PERSPECTIVES

SCHERER SMITH & KENNY LLP
THE STRENGTH OF PARTNERSHIP

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October 2015

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.

Scherer Smith & Kenny is Going Green!

We are excited to announce that we are going paperless and will go live on January 1, 2016. Our paperless system will consist of maintaining all files in electronic format, with the exception of items that require paper originals or files to be maintained. In addition to being more environmentally sound, our system will allow us to save costs by reducing our paper usage and allow us to better serve our clients by accessing client files regardless of where we are working and quickly sending files when they are needed.

Employer Alert: Recurring and New Legislation for 2016

California is a minefield for employers, with every year bringing a flurry of proposed laws that require employers to be on-guard with possible new obligations. Two notable 2015 laws are discussed below followed by some of the more important 2016 laws.

1. California Paid Sick Leave

California's *Healthy Workplaces, Healthy Families Act of 2014* ("Paid Sick Leave Law," California Labor Code §§ 245.5, 246, and 247.5) went into effect on July 1, 2015. Several amendments have followed. Despite employers being prepared for the July 1, 2015, implementation date, the complexity of the Paid Sick Leave Law effectively requires employers to double or even triple-check that their existing sick leave or paid time off policies comply with the Paid Sick Leave Law and its amendments. Our firm previously outlined the terms and conditions of the Paid Sick Leave Law in our October 2014, *Perspectives* edition. We further discuss the post-amendment nuances in this current *Perspectives* edition.

2. *Mandatory "Abusive Conduct" Training*

Effective January 1, 2015, AB 2053 amended California's Fair Employment and Housing Act's ("FEHA") mandatory anti-harassment training requirements for employers with 50 or more employees to include training and education on the prevention of "abusive conduct." AB 2053 (amending California Government Code § 12950.1) defines "abusive conduct" to be "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."

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Partner Notes

Brandon Smith

One of my passions is open water swimming in the San Francisco Bay. I typically enter the water early Friday morning just before the sun rises, to join a group of 15-20 fellow swimmers. The water is cold, we don't wear wetsuits, and it's dark. Usually very cold and very dark. The water can be as low as 49 degrees during the spring snow melt. Sometimes some of the swimmers say it's "warmer", which means it's only bitterly cold. I love it though, because of the friendships, because it's exhilarating, and because it's an amazing way to start the morning. Being

AB 2053 provides examples of abusive conduct including "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."

Besides the vagueness and generality of the "abusive conduct" definition, the other head scratching part of AB 2053 is that the law does not prohibit the conduct when not connected to a protected identity, but requires training on the prohibited conduct. While it makes sense for employers to have a policy of general civility, does it make sense to mandate general civility by law? As AB 2053 stands, there is no enforcement procedures or liability for violations, giving new meaning to the saying, "All bark and no bite." Nonetheless, applicable employers must make sure to revise their handbooks and policies to avoid potential problems.

2016 Upcoming Legislation

As should be obvious, employers need to keep a watchful eye on upcoming legislation. With a few more months left in 2015, what could have been a flurry of new laws and obligations has turned into a trickle. The following are bills that have survived the gauntlet of the legislative process, having been signed by the Governor or awaiting the Governor's signature.

Bills Signed by the Governor

- *AB 1506 (Amendment to Labor Code Private Attorneys General Act of 2004)*

AB 1506 amends California's Labor Code Private Attorneys General Act of 2004 ("PAGA") (amending Labor Code §§ 2699, 2699.3, and 2699.5) to provide employers the right to "cure" certain missing information in an employee's wage statement before an employee can bring a civil action.

California Labor Code § 226(a) requires employers to provide semimonthly or at the time of each wage payment specific pieces of information with each itemized wage statement to their employees. If an employer fails to provide one of the specific pieces of information, the employee could bring a PAGA claim against his or her employer for violations of the Labor Code, including section 226(a), on behalf of himself or herself and other current or former employees. In essence, the employer could find themselves on the business end of a lawsuit or, worse case, a "class action light" situation. Some courts will assign lawsuits for PAGA claims to complex litigation departments.

AB 1506 tempers the threat of a PAGA lawsuit by giving employers the right to "cure" technical wage statement violations where the employer fails to provide (a) the inclusive date of the employee's pay period or (b) the name and address of the legal entity that is the employer. The employer's right to cure these specific violations is limited to once in a 12-month period.

Recommendation: while AB 1506 provides some breathing room, employers should make sure their wage statements provide all of the required information required by Labor Code § 226(a).

