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# RJO Update: Labor and Employment

## Key Changes to California Employment Law in 2015

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A new year always means changes to California employment law and 2015 is no exception. Employers with employees performing services in California should familiarize themselves with these developments as many of these new laws will affect day-to-day operations, necessitate immediate action, and/or require the updating of employment policies, handbooks and practices. What follows is a summary of the most significant changes to California employment laws for 2015. Unless otherwise specified, the new laws are in effect *January 1, 2015.*

| Subject Matter | Law/Regulation | Summary Description |
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| **Time Off** | | |
| California Paid Sick Leave | AB 1522 enacts Cal. Labor Code section 245 *et seq.* | Beginning July 1, 2015, employers statewide must provide paid sick leave at a rate of 1 hour paid leave per 30 hours worked to employees who work at least 30 days in a year in California; employers may limit the *use* of paid leave to 24 hours per year and *set accrual caps* at 48 hours per year. Employees must be able to use paid sick leave for the diagnosis, care or treatment of an existing condition, or for preventive care for themselves or "family members" (broadly defined under the law). In addition, employees, who are victims of domestic violence, are entitled to use sick leave to address medical, legal and other related issues. Employers should pay close attention to this new law which includes numerous other detailed provisions, including various notice requirements (which take effect beginning January 1, 2015) and record keeping requirements (beginning July 1, 2015).<br><br>The City of Oakland has also enacted a |

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| | | paid sick leave ordinance, summarized below, which takes effect March 1, 2015. |
| Time Off For Emergency Rescue Personnel | AB 2536 amends Cal. Labor Code section 230.3. | Applies to employers of 50 or more employees; expands the definition of "emergency rescue personnel" entitled to unpaid time off to include officers, employees or members of disaster medical response entities sponsored or requested by the state. |
| **EQUAL EMPLOYMENT OPPORTUNITY** | | |
| FEHA Protections For Interns and Unpaid Volunteers | AB 1443 amends Cal. Govt. Code section 12940 | Extends FEHA's protections against discrimination to unpaid internships or other unpaid limited duration work experience programs; FEHA's protections against harassment will also extend to interns and volunteers. |
| National Origin Discrimination | AB 1660 amends Government Code section 12926 and Vehicle Code section 12809.5 | Definitional section amended: "national origin discrimination" includes discrimination on the basis of the applicant or employee having received a driver's license under the Safe and Responsible Driver's Act; limits employer's ability to request proof of driver's license only where license is bona fide job requirement. |
| Immigration Related Protections | AB 2751 amends Labor Code sections 1019 and 1024.6 | Clarifies that "unfair immigration practices" include filing or threatening to file a false report of complaint with any state or federal agency; limits existing law prohibiting employers from discriminating against an employee who updates his or her "personal information" to lawful changes of name, social security number, or federal employment authorization documents. |
| Recipients of Public Assistance | AB 1792 enacts Government Code Section 13084 | State agencies must prepare and publish a list of the 500 employers with over 100 California employees who have the most employees receiving public assistance (defined as Medi-Cal); prohibits |

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| | | employers from discriminating against employees who receive public assistance (as defined). This law is scheduled to sunset in 2020. |
| Supervisor Harassment Training | AB 2053 amends Cal. Govt Code Section 12590.1 | Mandatory harassment training for supervisors (employers of 50 of more employees) must now include training on the prevention of "abusive conduct" (as defined). |
| **Wage and Hour** | | |
| "Waiting Time Penalties" for Minimum Wage Violations | AB 1723 amends Labor Code Section 1197.1 | Clarifies that the Division of Labor Standards Enforcement ("DLSE") can award "waiting time penalties" of up to 30 days' pay to former employees who bring claims for minimum wage violations. |
| Joint Wage and Hour Liability for Staffing Companies and Clients | AB 1897 enacts Labor Code section 2810.3 | Companies that use staffing agencies to supply workers will share civil and legal liability for wage and hour violations and failure to secure workers' compensation coverage. |
| Heat Recovery Periods for Employees Working Outdoors | SB 1360 amends Labor Code section 226.7 | Clarifies that time spent taking heat recovery periods cannot be deducted from employees' paid hours worked. |
| Remedies for Employees Who Complain about Labor Code or Local Ordinance Violations | AB 2751 amends Labor Code section 98.6 | Employees who suffer retaliation for complaining about Labor Code or local ordinance violations can bring complaints to the DLSE, where remedies such as lost wages and reinstatement may be awarded. This law clarifies that the potential $10,000 civil fine that the DLSE may also award is payable to the employee suffering the retaliation. |
| Recovery of Liquidated Damages for Minimum Wage Violations | AB 2074 amends Labor Code Section 1194.2 | Clarifies that the time frame for employees to recover for minimum wage violations (three years) also applies to recovery of liquidated damages in the same amount. |
| **Prevailing Wage Laws** | | |
| Definition of Construction/Expansion of Prevailing Wage | AB 26 amends Labor Code section 1720 | Clarifies that post construction activities, including clean-up at the job site, are subject to prevailing wage requirements. |

