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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *June 2016*

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LEGISLATIVE

California

San Diego's Earned Sick Leave and Minimum Wage Ordinance Creates Compliance Challenges

Earlier this month, San Diegans voted to approve Proposition I, San Diego's Earned Sick Leave and Minimum Wage Ordinance. The ordinance raises San Diego's minimum wage above the state minimum wage and requires employers to provide a more generous sick leave policy than the state law mandates.

The ordinance sets San Diego's minimum wage at $10.50, with an increase to $11.50 on January 1, 2017. Since the ordinance was written, California has enacted a new state law incrementally increasing the state minimum wage. By January 1, 2019, the state's minimum wage will be equivalent with San Diego's.

San Diego's minimum wage does not impact California's minimum salary for white collar (executive, administrative, professional) exempt employees. The minimum salary for the wage component of the exemptions is set at twice the state minimum wage for a 40-hour work week, but is not affected by local ordinances. Please note that employers must also comply with the new federal salary requirements for exempt employees beginning on December 1, 2016.

The paid sick leave portion of the ordinance provides only for the accrual of paid sick time, at the rate of one hour of sick time for every 30 hours worked. The ordinance does not provide for any other method of awarding paid sick time, which is inconsistent with the 2015 California paid sick leave law. Under the state law's bank method, employers may lawfully allow each employee to bank 24 hours of paid sick leave at the beginning of his/her anniversary year. The San Diego ordinance does not expressly provide for a bank method. However, it does allow equally generous plans to be used to comply with the ordinance's requirements. It is unclear how this issue will be resolved.

The San Diego ordinance may impact the viability of paid time off policies. The new ordinance permits employers to use an existing PTO plan to meet the earned sick leave requirements if the leave can be used for the same purposes and under the same conditions as provided for in the ordinance. The issue is complicated because the San Diego ordinance does not allow employers to cap paid sick leave accrual or limit the carryover of accrued paid sick leave. The conundrum arises because under state law, employers must pay out unused PTO upon termination.

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Without the ability to cap accruals or carryover, this could lead to large amounts of accrued PTO that employers would be mandated to pay out at termination.

The ballot proposition states the ordinance becomes effective after voter approval, which creates an uncertain effective date. Under the standard process, the Registrar of Voters has 30 days to certify the election results. After the vote is certified, the City Council will vote to adopt the election results. The City Council vote is expected to occur on July 11th or July 18th. Once adopted, the ordinance will be effective immediately. Thus, employers should prepare now for compliance beginning in mid-July.

AGENCY

Federal

Department of Labor Publishes New Overtime Regulations

On May 18, 2016, President Obama and Secretary Perez announced the publication of the Department of Labor's final rule updating the overtime regulations. The final rule focuses primarily on updating the salary and compensation levels needed for executive, administrative, and professional workers to be exempt under federal law. Below is a summary of the key changes made to overtime regulations:

- Effective December 1, 2016, the standard salary level will raise from $455 a week to $913 a week ($47,476 for a full-year worker).
- Also effective December 1, 2016, the total annual compensation requirement for highly compensated employees ("HCE"), subject to a minimal duties test, raises from $100,000 to $134,004.
- The salary and compensation levels will automatically update every three years beginning January 1, 2010. Each update will raise the standard threshold to the 40th percentile of full-time salaried workers in the lowest-wage Census region, estimated to be $51,168 in 2020. The HCE threshold will increase to the 90th percentile of full-time salaried workers nationally, estimated to be $147,524 in 2020. The Department of Labor will post new salary levels 150 days in advance of their effective date, beginning August 1, 2019.
- The salary basis test is amended to allow up to 10 percent of the salary threshold for non-HCE employees to be met by non-discretionary bonuses, incentive pay, or commissions, provided these payments are made on at least a quarterly basis.
- No changes are made to the existing job duty requirements to qualify for exemption. For workers with salaries above the updated salary level, employers will need to continue to use the same duties test to determine whether the worker is entitled to overtime pay.

EEOC Issues Rules Clarifying the Ability of Employers to Request Health Information for Wellness Programs

Employers are increasingly implementing wellness programs aimed at improving employee health. These programs regularly ask employees (and,

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occasionally, their family members) to voluntarily provide medical information which can be used in the creation and pursuit of wellness goals.

Generally, the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA") prohibit employers from obtaining information about the health of employees (or their family members). These prohibitions, however, permit employers to ask health-related questions (and perform certain medical testing) if the information is provided as part of a *voluntary* wellness program. Confusion among employers and employees has recently arisen, however, as employers have begun offering incentives for employees to participate in these programs, raising questions as to whether or not the provision of such incentives renders the programs *involuntary*.

