer.

 - » This obligation applies up to 35 hrs/wk per part-time employee.
 - » Employer has discretion to divide extra hours among part-time employees
 - » Part-time employee has discretion whether to accept extra hours.
 - » **Employer must make offer in writing and retain for 3 years!**

SF "Retail Workers Bill of Rights"

Key Provisions



3. Equal Treatment for Part-Time Employees. Employers must provide equal treatment to part-time employees compared to full-time employees at same level:
 - » Hourly Wage. Must provide same starting hourly wage for jobs of equal skill, effort and responsibility performed under similar working conditions
 - Hourly pay differentials ok if not based on part-time status, e.g., seniority, merit, production, performance
 - » Access to Time Off. Must provide same access to employer-provided paid and unpaid time off. May be pro-rated.
 - » Eligibility for Promotions. Must provide same eligibility for promotions, but full time availability is legitimate condition for promotion

SF "Retail Workers Bill of Rights" Key Provisions



4. Sale of Business. If employer is sold:

- » Successor employer must retain for 90 days all employees who worked for former employer for at least six months prior to the sale
- » Cannot terminate during 90-day period without cause
- » Does not apply to supervisory or managerial employees
- » Employer must post notice of change of control within 24 hours of execution of transfer document, and maintain posting for at least 30 days

SF "Retail Workers Bill of Rights"

The Fine Print



- Must keep records for 3 years
 - » Must allow access to City and permit inspection of records
 - » If employer does not maintain adequate records, then presumption employer did not comply absent clear and convincing evidence of compliance
- Must post conspicuously. **Sample notices available.**
 - » Must post in English, Spanish, Chinese, Tagalog, and any language spoken by 5% of employees at location
- No retaliation

SF "Retail Workers Bill of Rights" Enforcement



- Office of Labor Standards Enforcement Administrative Enforcement
 - » Can investigate and respond to allegations
 - » Can order payment of:
 - lost wages to employee(s)
 - administrative penalty of \$50 per employee per day of violation
 - Amount of agency's enforcement costs to City
 - » Ultimate employer appeal to Superior Court by writ of mandate petition
- City Attorney Can Bring Civil Action
 - » Can recover lost wages, civil penalty up to amount of lost wages, reinstatement, injunction, attorney's fees, and costs

Oakland Minimum Wage Law Overview



- Effective March 2, 2015
 - Interpretive Regulations issued Feb. 19, 2015

Enforcement

- Employee lawsuits
- Oakland City Attorney

3 New Measures:

1. Establishes Oakland minimum wage of \$12.25/hr effective March 2, 2015, annual increases per CPI (but no decreases per CPI)
2. Requires Paid Sick Leave for certain Oakland employees effective March 2, 2015
3. Hospitality services charges must be paid to employees

Oakland Minimum Wage Law

Employee Eligibility & Geography



- Employees eligible if they work 2 hours in a given week within geographic boundaries of Oakland
 - Even if employer located outside Oakland
- Oakland minimum wage applies to all hours worked in Oakland
 - Includes hours worked from home, even if employer elsewhere
- Paid Sick Leave (PSL) accrues only for hours worked in Oakland

Oakland Minimum Wage Law

Paid Sick Leave - Accrual



- Accrual begins March 2, 2015
- Accrue 1 hour of PSL for every 30 hours of work
- No fractional accrual, whole hour accrual only
- “Small Business” employees capped at 40 hours of accrued PSL
 - » “Small Business” = “normally fewer than ten persons work for compensation during given week”
 - Includes non-Oakland employees
 - Includes full-time, part-time & temp/agency employees
- Other employer employees capped at 72 hours of accrued PSL
- PSL carries over yearly but unused not paid upon term

Oakland Minimum Wage Law

Paid Sick Leave - Use



- New employees cannot use until 90 calendar days of employment
- May use PSL in 1-hour increments
- May use PSL for:
 - » Employee illness, injury, receive medical care, treatment or diagnosis
 - » Aid or care for child, parent, legal guardian, ward, sibling, grandparent, grandchild, spouse, domestic partner, or designated person
- Employer may require employee to give reasonable notification of absence for PSL
- Employer may “only” take reasonable measures to verify or document lawfulness of employee use of PSL

Oakland Minimum Wage Law

Paid Sick Leave – Already Provided?