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| Coverage | | |
| Background Checks for On-Site Construction Contracts | AB 1650 enacts Public Contract Code section 10186 | Any person submitting a bid for a state contract involving on-site construction related services must certify that applicants for employment will not be asked to disclose criminal history information at the time of the initial employment application. |
| Recovery of Costs Incurred Before Project Designated a Public Work | AB 1939 enacts Cal. Labor Code Section 1784 | Contractors who were not notified that a project was a public work, and incur increased costs due to the project's reclassification as a public work, can now seek recovery from the "hiring party" as well as the awarding body. |
| Expansion of Remedies for Apprenticeship Violations | AB 2744 amends Labor Code sections 1771.1, repeals and replaces 1777.7 | Mandatory debarment remedy for two or more willful violations of prevailing wage laws is expanded to include apprenticeship violations; revises procedures for Labor Commissioner to enforce penalty assessments for apprenticeship violations. |
| **City Ordinances** | | |
| San Francisco "Retail Workers' Bill of Rights"<br>Hours and Retention Protection<br>Fair Scheduling and Treatment Ordinances | SF Police Code Article 33F | Applies to certain "formula retail" employers (broadly defined) with 20 or more employees working in San Francisco and to their "property services contracts"<br>"Hours and Retention Protection for Formula Retail Employees" ordinance requires employers to offer additional work to part-time employees before using contract, staffing agency or temporary employees, and retention of employees for 90 days following "change in control."<br>"Fair Scheduling and Treatment of Formula Retail Employees requires covered employers to provide employees with an initial estimate of work hours and schedule at their time of hire; notice of schedule two weeks in advance and payments ranging from 1 to 3 hours pay for canceled or changed shifts or for "on-call" shifts where the employee is not |

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| | | called into work; also requires that part-time employees receive the same hourly wage and paid time-off benefits (on a pro rata basis) as hourly employees. |
| Oakland Paid Sick Leave Ordinance | Measure FF enacts Oakland Municipal Code section 5.92.030 | Effective March 1, 2015, Oakland employers must provide paid sick leave to employees working in Oakland at a rate of 1 hour per 30 hours worked; employers in Oakland must ensure that their policies comply with both Oakland and state sick leave laws. |
| Oakland Hospitality Service Charge Ordinance | Measure FF enacts Oakland Municipal Code section 5.92.040 | This law, which has been in effect since November 2014, applies to hospitality industry employers; all service charges must be paid directly to the "hospitality worker" delivering the service. Under the ordinance the term "hospitality worker" excludes supervisors, unless the supervisor is providing actual services to customer. |
| Increase Minimum Wage | | ***San Francisco*** **- $12.25 per hour, beginning March 1, 2015.**<br><br>***Oakland*****: $12.25 per hour, beginning March 2, 2015**<br><br>***Los Angeles*****: $15.37 per hour beginning July 1, 2015, only applies to certain hotel employers within the Los Angeles city limits.**<br><br>***Berkeley*****: $10.00 per hour, already in effect as of October 1, 2014.** |

## TIME OFF

### California Paid Sick Leave
### AB 1522 enacts Labor Code section 245.5 *et seq.* and amends Labor Code section 2810.5

One of the more publicized new laws, the "Healthy Workplaces; Healthy Families Act of 2014", effective July 1, 2015, requires employers to provide paid sick days to employees who work 30 or more days a year in California. The law is similar to the San Francisco paid sick leave law, which has been in effect since 2007, and the Oakland ordinance (discussed below) which goes into effect March 1, 2015. There are, however, some differences.

The California law applies to all employers with employees in California regardless of size. The only exceptions are for employees covered by certain collective bargaining agreements, certain in home supportive care providers, and certain employees of air carriers.