In response to this uncertainty, the United States Equal Employment Opportunity Commission ("EEOC") issued final rules clarifying the application of provisions under both the ADA and GINA. The ADA final rule notes that wellness programs that are part of a group health plan and that seek information regarding an employees' health may only offer incentives equal to up to 30 percent of the total cost of self-only insurance coverage. Similarly, the GINA final rule states that providing a *spouse's* medical information may not result in an incentive greater than 30 percent of the total cost of self-only coverage. Neither the ADA nor GINA permit incentives for the provision of employees' children's health information, nor are incentives permitted for the provision of genetic information (e.g., family medical history) for employees or their family members.

Both rules prohibit employers from *requiring* employees (or their families) to participate in wellness programs and both provide additional confidentiality protection to employees and their families. Notably, the ADA rule also requires that employers provide employees participating in wellness programs with notice of what information is being collected and with whom that information may be shared.

The rules, which go into effect in 2017, apply to all workplace wellness programs across the nation. Once officially implemented, the rules will protect both employers and employees, by describing the specific means under which medical information may be ascertained for wellness programs as well as the specific benefits which may be tied to the provision of that information. As always, employers must remain aware of their rights and obligations when implementing wellness programs.

California

Proposed Regulations Regarding Transgender Identity and Expression

As part of a national trend, the California's Fair Employment and Housing Commission ("FEHC") has issued proposed regulations to address bathroom use by individuals who identify as transgender.

The FEHC has proposed amendments to sections 11030, 11031, and 11034 (the "Proposed Legislation") of the California Code of Regulations, would clarify and supplement existing regulations regarding the rights of transgender employees in the workplace.

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Section 11030 adds a definition for "transitioning" as "the process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth." The definition also includes examples of activities an individual may or may not include "changes in name and pronoun, bathroom, facility usage, participation in activities like sports teams, hormone therapy, sex reassignment surgery, or other medical procedures."

Section 11031, which outlines defenses available to employers for discrimination based on sex, would amend "individual of the opposite sex" to "individual of a different sex."

The most substantial changes are in section 11034 delineating the terms, conditions, and privileges of employment. The proposed regulations make it clear that employers must provide equal access to comparable, safe, and adequate restrooms, locker rooms, dressing rooms, dormitories, and other similar facilities without regard to the sex of an employee. Additionally, employers must permit employees to use facilities that correspond to the employee's gender identity or expression, regardless of the employee's assigned sex at birth. To balance the privacy interests of all employees, employers must provide alternatives if no individual facility is available, such as, locking toilet stalls, staggered schedules for showering, shower curtains, or other methods to ensure privacy. However, an employer may not require an employee to use a particular facility. If an employer has single-occupancy facilities under their control, they must use gender-neutral signage for those facilities. Examples for gender neutral signage include: "restroom," "unisex," "gender neutral," and "all gender restroom." Additionally, transitioning employees cannot be required to undergo or provide proof of any particular medical treatment to use facilities designated for use by a particular gender.

This section also clarifies standards for physical appearance, grooming and dress. Employers are permitted to impose physical appearance, grooming, or dress standards on an applicant and/or employee as long as the standards serve a legitimate business purpose and does not discriminate based on an individual's sex, including gender, gender identity, or gender expression. Employers may not require individuals to groom themselves in a manner inconsistent with their gender identity or gender expression.

The proposed regulations also include regulations regarding the recording of gender and name. An employer may not require an applicant or employee to state whether the individual is transgender. If a job application form requires an individual to identify as male or female, designation by an applicant that is inconsistent with the individual's sex assigned at birth, or presumed gender, will not be considered fraudulent or a misrepresentation for the purpose of an adverse action based on the individual's designation. Additionally, if an employee requests to be identified with a preferred gender, name, and/or pronoun, then the employer must honor that preference. The failure to abide by the employee's stated preference instead of the individuals' legal name on government-issued identification, could result in the employer facing liability under the Fair Employment and Housing Act ("FEHA") unless it is necessary to meet a legally-mandated obligation.

This section also specifies additional rights to employees. First, employers are prohibited from inquiring about or requiring documentation or proof of an individual's sex, gender, gender identity, or gender expression as a condition of employment, unless the employer meets its burden of proving a bona fide occupational qualification

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defense, or the employee initiates communication with the employer regarding any requested adjustment to the employee's working conditions. Second, denying employment to an individual based wholly or in part on the individual's gender identity or gender expression is illegal. Third, these regulations will not prevent an applicant or employee from asserting right under the FEHA, including leave under the California Family Rights Act and rights afforded to individuals with mental or physical disabilities. Lastly, it is unlawful to discriminate against an individual who is transitioning or has transitioned.