- *SB 358 (Fair Pay Act)*

California's Fair Pay Act, arguably one of the most aggressive laws in the nation, amends Labor Code § 1197.5 to bring more teeth to California's Equal Pay Act. The Fair Pay Act requires employers to pay male and female employees an equal pay rate where they perform "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." In plain English, this means that the Fair Pay Act targets wage disparity where the female and male employees perform substantially similar work but may have different job titles or work in different locations of the same employer.

While employers may wince at the thought that *every* wage differential is actionable, the Fair Pay Act makes clear that if the employer can show that the wage differential is reasonably based on one or more factors—seniority system, merit system, system that measures earnings by quantity or quality of production, or "bona fide" factors other than sex,

out in the water and looking back at the City lights also allows me to see the City from a different perspective.

Sometimes though events occur that cause you to pause and reflect on what you are doing and why. That happened for me recently-and you may have heard about this- when there was an incident in the Bay near Alcatraz (not that far from my usual morning swim) involving a rather large great white shark, a very unfortunate seal, and some very excited tourists. It was a good, if not scary, reminder that our passions are not without risks. We live in a wild world despite the biggest risk often being dodging a bike messenger or a ubiquitous double parked car service.

It's easy to get caught up in the routine of work and the day-to-day stress of everyday life. These moments serve to help us pause, look up and reevaluate how we spend our time, who we spend it with, and why we are spending it that way. It reminded me to take the extra time with my twin girls in the morning before school and work to connect with them, even in a small way before we rush off to our busy days. I urge you all to do that from time to time, whether one of these life pausing moments happens to you or just when you find yourself waiting for the bus, sitting at a traffic light or walking to lunch.

At Scherer Smith & Kenny we try to do that on a regular basis by gathering all of the firm together to reconnect and to talk about things in our lives other than the

such as education, training, or experience consistent with "business necessity"—then the subject wage differential does not violate the law. But employers should note that the "bona fide factor" defense will not apply if the employee can show that an "alternative business practice exists that would serve the same business purpose" but would not produce the wage differential.

In addition to the Fair Pay Act's antidiscrimination provision, the Act prohibits employers from discriminating or retaliating against an employee who discloses the employee's own wages, discusses wages with others, inquiries about another's wages, or aids or encourages another employee in exercising his or her rights under the law.

The Fair Pay Act also extends the record keeping retention requirement from two to three years.

Recommendation: evaluate wage rates to make sure you will not be a target of a lawsuit, document reasons for any system used to set wage rates, maintain records for three years, and do not retaliate or discriminate employees regarding activities surrounding wages.

- *AB 359 (Grocery Workers)*

AB 359 adds to the Labor Code by seeking to protect certain grocery workers in stores of at least 15,000 square feet from being fired during a 90-day transition period if the grocery store is undergoing a change of ownership. Following the transition period, the new employer must provide a written performance evaluation and consider an offer of continued employment following a satisfactory evaluation. Specifically, if the worker's performance during the 90-day transition employment period is satisfactory, the successor grocery employer must "consider offering the eligible grocery worker continued employment." Employers would retain the right to terminate an employee for cause at any time during and following the transition period, however.

The law does not apply to managerial or supervisory grocery workers. There are also exceptions to the law including whether the subject store location is known as a "food desert" (designated and defined by the U.S. Department of Agriculture as certain urban neighborhoods and rural towns without ready access to fresh, healthy and affordable foods). Some cities already have similar laws on the books including San Francisco and Los Angeles. If these laws may apply to your business, please consult with experienced legal counsel before any business merger or acquisition.

- *AB 987 (Employment Discrimination and Retaliation)*

AB 987 amends FEHA to prohibit an employer from retaliating or discriminating against an employee who requests an accommodation for the employee's disability or religious belief, regardless of whether the employer grants the accommodation.

Recommendation: amend policies and handbooks regarding these forms of discrimination or retaliation .

Advice Going Forward

California is a land of opportunity. While businesses want to focus on the things that inspired them to start businesses, businesses should not forget the hat they wear as employers and their obligations to their employees. As the winter season approaches, employers should consider evaluating their current policies in light of the upcoming legislation so that they can enter the New Year with a clear plate.

Please contact Denis Kenny at dsk@sfcounsel.com, Ryan Stahl at rws@sfcounsel.com, or John Lough, Jr. at jbl@sfcounsel.com for more information on upcoming laws that may affect your workforce.

- Written by John Lough, Jr.

Paid Sick Leave Amendments: Clarifying and

day to day projects we're all busy with.

I haven't been back in the water yet after that incident but I'm sure I'll go back in soon, just with a slightly different perspective.