Under this new California law, both full and part-time, exempt and non-exempt employees who work in California for 30 or more days within a year from the commencement of employment must accrue paid sick leave at a rate of 1 hour per 30 hours worked at the outset of their employment. (San Francisco's law begins accrual after 90 days). Under the state and San Francisco law, employees can begin using accrued sick leave beginning the 90th day of employment. Accrued paid sick days carry over to the following year of employment. However, an employer may limit an employee's use of paid sick days to a total of 24 hours or three full work days in each year of employment. Employers may also cap accrual at 48 hours or 6 full work days. The accrual and carryover requirements may also be satisfied by providing at least 24 hours or three days of paid sick leave at the beginning of each year. Employers are not required to pay accrued unused paid sick days upon termination of employment. However, if an employee separates from an employer and is rehired within one year of the separation date, all previously accrued but unused sick leave must be reinstated.

Employees must be able to use paid sick days for the diagnosis, care, or treatment of an existing health condition, or preventive care for, an employee or an employee's family member. Additionally, paid sick days may be used by an employee who is a victim of domestic violence, sexual assault, or stalking.

Under the new law, the term "family member" is broadly defined to include child (including biological, foster or stepchild or a child to whom the employee stands in loco parentis), parent (including biological, foster or stepparent, legal guardian of an employee or that employee's spouse or registered domestic partner, or a person who stood in loco parentis when the employee was a minor child), spouse, registered domestic partner, grandparent, grandchild, or sibling. Notably, California's Kin Care law (Labor Code section 233), which requires that employers permit employees to use a portion of their sick leave to care for sick family members, does not include siblings, grandparents or grandchildren.

When using sick leave, employees must be paid their regularly hourly rate in effect at the time the sick leave is used. If, however, in the 90 days of employment prior to the taking of sick leave, the employee is paid different hourly pay rates, paid by commission or piece rate, or was a non-exempt salaried employee, then the sick leave rate of pay is calculated by dividing the

employee's total wages (not including overtime premium pay) by the total hours worked in the full pay periods of that 90 day period.

While employees have the right under the law to determine how much of their accrued sick leave they can use at a time, employers can set a reasonable minimum increment, not to exceed two hours. Existing paid sick days or PTO policies may satisfy the requirements of this new law if the existing policy makes available an amount of leave that may be used for the same purposes and under the same conditions as the new law, and the policy either meets the accrual, carry over and use requirements of the law, or awards at least 24 hours or three full days of paid sick leave or equivalent paid time off to employees for use each year (based on calendar year, anniversary date or other 12-month basis). Employers who provide more sick leave or PTO days than required by this new law must still ensure that they comply with the Kin Care law (Labor Code section 233) as well as any applicable local sick leave ordinance.

The new law also contains specific notice and recordkeeping obligations, some of which go into effect January 1, 2015. Beginning January 1, 2015, a poster notifying employees of their rights under the law must be conspicuously posted at each worksite. The poster can be found on the DLSE website.

In addition, beginning January 1, 2015, employers must use a new Labor Code section 2810.5 notice containing information on the paid sick leave law for all non-exempt employees. Because Labor Code section 2810.5 requires non-exempt employees to receive new notice forms when changes are made, the new 2810.5 notice must be given to current non-exempt employees, not just new hires. The 2810.5 notice can be found on the DLSE website. Finally, beginning July 1, 2015, with each paycheck employees must be informed in writing of how much paid sick leave is available.

Employers should pay particular attention to the a anti-retaliation provision of the law, which provides for a rebuttable presumption of unlawful retaliation if, an employer denies an employee the right to use accrued sick days, discharges, threatens to discharge, demotes, suspends, or in any manner discriminates against an employee within 30 days of an employee (1) filing a complaint with the Labor Commissioner or alleging a violation of the paid sick leave law; (2) cooperating with an investigation or prosecution of an alleged violation of the sick leave law; or (3) opposing a policy, practice, or act that is prohibited by the sick leave law.

The Labor Commissioner enforces the new law, and can award reinstatement, back-pay and penalties in addition to the amount of sick days withheld. The Labor Commissioner can also bring a civil action on behalf of an aggrieved employee. While the law does not specifically provide employees with a right to bring an action in court, employees may also pursue a civil court action for sick leave violations under the Private Attorney General Act, Labor Code section 2698 *et seq.*

Employers should carefully review their sick leave policies and practices as this new law will likely require most California employers to make adjustments to comply with both this law as well as applicable local sick leave ordinances.

**Time Off For Emergency Rescue Personnel and Reserve Police Officers**
**AB 2536 Amends Labor Code Section 230.3**

Pursuant to Labor Code section 230.3, employers of 50 or more employees cannot discharge or discriminate against an employee for taking time off to perform emergency duty as a volunteer firefighter, reserve peace officer, or emergency rescue personnel. AB 2535 amends Labor Code section 230.3 to expand the definition of "emergency rescue personnel" to include an officer, employee, or member of a disaster medical response entity sponsored or requested by the state (in addition to an officer, employee, or member of a political subdivision of the state, or of a sheriff's department, police department, or a private fire department, as the term was previously defined).

