

PERSPECTIVES

SCHERER SMITH & KENNY LLP
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Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.



Climbing Up, Up, Up: Minimum Wage Hikes in San Francisco, Oakland, and Beyond

This past year has been a busy one for change in wage and hour laws, and the coming year will continue this trend with San Francisco and Oakland in the spotlight.

In the face of the rising cost of living in one of the nation's most expensive cities, voters in San Francisco overwhelmingly voted (read: 77%) to gradually raise the minimum wage to \$15.00 per hour in a five-step increase process. Currently, minimum wage in San Francisco is \$10.74 per hour, but will increase as follows: to \$11.05 in January 2015; 12.25 per hour in May 2015;^[1] \$13.00 per hour in July 2016; \$14.00 per hour in July 2017; and \$15.00 per hour in July 2018. After July 2018, wage increases will increase according to a cost-of-living calculation. This covers nearly all workers in the city, with the only exemptions being (1) individuals under 18 in government-subsidized training programs, and (2) individuals over 55 at some government-subsidized nonprofits. Failure to comply with these new requirements can invite damages and penalties under the California Labor Code as well as liability for back wages, attorneys' fees and costs, and interest.

Similarly, Oakland voters have voted to raise Oakland's minimum wage from \$9.00 to \$12.25 per hour, effective March of 2015, and the wage will continue to increase each successive year based on cost-of-living increases. Also beginning March 2015, employers must offer at least five days (or 40 hours) of sick leave to all employees working at least two hours per week, which allows these Oakland employees to accrue one hour of paid sick leave for every 30 hours worked, just like their San Franciscan counterparts. Employers are required to give written notification about these changes to all current and new employees.

An estimated 190,000 workers in San Francisco and Oakland will see pay increases due to these changes.^[2] With many other cities, including Los Angeles, expected to soon follow with similar wage increases. For example, Eureka will also be increasing its minimum wage from \$9.00 to \$12.00 per hour in February of 2015.

The many recent and upcoming changes in minimum wage thresholds highlight employers' need to be vigilant in monitoring legislation and adopting changes in wages and other practices for employees, which in some cases can even extend to overtime-exempt employees. This not only includes adjusting payroll, but also displaying new wage and hour posters, informing employees about their new rates, and training managerial employees to ensure implementation and compliance.

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Partner Notes



Denis Kenny

Happy 2015! Hope the Holidays treated you well. Now it is back to reality. This quarter's *Perspectives* Newsletter contains a discussion of several of the many new laws and developments which may impact some of you this year. Rather than talk about more law and business matters here, I thought it apt and timely to discuss another popular topic altogether: the Super Bowl.

What I find most noteworthy about the Super Bowl is how it has become an American institution. Whether you are an avid football fan or could care less about football, I would bet that at least half of you

If you have questions regarding these employment and HR-related matters, we at Scherer Smith & Kenny LLP are happy to assist you. Please contact Denis Kenny (dsk@sfcounsel.com), Ryan Stahl (rws@sfcounsel.com), or Negin Yazdani (nny@sfcounsel.com) for more information.

- *Written by Negin Yazdani*

[1] Note that there are two increases in 2015.

[2] Data provided by the National Employment Law Project which projects affected workers at, approximately 142,000, in San Francisco and 40,000-48,000 in Oakland.



The Consumer Is Always Right: Retailers Non-Disparagement Clauses Prohibited

In today's Internet age, online consumer-based reviews can make or break a business. A few negative comments and one-star ratings on sites such as Yelp, Amazon, and eBay can have a decidedly negative impact on future business. This is a particularly real problem for small and emerging businesses who have yet to solidify their good reputation or presence in the community, and depend heavily on online consumer traffic.

Some business owners have attempted to combat this social media nightmare by crafting non-disparagement clauses into their online consumer contracts. Such clauses make it a violation for consumers to publish negative or disparaging comments about the business, while also imposing fees and penalties (including the threat of litigation) if they do so. From a business perspective, it is understandable that business owners would want to take such steps to prevent blanket and unchecked criticism of their business online.

Unfortunately, the end result is that these non-disparagement clauses have an impermissible chilling effect on free speech. This method of combating the problem discourages consumers from open dialogue and from sharing honest opinions on their experiences for fear of the consequences. Consumers in some cases have found themselves on the wrong side of costly and time-consuming defamation lawsuits simply for sharing candid statements about their bad experiences.

In order to eradicate this problem, Governor Jerry Brown passed into law Assembly Bill (AB) 2365, commonly known as the "Yelp Bill," late last year in California. Codified at California Civil Code §1670.8, the law (a) prohibits business owners from inserting waivers in consumer contracts on a consumer's right to make statements regarding the business or the goods or services, (b) makes it unlawful to threaten or penalize a consumer for make statements regarding the business or the goods or services, and (c) makes any attempt at waiving the provisions of this Civil Code section void and unenforceable. The law also imposes civil penalties upon any person who violates its provisions.