- No additional Paid Sick Leave under this Ordinance need be provided if:
 - » Employer has paid leave policy, such as PTO,
 - » That may be used for same purposes as under ordinance, and
 - » Meets requirements of ordinance

Oakland Minimum Wage Law Hospitality Service Charges



- Applies to employees of hotels, restaurants and banquet facilities in Oakland
- Any separately designated amounts collected as “service charges”, “delivery charges”, etc. must be paid to employee who performed the service
- No part may be paid to supervisor
- Service charges shall be paid no later than next payroll period (a) following the work or (b) collection of the charge, whichever is later
- This ordinance has no effect on tips

Oakland Minimum Wage Law

The Fine Print



- Must keep records for 3 years
 - » Name, hours worked, pay rate, PSL accrual and use
- Must provide written notice of rights to each current employee and to each new hire, and post prominently. Sample notices available.
- Must provide notice of new minimum wage no later than December 15 each year
- Must allow access to City and inspection of records to monitor compliance
- City may consider noncompliance for:
 - » City contracts
 - » City land use approvals
 - » City permits

Oakland Minimum Wage Law Penalties & Other Awfulness



- Employees may recover back pay, reinstatement and/or injunction
- Employees (but not employers) who prevail shall recover attorney fees and costs
- Any violator shall be liable for civil penalties for each violation in amount determined by Court up to **\$1,000 per violation**
- No retaliation
 - » Cannot terminate employee for 120 days after employer aware of complaint unless employer has “clear and convincing evidence” of “just cause” for termination!!!
- Employer funding of new laws by magic!
 - » Employer cannot fund increases in compensation required by these laws by reducing compensation or benefits of any non-management employees

CALIFORNIA'S MYRIAD NEW EMPLOYMENT LAWS:

**Complying With Significant Changes To
Discrimination, Leave And Wage Laws**

California Labor Code § 2810.3
increases liability for employers
who use staffing agencies.

(Effective January 1, 2015)

Three new requirements:

1. Shared civil legal responsibility and liability for all workers supplied by a Labor Contractor for payment of wages and failure to secure valid workers' compensation coverage.
2. Client Employer cannot shift Cal/OSHA legal duties or liabilities to the Labor Contractor.
3. The Client Employer and Labor Contractor must provide state enforcement agencies or departments all information required to verify compliance with applicable state laws.

Who is Covered?

The statute does not apply:

- If the workforce is less than 25 workers, including those provided by a Labor Contractor.
- If the Client Employer uses five or fewer workers supplied Labor Contractors at any given time. (Open issue as to whether experience before January 1, 2015 is relevant.)
- To exempt employees.
- If Client Employer uses an independent contractor other than from a Labor Contractor.
- To the state or any political subdivisions.

Who is Covered?

Labor Contractor does not include:

- Bonafide non-profit, community-based organization.
- Bonafide labor organization or apprenticeship program or hiring hall.
- Motion picture payroll services company.
- A third party who is a party to an employee leasing arrangement if the employee leasing arrangement contractually obligates the Client Employer to assume all civil legal responsibility.

What to do

- Client Employers and Labor Contractors should review contractual relationships to determine whether or to what extent the new law applies.
- A waiver of the law is a public policy violation.
- Client Employers and Labor Contractors are permitted to enter into contracts allowing each other to pursue remedies against the other for liability created by the other's acts
- Include provisions that address defense of claims, indemnification and allocation of damages (these provisions may differ depending on the nature of the claim).
- Include representation that the Labor Contractor has workers' compensation coverage and complies with workplace safety laws.

What To Do

- Determine whether Labor Contractor has insurance to cover claims.
- Who will be responsible for Cal/OSHA duties?
- Client Employer cannot contractually shift to the Labor Contractor any legal duties or liabilities related to workplace safety.
- Unclear whether this means the Client Employer must provide training safety and health programs, supervision and enforcement of programs, investigation of incidents and corrective measures.
- Likely that training responsibilities can be delegated to the Labor Contractor but the Client Employer will remain liable if they are not performed properly.

Enforcement

- 30-Day Cure Provision.
- Cannot take adverse action against a worker who asserts a claim under this section.
- All other legal remedies are still available.
- PAGA.