## EQUAL EMPLOYMENT OPPORTUNITIES

**Scope of FEHA Extended to Protect Unpaid Interns and Volunteers**
**AB 1443 Amends Government Code Section 12940**

FEHA prohibits discrimination and harassment in employment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. FEHA's provisions apply to employers, labor organizations, employment agencies, and specified training programs. Starting January 1, 2015, FEHA will prohibit discrimination in unpaid internships, or other limited duration programs to provide unpaid work experience, as well as harassment of unpaid interns or volunteers, on account of FEHA protected characteristics. FEHA-covered employers, especially those who maintain internship or volunteer programs, should make sure their policies and training programs are up to date.

**National Origin Discrimination and the Safe and Responsible Drivers Act**
**AB 1660 Amends California Gov't Code Section 12926 and Vehicle Code Section 12809.5**

The Safe And Responsible Driver's Act amended the Vehicle Code, allowing the DMV—beginning in January 2015—to issue drivers' licenses to applicants who are unable to submit proof that their presence in the United States is authorized under federal law, as long as the applicant meets all other qualifications for licensure and provides satisfactory proof to the department of his or her identity and California residency. ( *See* Veh. Code § 12801.9.) Beginning January 1, 2015, the definition of "national origin" under the FEHA (Gov't Code §12940 *et seq*.) will be amended to include discrimination on the basis of possessing a driver's license granted under these provisions of the Vehicle Code. In addition, under the amended version of the FEHA, an employer who requires an employee or applicant to a present a driver's license as a condition of employment will be deemed to have violated the FEHA, unless the possession of that driver's license is a bona fide employment requirement or otherwise required by applicable law (for example, establishing employment authorization under Federal law).

**Clarification of Immigration-Related Protections**
**AB 2751 Amends Labor Code Sections 1019 and 1024.6**

Last year, California enacted various laws protecting employees from "unfair immigration-related practices" taken by employers in retaliation for the employee's exercise of rights protected under state or local labor and employment laws. As a result, employers engaging in such retaliatory unfair immigration-related practices can be subject to a civil action for equitable relief, damages or penalties, and additionally may have certain business licenses suspended.

This year, AB 2751 amends Labor Code section 1019 expanding the definition of unfair immigration-related practice. Previously, unfair immigration-related practices were defined to include, among other things, threatening to file or filing a false police report. (*See* Labor Code § 1019(b)(1)(C).) This subsection of the law has been amended to now include threatening to file or filing a false report or complaint with *any* state or federal agency.

Enacted last year, Labor Code section 1024.6 prohibited an employer from discharging an employee or in any manner discriminating, retaliating, or taking any adverse action against an employee because the employee updates or attempts to update his or her personal information, "unless the changes are directly related to the skill set, qualifications, or knowledge required for the job." Labor Code section 1024.6, however, did not detail what type of "personal information" was covered by the law. AB 2751 amends Labor Code section 1024.6 to specify that employers may not discharge, discriminate or retaliate against employees who update their personal information "based on lawful change of name, social security number or federal employment authorization document." As a result of this amendment, the exception for changes "related to the skill set, qualifications, or knowledge required for the job" has been deleted.

**Recipients of Public Assistance:**
**Prohibition of Discrimination and Preparation of Public Reports**
**AB 1792 Enacts Government Code Section 13084**

Determining that "[e]mployers that pay low wages and offer no benefits shift the costs of doing business onto taxpayers," the Legislature approved, and the Governor signed, AB 1792, which creates Government Code section 13084. This new law requires state agencies to prepare and publish, beginning January, 2016, a list of the 500 employers (defined for the purposes of this law as those who employ more than 100 employees in California) with the most number of employees receiving public assistance through Medi-Cal benefits. The report will be transmitted to the Legislature and posted on the Department of Finance's Internet Web site.

Additionally, the new section prohibits employers from discriminating or retaliating against employees who receive Medi-Cal benefits. The new law is scheduled to sunset in 2020.

**Supervisor Harassment Training to Include Prevention of "Abusive Conduct"**
**AB 2053 Amends Government Code Section 12590.1**

California employers of 50 or more employees have for many years been required to provide anti-harassment training to their supervisors. This "AB 1825 Training" requirement must be completed every two years and include interactive content. As of January 1, 2015, AB 1825 Training must include training on the prevention of broadly defined "abusive conduct": "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious." This law does not create a new claim under FEHA for "abusive conduct," but employers must make sure that their training modules are up to date in light of this new requirement.