- Written by Brandon Smith

Providing More Options to Employers

On July 1, 2015, the long-anticipated California's *Healthy Workplaces, Healthy Families Act of 2014* ("Paid Sick Leave Law") went into effect. In our October, 2014, *Perspectives* Newsletter, *California to Require Paid Sick Leave Beginning July 2015*, our firm details an employer's obligations under the new law. But like any new law, confusion quickly arose on how to implement parts of this new Paid Sick Leave Law.

To address some of the confusion, less than two weeks after California's Paid Sick Leave Law went into effect, the Governor signed AB 304. Effective immediately, AB 304 gives employers more options in calculating sick leave accrual, increases the permutation of 12-month periods that an employer can limit an employee's use of paid sick leave, and clarifies an employer's reporting requirements, among other things.

Accrual Method Options

Beside the one (1) hour per thirty (30) hours accrual method and up-front grant, AB 304 adds two more accrual options. First, an employer may use an accrual method different from the "1 for every 30 hours" accrual method so long as the different accrual method is calculated on a regular basis *and* the employee has no less than twenty-four (24) hours of accrued sick leave by the 120th calendar day of employment, each calendar year, or in each 12-month period. Second, the employer may use a delayed front-loaded method for sick leave accrual. The employer may satisfy the accrual requirement by providing, at a minimum, twenty-four (24) hours or three (3) days of paid sick leave to an employee by the employee's 120th calendar day of employment. AB 304 gives employers more flexibility in calculating accrual rates for paid sick leave.

Grandfathered Policies with Slower Accrual Methods

If an employer had a paid sick leave or paid time off policy before January 1, 2015, that provides a slower accrual method than "1 hour for every 30 hours" worked, AB 304 allows employers to grandfather these policies under the Paid Sick Leave Law. This grandfathering comes with a caveat, though. These pre-January 1, 2015, policies must meet a precise set of requirements. First, the accrual must be on a regular basis. Second, the policy must provide at least one (1) day or eight (8) hours of accrued sick leave or paid time off within three (3) months of employment each calendar year or 12-month period. And, third, the employee must be eligible to earn at least three (3) days or twenty (24) hours within nine (9) months of employment.

While AB 304 provides a safe haven for pre-January 1, 2015, paid sick leave/PTO policies with slower accrual methods, the safe haven comes with a serious condition. If the employer modifies this grandfathered accrual method, then the employer needs to comply with the current accrual methods under the Paid Sick Leave Law.

Limitations on Sick Leave Usage

AB 304 expands the permutations of 12-month periods in which an employer may limit an employee's use of paid sick leave. An employer may limit an employee's use of accrued paid sick leave to twenty-four (24) hours or three (3) days in each year of employment, calendar year, or 12-month period. These permutations allows an employer to choose the best method that aligns with its current method for other forms of leave.

Reinstatement

AB 304 clarifies that while employers must reinstate accrued, unused paid sick leave for employees rehired within a year of that employee's separation, the employer does not have to reinstate any accrued paid sick that was paid out at the time of the employee's initial separation, for example, if the employer paid out the employee's PTO. Please note that paid sick leave is *not* required to be paid out unless rolled into a PTO policy (under which California law requires accrued, unused PTO be paid out like vacation upon employment separation).

Recordkeeping

AB 304 simplifies some of the recordkeeping demanded from employers. Some employers provide their employees unlimited paid

sick leave, so these employers were left baffled on how to provide notice to their employees of the amount of leave available. AB 304 allows employers to satisfy the notice requirement by simply noting "unlimited" on their employee's itemize wage statement. Further, employers are not required to inquire into or record for what purpose an employee takes paid leave.

As can be seen with the rollout of the California's Paid Sick Leave Law, the employment law terrain is ever-shifting and arguably a minefield for employers. Not only do employers need to navigate the state law, but they need to assess their compliance with local ordinances in cities like San Francisco, Oakland, and Emeryville. Specifically, as with minimum wage laws, employers must adhere to the most employee-friendly provisions of both California and local ordinances concerning paid sick leave. Employers should schedule time to give their employment policies a regular, healthy check-up. The time spent evaluating current policies and ensuring employees understand their rights and obligations translates into preventing unnecessary litigation costs down the road.

We at Scherer Smith & Kenny remain available to answer any questions you may have about California's Paid Sick Leave or any other employment- or business-related legal matter.

Please contact Denis Kenny at dsk@sfcounsel.com, Ryan Stahl at rws@sfcounsel.com, or John Lough, Jr. at jbl@sfcounsel.com for more information.

- Written by John Lough, Jr.

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