Employment Law Update

March 2016

California Regulatory Update: Amended FEHA Regulations and New PDL Poster Effective April 1, 2016

California employers need to be aware of recent regulatory changes. First, the California Fair Employment & Housing Council has released Amended FEHA Regulations effective on April 1, 2016. Second, the Department of Fair Housing & Employment has released an updated version of the mandatory Pregnancy Disability Leave notice, which employers must display starting on April 1, 2016. A copy of the mandatory poster can be found here.

Amended FEHA Regulations

While many of the changes to the FEHA Regulations simply incorporate recent legislative changes to the Fair Employment and Housing Act, employers should note a few of the changes:

First, California employers employing five or more employees (whether in California or outside of California) must develop detailed written policies prohibiting and preventing discrimination, harassment, and retaliation, including the following provisions (among others):

- a list of all protected characteristics under FEHA;
- a complaint procedure that ensures confidentiality, a timely response, impartial and timely investigation, appropriate options for remedial action, and timely closure;
- a complaint mechanism that does not require complaints be directed to the direct or immediate supervisor;
- a requirement that supervisors report complaints to designated company representatives, such as a human resources director; and
- a prohibition against retaliation.

Further, such policies must be translated into any language that ten percent or more of employees speak as their primary language.

Second, California employers employing 50 or more employees (whether in California or outside of California) must keep records of the following harassment training information for at least two years: (1) names of supervisory employees trained; (2) sign-in sheets; (3) copies of all certificates of attendance or completion issued; (4) type of training; (5) a copy of all written or recorded materials; (6) name of the training provider; (7) a copy of any webinar used; (8) all written questions submitted during a webinar; and (9) all written responses or guidance a trainer provided during a training/webinar.

Third, the Amended FEHA Regulations include several new definitions for gender expression ("a person's gender-related appearance or behavior, whether or not stereotypically associated with the person's sex at birth"), gender identity ("a person's identification as male, female, a gender different from the person's sex at birth, or transgender"), sex stereotype ("an assumption about a person's appearance or behavior, or about an individual's ability or inability to perform certain kinds of work based on a myth, social expectation, or generalizations about the individual's sex") and transgender ("a person whose gender identity differs from the person's sex at birth").

Employers should carefully review their discrimination/harassment and recordkeeping policies to ensure compliance with the Amended FEHA Regulations.

Final Federal Overtime Exemption Rule Expected Soon; Reminder On Independent Contractor Test (Federal Guidance)

Last June, the U.S. Department of Labor (DOL) released its proposed rule changes to the "white-collar" overtime exemptions (administrative, executive, and professional) under the Fair Labor Standards Act (FLSA), in which it proposed to raise the minimum salary required to qualify as exempt under the FLSA from $23,660 per year to an estimated $50,440 per year. On March 14, 2016, the DOL sent its final overtime rule to the White House Office of Management and Budget (OMB). Although the OMB has 90 days to review the final rule, it could publish the final rule sooner, causing the rule to become effective this spring.

Once released, the new minimum salary requirement will have a significant impact on California employers. Under California law, employees must earn a salary at least twice the state minimum wage to qualify under one of the white-collar overtime exemptions (currently, a minimum of $41,600 annually). However, once the DOL rule becomes effective, employers subject to the FLSA will have to pay their exempt employees an annual salary of at least $50,440 (or whatever number the final rules provides) to satisfy the salary requirement under the FLSA. California employers should audit their payrolls to determine whether their exempt employees will satisfy this new threshold.

Reminder: The regulatory trend toward classifying workers as "employees" whenever possible continues to challenge employers nationwide. The DOL weighed in on this trend in July 2015 with written guidance on how it analyzes employee vs. independent contractor status. In an "Administrator's Interpretation" of the FLSA, the DOL said it now uses a six-question "economic realities" test designed to test whether the worker is economically dependent on the employer (thus being an employee), or is really in business for himself or herself (and thus being an independent contractor):

(1) Is the work an integral part of the employer's business?
(2) Does the worker's managerial skill affect the worker's opportunity for profit or loss?
(3) How does the worker's relative investment compare to the employer's investment?
(4) Does the work performed require special skill and initiative?
(5) Is the relationship between the worker and the employer permanent or indefinite?
(6) What is the nature and degree of the employer's control?

We've written about this previously.

A close reading of the DOL's guidance suggests that, in the DOL's view, these factors almost always point to an employment relationship. In light of the DOL's approach to the subject, California employers subject to the FLSA must ensure (under both state and federal law) that they properly classify their workers as independent contractors, or face significant liability. Further, when subject to a DOL (or state Labor Commissioner) misclassification or wage-hour audit, employers should carefully weigh their capabilities of handling such an audit on their own.

Clients with questions about this Alert or related issues are welcome to contact the article authors, or the Rutan & Tucker attorney with whom you are regularly in contact.

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