## WAGE AND HOUR

**DLSE Can Award Waiting Time Penalties for Minimum Wage Violations**
**AB 1723 Amends Labor Code Section 1197.1**

Employers facing administrative claims at the Division of Labor Standards Enforcement (DLSE) for minimum wage violations face civil penalties of $100 per employee per pay period for the first violation and $250 per employee per pay period thereafter. These penalties are in addition to the amount of the underpayments and liquidated damages in the same amount. AB 1723 amends Labor Code section 1197.1, clarifying that the DLSE can also award separate "waiting time" penalties in these matters for employees who no longer work for the employer. These penalties, which are also called "section 203" penalties, can be up to 30 days of the employee's rate of pay at the time of termination. As any employer who has faced a wage claim from former employee knows, "waiting time" penalties are not related to the amount of unpaid wages, and can add a full thirty days' pay to even a small claim for unpaid wages.

**Expanded Timeframe for Recovery of Liquidated Damages for Minimum Wage Violations**
**AB 2074 Amends Labor Code Section 1194.2**

Under existing law, employees making claims for minimum wage violations can recover liquidated damages in addition to the unpaid wages, effectively making the employer liable for twice the amount of unpaid wages. However, some courts held that, although the statute of limitations for the minimum wage violations is three years, the statute of limitations for the liquidated damages recovery is only one year. This bill clarifies that the time frame for recovering liquidated damages for minimum wage violations is three years, as opposed to one year.

**Joint Wage and Hour Liability For Staffing Companies and Clients–**
**AB 1897 Enacts Labor Code Section 2810.3**

Employers who use staffing agencies to provide labor ("client employers") and the staffing agencies who supply the workers ("labor contractors") will share civil and legal liability under Labor Code section 2810.3 for wage and hour violations and failure to secure workers compensation coverage. The new law does not apply to employers of fewer than 25 employees (including those hired through a labor contractor) or to employers who use 5 or fewer workers from labor contractors at a given time. Other exclusions apply, such as for motor carriers contracting with another motor carrier, cable operators, telephone corporations and direct to home satellite providers that contract with a company to build install, maintain, or perform repair work, as long as the name of the contractor is visible on employee uniforms and vehicles.

Under this new law, workers making claims for unpaid wages, or for workplace injuries where no workers' compensation policy is in place, can bring their administrative claims for civil actions against either the "client employer" or the "labor contractor" or both. Workers filing a civil action must provide 30 days' advance notice to the client employer. The parties cannot waive the provisions of this statute, but they can agree to and enforce contractual indemnity provisions. However, the client employer can never shift any liability for workplace safety laws to the labor contractor.

Entities that may fall within the definition of a "client employer" under this statute should work with counsel to consider what efforts may be made to reduce potential exposure under this important new law.

**Heat Illness Recovery Periods for Employees Who Work Outside**
**SB 1360 Amends Labor Code Section 226.7**

Cal-OSHA regulations have for many years required employers to provide employees who work outside with heat recovery periods of at least five minutes in the shade on an "as needed" basis. Employees who don't get their recovery periods can bring a cause of action for an extra hour's pay under the Labor Code section that provides for an extra hour's pay for missed meal or rest breaks (Labor Code section 226.7). SB 1360 amends Labor Code section 226.7 to clarify that heat recovery periods are hours worked and cannot be deducted from paid hours. Employers who employ individuals working outdoors should familiarize themselves with Cal-OSHA's heat recovery period regulations, and ensure that their Illness and Injury Prevention Programs and time keeping practices are compliant.

**Increased Protections For Employees Who Complain About Labor Code Violations**
**AB 2751 amends Labor Code Section 98.6**

Under Labor Code section 98.6(b)(3), which took effect in 2014, employers facing DLSE proceedings for retaliating against employees who engage in protected activities under the Labor Code face a potential $10,000 civil penalty in addition to reinstatement and lost wages. AB 2751 amends Labor Code section 98.6 to clarify that this penalty is payable to the employee who suffered the violation. As noted more fully above, AB 2751 also amends Labor Code sections

1019 and 1024.6 prohibiting discrimination and retaliation based upon immigration and work authorization status.

## PREVAILING WAGE LAWS

### Prevailing Wage Laws Apply to Post Construction Phases of Public Work Projects AB 26 Amends Labor Code §1720

Construction, alteration, demolition, installation, or repair work done under contract and paid in whole or in part out of public funds are "public works" and subject to the state prevailing wage rules. Existing law defines "construction" for these purposes to include work performed during the design and preconstruction phases of construction. Pursuant to AB 26, Labor Code section 1720 is amended so that the definition of "construction" also includes work performed during the **post**-construction phases of public works projects including, but not limited to, all cleanup work at the jobsite, thus clarifying that prevailing wage laws apply through final cleanup work on projects.

