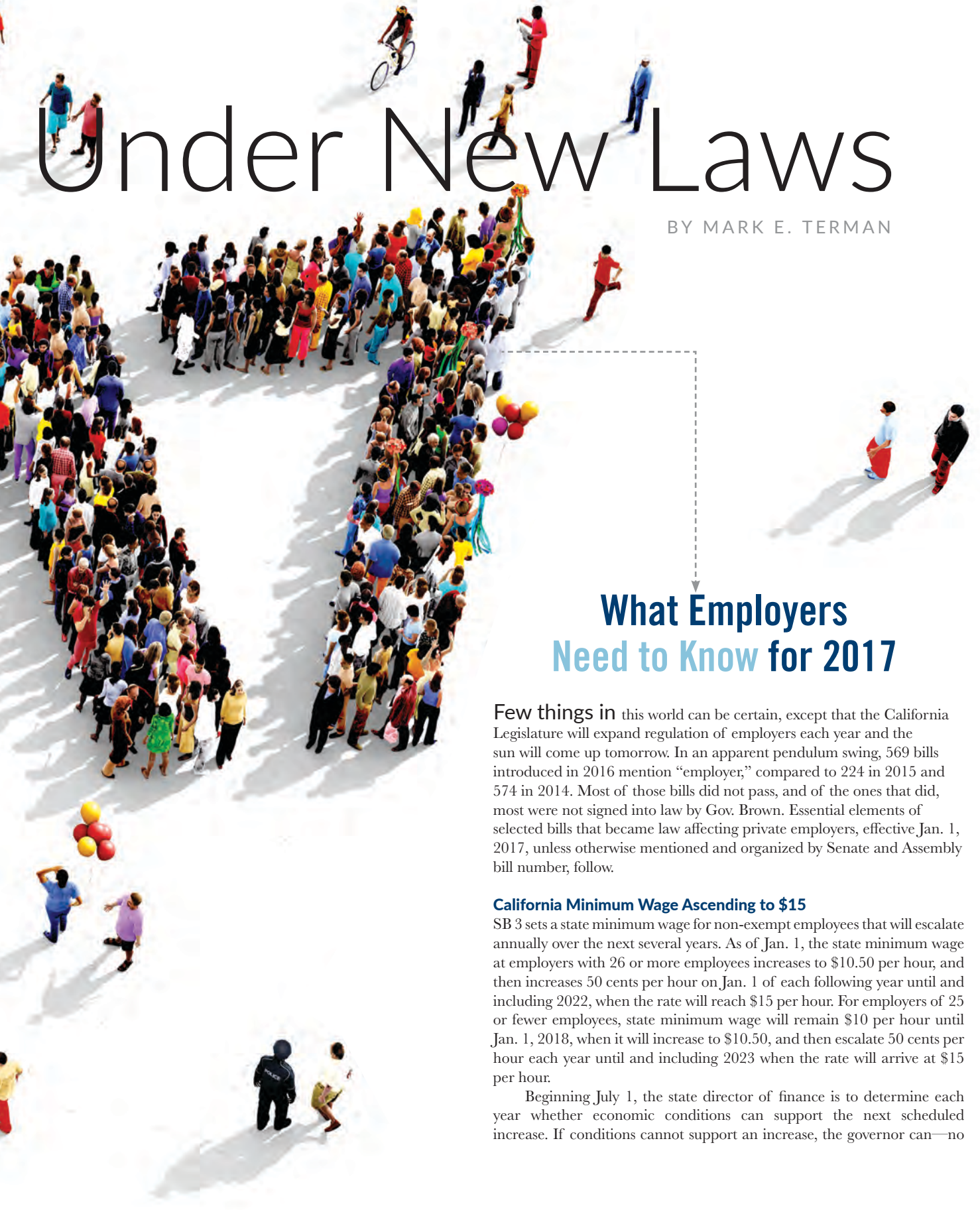
Laboring

Under New Laws

BY MARK E. TERMAN



What Employers Need to Know for 2017

Few things in this world can be certain, except that the California Legislature will expand regulation of employers each year and the sun will come up tomorrow. In an apparent pendulum swing, 569 bills introduced in 2016 mention "employer," compared to 224 in 2015 and 574 in 2014. Most of those bills did not pass, and of the ones that did, most were not signed into law by Gov. Brown. Essential elements of selected bills that became law affecting private employers, effective Jan. 1, 2017, unless otherwise mentioned and organized by Senate and Assembly bill number, follow.