While the law is seen as a win for Yelp and other online review forums, it just reinforces long established First Amendment principles codified within California law, along the lines of California's Anti-SLAAP statute (Anti-SLAPP ("Strategic Lawsuits Against Public Participation")) legislation is aimed at protecting individuals and community groups from being sued for exercising their constitutional rights to participate in civic affairs, to speak freely on public issues, and to petition the government for redress of grievances), and adds yet another layer of protection for consumers and online forums in the nature of free speech.

In the wake of the Yelp Bill, we strongly urge our small-business clients to review their existing contracts, online terms of use and other policies for provisions that could potentially be construed as limiting consumer speech. We also remind clients to be mindful of the prohibition on non-

that at least half of you who read this will be tuned into Super Bowl XLIX (number 49 for those of us who don't have total recall of Roman numerals) on February 1st. As it stands now, very few of you (aside from those who like to place sports bets from time to time) will have any significant emotional investment in the game since most of "our" teams (in California and the Bay Area, in particular) are long gone from the Super Bowl hunt.

Here are few tidbits which highlight the television popularity of the Super Bowl:

- - The last four Super Bowls have been the four most watched TV programs in U.S. history in terms of total viewers. The most watched is Super Bowl XLVI in 2012 with 111.3 million viewers. The "M*A*S*H" finale in 1983, long the standard bearer of most-watched programs, now ranks fifth all time, with 106 million viewers.
- - The Super Bowl averaged more than 50 million female viewers in 2013. Women make up about 35 percent of your typical regular season NFL game.
- - The highest-rated Super Bowl was in 1982 (49.1 percent of households) when the San Francisco 49ers beat the Cincinnati Bengals. It is the fourth highest-rated TV show ever, and the highest-rated sports show ever. (Who say's Californians are not rabid sports fans?!)
- - 18 of the 20 highest-ever rated sporting events have been Super Bowls. The lone exceptions were the two world

disparagement clauses in consumer contracts going forward and for future contract negotiations.

In addition, if your small business is experiencing issues or difficult with negative online consumer-based reviews, we encourage you to try consumer-positive methods of addressing these reviews, such as proactively monitoring review sites for negative criticism, responding to commentary directly and in a positive manner, and offering one-time free goods and/or services to gain a second chance at consumer impression. To discuss further information on the Yelp Bill, or if you have questions concerning your consumer contracts or online presence, please feel free to contact Bill Scherer at (wms@sfcounsel.com), Brandon Smith at (bds@sfcounsel.com), or Heather Sapp at (hgs@sfcounsel.com) to discuss in more detail.

- *Written by Heather Sapp*



the two women's figure skating events during the 1994 Winter Olympics. That was when Nancy Kerrigan faced off against Tonya Harding.

What are your Super Bowl plans? Are you hosting a party or attending one? Are you going to tape or DVR the game (and perhaps watch only the now infamous Super Bowl commercials) or watch it live? Or are you going to skip the event altogether and pounce on the opportunity to visit an uncrowded movie theater, museum or fancy restaurant during the game?

I, for one, have never viewed the Super Bowl as a can't miss event. And I love football. As a lifelong Raider fan (I know, it is hard to believe and I truly am a glutton for punishment) I missed watching the Raiders' last Super Bowl as I was flying back from Canada (from a ski trip, so don't feel too bad for me). For those with any interest, that was the 2002 Super Bowl. It was the Raiders' first Super Bowl in 19 years (when they beat the Redskins in 1983). Incidentally, 2002 was the last year the Raiders made it to the playoffs. Talk about a drought!

As it turned out, the Raiders got annihilated in that Super Bowl by their former head coach, Jon Gruden, and his Tampa Bay Buccaneers. Since I get a bit too worked up watching my team lose, I was truly relieved that I did not have to endure watching that game (and instead received the bad news via updates from the pilot on my return trip to the

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Bay Area).

To me, the Super Bowl represents a microcosm of our American culture.

Even the most ardent football fans with the team that they know and love playing in the game itself may choose to do something else simply because they can.

And, conversely, someone who has never attended, let alone watched an NFL game, may choose to host a Super Bowl party simply because that is the thing to do (and it is a great excuse for an afternoon party!)

What better way to show your American spirit. Choices like these are what make our society great.

So, I do hope you find a fun way to spend your Super Bowl Sunday, February 1, 2015. And remember your friends at Scherer Smith & Kenny LLP are here to help you on February 2nd and beyond (even if you might be feeling a little slow "the day after").

All the best to you and yours!

- Written by Denis Kenny