### Background Checks By Employers For Onsite Construction Contracts AB 1650 Enacts Public Contract Code §10186

The Fair Chance Employment Act, Public Contract Code section 10186, requires any person submitting a bid for a state contract involving onsite construction-related services to certify that he/she/it will not ask an applicant for onsite construction-related employment to disclose information concerning his or her conviction history on or at the time of an initial employment application. This law adds to the "ban the box" trend of recent years. In 2014, AB 218 limited the ability of public agencies to require the disclosure of certain criminal history on employment applications, effectively banning the use of check-box questions on employment applications that ask "Have you ever been convicted of a felony?" In addition, the City and County of San Francisco enacted its own detailed "ban the box" ordinance limiting the use of pre-employment criminal history inquiries for city contractors and private employers in San Francisco. RJO Update. Existing law prohibits all employers, both public and private, from asking job applicants to disclose, either in writing or verbally, any information concerning an arrest or detention that *did not* result in a conviction.

### Recovery of Costs Incurred Before Project is Designated a Public Work AB1939 Enacts Labor Code Section 1784

Generally, contractors are required to pay "prevailing wages" to employees working on "public works" projects. However, situations sometimes arise where the contractor fails to pay prevailing wages because the contractor was never informed that the project was actually a "public works" project or because a subsequent administrative or court decision classifies the project as a "public works" project. As a result, the contractor may be held responsible for the difference between the prevailing wage and the wages actually paid as well as associated penalties. Existing law provides contractors with a remedy, under certain circumstances, to recover such costs and penalties from the "awarding body" (generally, the government agency which awarded the contract). *See* Cal. Labor Code § 1781. Newly created Labor Code section

1784 (enacted by AB 1939), establishes similar remedies for a contractor with respect to the party with whom the contractor directly contracts with (such as private developers).

More specifically, contractors who face increased costs as a result of a subsequent decision to classify a project (or any portion of a project) as a public work, will be able to bring a court action against the "hiring party" to recover such increased costs, including, the difference between the wages actually paid to an employee and the wages that were required to be paid under the prevailing wage rules, penalties, and costs and attorney's fees incurred by the contractor as a result of the court action. For purposes of Labor Code section 1784, "hiring party" is defined as "the party that has the direct contract for services provided by the contractor . . . seeking recovery . . . ."

Certain exceptions apply, including where the owner, developer (or its agent) or the hiring party expressly advised the contractor that the work to be covered by the contract *would* be a public work or otherwise subject to prevailing wage. In addition, a contractor will be precluded from bringing an action under Labor Code section 1784, if the contractor otherwise had actual knowledge that the project was a public work or if the contractor itself caused the project to be subsequently deemed as a public works project.

To bring a timely action under Labor Code section 1784, the contractor must notify the hiring party and the owner or developer within 30 days after receipt of the notice of a decision by the Department of Industrial Relations or the Labor and Workforce Development Agency, or the initiation of any action in a court alleging, that the work covered by the project (or any portion of the project) is a public work.

**Expansion of Remedies for Prevailing Wage Violations**
**AB2744 Amends Labor Code Section 1777.1 and Repeals and Replaces Section 1777.7**

Under existing law, contractors and subcontractors who are found to have violated the prevailing wage laws with intent to defraud, or who are found to have willfully violated prevailing law on two or more occasions during a three-year period, are subject to automatic debarment for a period of up to three years. *See* Labor Code section 1777.1. Previously, this statute specifically excluded violations involving the employment of apprentices. Instead, under section 1777.5, the Labor Commissioner had discretionary authority to issue a debarment remedy of 1 to 3 years for "knowing" and "serious" violations of the apprenticeship laws. However, as a result of AB 266, starting in 2015, the automatic debarment provisions provided for in section 1771.1 will be expanded to apply equally to apprenticeship violations that meet its criteria (i.e., violations committed with intent to defraud or two or more willful violations within three years).