California Minimum Wage Ascending to $15

SB 3 sets a state minimum wage for non-exempt employees that will escalate annually over the next several years. As of Jan. 1, the state minimum wage at employers with 26 or more employees increases to $10.50 per hour, and then increases 50 cents per hour on Jan. 1 of each following year until and including 2022, when the rate will reach $15 per hour. For employers of 25 or fewer employees, state minimum wage will remain $10 per hour until Jan. 1, 2018, when it will increase to $10.50, and then escalate 50 cents per hour each year until and including 2023 when the rate will arrive at $15 per hour.

Beginning July 1, the state director of finance is to determine each year whether economic conditions can support the next scheduled increase. If conditions cannot support an increase, the governor can—no

more than twice—temporarily postpone the increase schedule for a year. After the final scheduled escalation year, the state minimum wage can remain the same or increase based on any increase in consumer inflation as determined by the director.

Changes in state, but not local, minimum wage also impact classification of most exempt workers. In addition to strict "duties tests" for administrative, executive and professional wage and hour exemptions, a salary of at least twice the state minimum wage must be paid to meet the "salary basis test." As of Jan. 1, the annualized salary rate that employers with 26 or more employees must pay to meet the exempt salary requirement will advance to $43,680, up from $41,600.

For employers with smaller workforces, the $41,600 amount of the exempt salary requirement will remain in place until Jan. 1, 2018, when it will move up to $43,680. With each escalation, the required salary also will rise. At a $15 state minimum wage, the exempt salary requirement will be $62,400.

Also affected by SB 3 is the retail, inside-sales exemption, which requires employees be paid at least 1.5 times the state minimum wage, and at least half of their other earnings be from commissions.

At the same time, the trend of municipalities creating and increasing their own minimum wage for companies that have employees working in their jurisdiction continues. For example, by July 1, the city and the County of Los Angeles require employers with 26 or more employees to raise the local minimum wage to $12 per hour, up from $10.50, and then comply with other scheduled annual increases up to $15 per hour by July 1, 2020. Los Angeles employers with fewer employees, or nonprofit corporations who obtain approval to pay a deferred rate, do not start paying more than the state minimum wage until July 1, 2018.

Minimum wage for employees in San Francisco will increase to $14, up from $13, on July 1, 2017. Many other cities—including Berkley, Oakland, Malibu, Santa Monica, El Cerrito and San Diego—have enacted local minimum wage laws. In addition, living-wage laws may require higher minimum wages be paid as a condition of contracting with local, state or federal agencies. Employers should monitor each of the requirements to assure compliance.

As of press time, a federal court enjoined implementation of a new federal rule that would have increased by Dec. 1, 2016, the salary basis requirement for exempt workers status under the Fair Labor Standards Act to $47,476. This would have been higher than the California exemption salary amount will be for at least two years. For now, California employers are not legally required to either increase salaries to satisfy this federal exemption rule or to reclassify employees as non-exempt.

No Sunset on Overtime Pay for Personal Attendant Domestic Workers

The Domestic Worker Bill of Rights (AB 241) added Labor Code Sec. 1454, effective Jan. 1, 2014, (and caused amendment to Wage Order 15-2001). It entitles a domestic work employee who is a "personal attendant" overtime pay at the rate of one-and-one-half times their regular rate of pay for hours worked in excess of nine hours in any workday or more than 45 hours in any workweek. A domestic worker who spends at least 80 percent of his or her time supervising, feeding and dressing a child or person who needs assistance due to advanced age, physical disability or mental deficiency is considered a personal attendant. SB 1015 removes a Jan. 1, 2017, sunset provision from the law. As such, these overtime rules will remain in effect into the future.