If the proposed regulations are enacted, California employers will have improved guidance on what is permitted and what is prohibited in this evolving area of the law. Employers should examine their current policies to ensure they are compliant. Employers should also scrutinize their application process, use of facilities, dress standards, and policies to identify whether adjustments need to be made to comply with the new regulations.

The "comment period" on the proposed legislation permits the submission of written comments until June 27, 2016, the same day that a public hearing will be held to discuss comments, objections, and recommendations regarding the proposed action.

JUDICIAL

Federal

U.S. Supreme Court Clarifies When the Limitations Period Commences on a Title VII Constructive Discharge Claim

In *Green v. Brennan, Postmaster General*, the United States Supreme Court resolved the following issue: at what point does the limitations period begin to run for a federal employee's constructive discharge claim—when the employer commits the last discriminatory act, or when the employee resigns? According to the Court, the *employee's resignation* (which occurs at the time the employee gives *notice* of resignation) triggers the limitations period.

In *Green*, former employee Marvin Green ("Green") filed suit against the U.S. Postal Service, alleging that he had been constructively discharged in violation of Title VII. In 2008, Green complained to his employer that he had been passed over for a promotion on account of his race. The following year, the Postal Service accused Green of intentionally delaying the mail—a federal crime. On December 16, 2009, the Postal Service and Green signed a settlement agreement providing that the Postal Service would not pursue criminal charges if Green (a) resigned or (b) accepted a transfer to a less desirable location at a lower rate of pay. Green opted for resignation, submitting his retirement paperwork on February 9, 2010 and setting the effective date for his resignation as March 31, 2010.

On March 22, 2010, 96 days after signing the settlement agreement, but 41 days after submitting notice of his resignation (on February 9), Green initiated contact with an Equal Employment Opportunity ("EEO") counselor, complaining that he had been constructively discharged. After Green filed a civil action for constructive discharge, the Postal Service moved for summary judgment, asserting that Green's claim was barred by the statute of limitations. Pursuant to Title VII regulations, federal employees must "initiate contact" with an EEO counselor within 45 days of the "matter alleged to be discriminatory." (29 C.F.R. § 1614.105(a) (1).) The Postal Service

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argued that the "matter alleged to be discriminatory" encompassed only the Postal Service's acts, not the employee's independent decision to resign on February 9. Thus, according to the Postal Service, the limitations period was triggered by the signing of the settlement agreement on December 16, 2009, 96 days before Green contacted the EEO counselor. The district court agreed, and granted summary judgment. The Tenth Circuit Court of Appeals affirmed.

The Supreme Court held that the limitations period for a constructive discharge claim commences at the time the employee resigns. According to the Court, the "standard rule" is that the limitations period starts when a plaintiff has a "complete and present cause of action;" that is, at the time the plaintiff is able to file suit and obtain relief. In the context of constructive discharge claims, an employee is not able to file suit and obtain relief until the resignation occurs. Thus, pursuant to the "standard rule," the limitations period for a constructive discharge claim does not begin to run until the employee resigns.

The Court further reasoned that nothing in the Title VII regulations suggests an intent to displace the "standard rule," and practical considerations weigh against displacing the "standard rule." The Court explained that, forcing employees to lodge an EEO complaint before they can bring a claim for constructive discharge would put the employees in a difficult position. Sometimes, for various reasons, employees might force themselves to tolerate workplace discrimination for a period of time before they ultimately quit. Such employees might be reluctant to complain while still employed, since a complaint might risk termination of employment or other adverse consequences. Thus, applying the "standard rule" for limitations periods to constructive discharge claims makes practical sense.

After determining that the employee's resignation triggers the limitations period, the Court clarified when exactly an employee resigns. The Court held that a constructive discharge claim accrues, and the limitations period begins to run, when the employee gives notice of his resignation—not on the effective date of that resignation. Thus, when an employee gives two weeks' notice of his intent to resign, the limitations period begins to run on the date the employee tells his employer, not on his last day of work.

The Supreme Court's opinion in *Green* resolved a split among the Circuit Courts as to when the limitations period commences in the context of a constructive discharge claim. For employers in the Ninth Circuit, this decision does not affect a change in applicable law; in *Draper v. Coeur Rochester, Inc.* (9th Cir. 1998) 147 F.3d 1104, 1111, the Ninth Circuit had already held that the employee's resignation triggers the limitations period. Nonetheless, *Green* provides clarity as to *when* the resignation occurs. Moreover, while *Green* is limited to the context of constructive discharge claims brought by federal employees, it is likely that the Court's reasoning will be extended to private sector constructive discharge claims as well.