Section 1777.1, as amended, also spells out criteria for the Labor Commissioner to consider when determining whether a party be debarred for knowingly committing a serious violation of the apprenticeship standards set forth in Labor Code section 1777.5. Specifically, under the amended statute, the Labor Commissioner is required to consider: (a) whether the violation was intentional; (b) whether the party has committed other violations of section 1777.5; (c) whether, upon notice of the violation, the party took steps to voluntarily remedy the violation; (d) whether, and to what extent, the violation resulted in lost training opportunities for

apprentices; and (e) whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

AB 2744 also overhauls section 1777.7. Under the new version of 1777.7, the Labor Commissioner is now required to use the same procedures previously specified in Labor Code section 1741 to enforce monetary penalty assessments for apprenticeship violations and the same burdens of proof as previously set forth in Labor Code section 1742 are now applicable to hearings on alleged apprenticeship violations. Additionally, under the amended version of the statute, the amount of penalties issued (which cap out at between $100 and $ 300 per calendar day of non-compliance, depending upon the circumstance) are reviewable only for abuse of discretion.

## CITY ORDINANCES

### San Francisco's "Retail Workers' Bill of Rights" Hours and Retention Protection and Fair Scheduling and Treatment Ordinances For "Formula Retail" Employees San Francisco Police Code Article 33F

San Francisco again forges a new path in employee-protective laws, passing two new ordinances primarily affecting retail employees working in the City and collectively referred to as the "Retail Workers' Bill of Rights." These laws, which will take effect in July 2015, apply to employers operating "Formula Retail Establishments" with twenty or more employees working in the City and County of San Francisco and certain janitorial or security service contractors or subcontractors ("Property Service Contractors") of covered Formula Retail Establishments.

#### *Formula Retailers Broadly Defined*

Given the expansive definition of Formula Retail Use, these laws will have an effect on a large number San Francisco employers. Under these ordinances, "Formula Retail Use" means a "retail sales activity or retail service establishment" as defined by City Planning Code section 303.1, with 20 or more establishments located worldwide, that maintain two or more of the following features:

- **A standardized array of merchandise**
- **A standardized façade**
- **A standardized décor and color scheme**
- **A uniform apparel**
- **A trademark or service-mark**

Notably, under section 303.1(i)(2), the phrase "retail sales activity or retail sales establishment" includes not only traditional retail stores, but also bars, liquor stores, certain financial services (such as banks and credit unions), certain restaurants and eating establishments, movie theaters as well as certain personal service providers (such as salons, health spas and fitness classes).

### *Hours and Retention Protection*

The first ordinance, "Hours and Retention Protection for Formula Retail Employees" (Police Code Article 33F), requires covered employers to offer additional work to "part-time employees" (those working less than 35 hours per week) before using contract or temporary employees or staffing agencies. These offers of additional work must be made in writing and maintained for three years. These requirements also apply to "Property Services Contractors" (those who maintain contractors for janitorial or security services with a covered employer) and must be included in the contract itself.

If a Formula Retail Establishment undergoes a change in ownership, the old "Incumbent Employer" must prepare a detailed "Retention List" of employees (excluding managers and supervisors) which it employed over the past six months. The new "Successor Employer" must make a written offer of employment to eligible employees and retain them for at least 90 days under the same terms of employment with respect to job classification, compensation, and number of work hours that governed those individuals and the Incumbent Employer. Employees who accept the offer of employment cannot be discharged without cause during the 90-day period. The obligation to hire employees from the Retention List applies whether the Successor Employer operates the business in the same location or relocates it elsewhere in San Francisco and remains in effect during any delay in the re-opening of the business because of remodeling, relocating the business or other related reasons for up to three years after the date of transfer. If the Successor Employer, however, does not have a need to employ all of the individuals on the Retention List, it must retain those who it does need based on seniority or under the terms of any applicable collective bargaining agreement.

### *Fair Scheduling and Treatment*

The second ordinance, "Fair Scheduling and Treatment of Formula Retail Employees" (Police Code Article 33G) also applies to Formula Retail Establishments and Property Services Contractors (as described above) and requires these covered employers to provide advance notice of employee work schedules and schedule changes, compensation for changed shifts and on-call shifts, and equal treatment to part-time employees in terms of pay, time off and promotion opportunities.

Specifically, under this ordinance, employers must provide new hires, prior to the start of their employment, with an estimate of their expected minimum number of scheduled shifts per month and the days and hours of those shifts. All employees must also be given two weeks' advance notice of their work schedules and advance notice of any changes in their bi-weekly schedules. If the employer changes or cancels the scheduled employee's shift with less than 7 days' notice, the employer must pay the employee an additional hour's pay. If less than 24 hours' notice is given, the employer must provide the employee with two additional hours of pay for scheduled shifts of 4 hours and under, and 4 additional hours of pay for scheduled shifts longer than 4 hours.