Ninth Circuit Finds that an Employer's Rounding Policy Satisfied Federal Rounding Regulations and that the Employee's One Minute of Uncompensated Time Was *De Minimis*

In *Corbin v. Time Warner*, the Ninth Circuit found that an employer's rounding policy was neutral on its face, and that the district court properly classified one minute of uncompensated time as *de minimus*. Time Warner Entertainment-Advance/Newhouse Partnership ("TWEAN") operated a call center in San Diego,

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California, where employees fielded calls from customers. In 2010, TWEAN transitioned to an online timekeeping platform, Kronos Connect, which directly linked an employee's time stamps to a program called Avaya—a program that must be activated before employees can begin taking customer calls. When an employee logs into Avaya, he is automatically logged into Kronos; when an employee logs out of Avaya, he is automatically logged out of Kronos. TWEAN implemented this system in order to prevent off-the-clock work, blocking employees from answering customer calls unless they are properly clocked in. TWEAN's timekeeping policy incorporates a rounding procedure that relies on the time stamps recorded in the Avaya/Kronos system. When employees clock in and out, the system rounds each time stamp recorded to the nearest quarter-hour. Employees are paid based on the rounded figures.

Plaintiff Andre Corbin ("Corbin") filed a wage and hour lawsuit against TWEAN, asserting class claims under California law and collective action claims under the federal Fair Labor Standards Act ("FLSA"). Corbin claimed that (1) he was paid improper overtime wages because TWEAN's rounding procedure violated federal rounding regulations; and (2) he was not paid for one minute of compensable work time (since, on one occasion, he accidentally logged into an auxiliary program before logging into Avaya). The district court granted summary judgment in favor of TWEAN. The Ninth Circuit held that TWEAN's rounding policy complied with federal rounding regulations, 29 C.F.R. § 785.48(b) ("Section 785.48(b)").

Section 785.48(b) provides that an employer's practice of rounding clock in and clock out times is permissible where the practice is facially neutral or neutral as applied. In other words, employers may round time stamps so long as the practice favors neither overpayment nor underpayment. The Court of Appeals rejected Corbin's contention that, for a rounding practice to be compliant, the employee must either gain money or break even during every pay period in which rounding occurs; the employee must never lose money as a result of the practice. The Court of Appeals explained that the regulation did not require employers to ensure that employees never "lost a single cent over a pay period." Such an interpretation would defeat the purpose of the regulation, which was intended to make wage calculations more efficient for employers—if Corbin's contention were accepted, employers would be required to engage in the tedious and time consuming process of verifying that each time stamp resulted in a benefit to the employee, which would "gut the effectiveness" of a rounding policy.

The Ninth Circuit further determined that TWEAN's rounding policy was neutral on its face and as applied to Corbin. The time stamps of all non-exempt employees were rounded in accordance with the policy, regardless of whether the rounding benefitted the employee or employer. That is, the policy did not systematically round down, to the detriment of the employee. Moreover, Corbin's own time records show that, in some pay periods he gained time (and thus gained money), while in others he lost time (and money). Thus, over a period of time, Corbin was not improperly compensated for his work. Accordingly, the district court properly granted summary judgment in favor of TWEAN on Corbin's rounding claim.

The Court of Appeals also rejected Corbin's claim that he was not compensated for all time worked, because he was not paid for one minute during which he accidentally logged into an auxiliary program before clocking in. The Ninth Circuit determined that the compensable time at issue was *de minimis* (i.e., an amount of time so insignificant that the failure to compensate the employee for that time is justified by "industrial realities"). In analyzing whether time is *de minimis*, courts consider the

following factors: (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work. Here, all three factors weighed against Corbin: (1) in order to guarantee that no off-the-clock work is performed, TWEAN would have to double check four time stamps per employee per day—an arduous burden; (2) Corbin only worked one minute of compensable time without receiving pay; and (3) the uncompensated time did not occur with any regularity, since Corbin only worked this uncompensated time on one occasion. In light of these considerations, the district court properly granted summary judgment on Corbin's uncompensated time claim.

The *Corbin* opinion reaffirms the propriety of implementing rounding policies to simplify the calculation of employee wages, so long as those policies are facially neutral and neutrally applied. Employers should periodically review their rounding policies to ensure that, on average, employees are overpaid roughly as often as they are underpaid pursuant to those policies.

This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Jenna Leyton-Jones, Ryan Nell, Lauren Bates, Jennifer Suberlak, Shannon Finley, or Cameron Flynn at (858) 755-8500; or Jennifer Weidinger, Tristan Mullis or Andrew Chung at (310) 649-5772.

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