Employees on "On Call Shifts" (defined as shifts where the employee must call or wait to be called to see if they are scheduled to work less than 24 hours in advance of the shift) who are

not called in to work must receive 2 hours of pay for scheduled shifts of 4 hours and under, and 4 hours of pay for scheduled shifts longer than 4 hours.

This ordinance also requires that part-time employees (who regularly work less than 35 hour per week) receive the same hourly wage as full time employees for jobs requiring equal skill, effort, responsibility and working conditions. Part-time employees must also receive paid time off benefits in pro-rated amounts on the same basis as full time employees.

***Enforcement***

Both ordinances contain specific notice and record keeping requirements as well as anti-retaliation provisions which make it unlawful for an employer to take adverse action against any employee who exercises their rights under the law. The San Francisco Office of Labor Standards and Enforcement is primarily charged with enforcing the ordinances and has the authority to investigate employers and issue penalties and award back wages for non-compliance. In addition, the City Attorney is also given the authority to bring civil actions against employers for alleged violations to recover lost wages, civil penalties, reinstatement of employment, injunctive relief and attorneys' fees and costs.

**Oakland Sick Leave Ordinance**
**Measure FF enacts Oakland Municipal Code Section 5.92.030**

In November, Oakland voters passed measure FF which included an ordinance providing for paid sick leave for all employees who work at least 2 hours in a particular week in City of Oakland. Like California's new sick leave law, Labor Code section 245.5, the Oakland ordinance provides that sick leave accrues at a rate of one hour for every 30 hours worked and carries over from year to year and need not be paid out upon termination of employment. The Oakland ordinance is more generous than the new state law in some respects. For example, the ordinance provides employees with a higher cap on accrual: 72 hours for all business with ten or more employees In addition, unlike the California law, the Oakland ordinance does not permit employers to limit the amount of accrued sick leave that an employee uses in a year.

Under the Oakland ordinance (as under the California law), employees may use accrued sick leave beginning 90 days after employment when the employee is ill or injured or receiving medical care, treatment, or diagnosis, or to aid or care for a child, ward, parent, legal guardian, sibling; grandparent, grandchild, spouse, or registered domestic partner. The Oakland ordinance also has a provision similar to the San Francisco Paid Sick Leave Ordinance which permits employees without a spouse or registered domestic partner to designate one person for whom the employee may use paid sick leave to provide aid or care.

The ordinance also provides that employers "may only take reasonable measures" to verify that an employee's use of sick leave is lawful and cannot require an employee to incur expenses in excess of five dollars in order to substantiate his or her need to take sick leave.

The Oakland Sick Leave Ordinance goes into effect on March 2, 2015.

**Hospitality Worker Service Charges**
**Measure FF enacts Oakland Municipal Code Section 5.92.040**

Measure FF also enacted Oakland Municipal Code section 5.92.040, which requires employers in the hospitality industry (restaurants, hotels, and banquet halls within the City of Oakland) to pay all service charges to the "hospitality workers" delivering the service. Hospitality workers do not include supervisors, unless a supervisor is not supervising but actually providing service to customers. In that event, the supervisor may receive only an amount equal to the average of what other employees receive for providing the same service.

Service charges are defined as separately designated amounts collected by an employer that are for services provided by a hospitality worker or which might be reasonably interpreted to refer to services provided by a hospitality worker, such as service charges, delivery charges, and porterage charges. Service charges must be paid to employees no later than the payroll following when the service was provided or the charge is paid by the customer.

**Increased Minimum Wage for Various Cities**

2015 also brings minimum wage increases to various cities across California, including:

- ***San Francisco***: Effective March 1, 2015, employees working in San Francisco must receive at least $12.25 per hour.

- ***Oakland***: Effective March 2, 2015, employees working in Oakland must receive at least $12.25 per hour.

- ***Los Angeles***: Effective July 1, 2015, pursuant to the Los Angeles "Citywide Hotel Worker Minimum wage Ordinance" certain hotels within the Los Angeles City limits must pay employees at least $15.37 per hour. (This Los Angeles ordinance, which also includes among other things, provisions requiring employers to provide paid sick leave and additional unpaid time off, is the subject of current litigation).

- ***Berkeley***: Already in effect (as of October 1, 2014), employees working in Berkeley must receive at least $10 per hour.

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If you employ workers in California and have questions on how these new laws will affect you, please contact the Rogers Joseph O'Donnell attorney with whom you regularly work, or the authors of this legal update.

RJO's Labor & Employment Law Practice Group is comprised of experienced labor and employment attorneys who regularly represent and advise employers, big and small, in wide variety of industries.

*The content of this article is intended to provide a general guide to the subject matter, and is not a substitute for legal advice in specific circumstances.*