Immigration Related Unfair Practices Expanded

SB 1001 adds Labor Code Sec. 1019.1 to existing prohibitions of unfair immigration practices. This bill constrains employers, who are verifying that workers have the necessary documentation to lawfully work in the United States, from requesting of such workers more or different documents than are required under federal law, refusing to honor documents tendered that on their face reasonably appear to be genuine, refusing to honor documents or work authorization based upon the specific status or term of status that accompanies the authorization to work, or reinvestigating or re-verifying an incumbent employee's authorization to work using an "unfair immigration practice." Applicants and employees may file a complaint with the Division of Labor Standards Enforcement. Any person who is deemed in violation of this new law is subject to a penalty imposed by the labor commissioner of up to $10,000, among other relief available.

Wage Anti-discrimination Law Now Applies to Race and Ethnicity

Under the Fair Pay Act in effect since Jan. 1, 2016, employers are prohibited from paying an employee at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions.

The Fair Pay Act provides for exceptions such as, the wage differential is based upon one or more of the following factors:

1. A seniority system;
2. A merit system;
3. A system that measures earnings by quantity or quality of production; and
4. A *bona fide* factor other than sex, such as education, training or experience.

The later factor will apply if the employer shows that the factor is not the result of a sex-based differential in compensation, is job related to the position, and is consistent with business necessity.

Existing law affords agricultural workers who work more than 10 hours per day overtime pay at one-and-one-half times the regular rate of pay.

SB 1063 amends Labor Code secs. 1197.5 and 1199.5 to expand requirements of the Fair Pay Act to employees' race or ethnicity, in addition to gender. In other words, the same rules now apply to prohibit wage differential based on race or ethnicity. Like existing Fair Pay Act sex-based prohibitions, the amendment bans employers from discriminating or retaliating against employees who report or assist with others' affected by race or ethnicity-based wage differentials; provides the same enforcement rights; and includes protections for employees to disclose, inquire or discuss wages.

AB 1676 amends the Fair Pay Act (Labor Code Sec. 1197.5) to provide that an employee's "prior salary shall not, by itself, justify any disparity in compensation" under the *bona fide* factors above.

At a $15 state minimum wage, the exempt salary requirement will be $62,400.

Non-California Choice of Law and Forum in Employment Contracts Voidable

SB 1241 adds Labor Code Sec. 925 to prohibit employers from requiring an employee who primarily resides and works in California, as a condition of employment, to enter into agreements (including arbitration agreements) to:

- Adjudicate claims arising in California in a non-California forum; or
- Deprive the employee of the substantive protection of state law during a controversy arising in California.

Any provision of a contract that violates this new law is voidable by the employee, the dispute will be adjudicated in California under California law and the employee is entitled to recover reasonable attorneys' fees incurred enforcing Sec. 925 rights. This section applies to any contract entered into, modified or extended on or after Jan. 1, 2017.

There's an exception to Sec. 925: It does not apply to any contracts with an "an employee who is in fact individually represented by legal counsel in negotiating the terms of an agreement to designate either the venue or forum in which a controversy arising from the employment contract may be adjudicated or the choice of law to be applied." Thus, in the case of more executive-level employees, who often retain independent counsel to negotiate employment agreements, employers may still be able to make use of forum-selection and choice-of-law provisions.

Workplace Smoking Restricted Further

California law already prohibited smoking of tobacco products inside an enclosed place of employment for certain employers. ABX2-7 amends Labor Code Sec. 6404.5 to expand that enclosed space prohibition to all employers of any size, including a place of employment where the owner-operator is the only employee. "Enclosed space includes covered parking lots, lobbies, lounges, waiting areas, elevators, stairwells and restrooms that are a structural part of the building." A "place of employment" does not include:

- 20 percent of the guestroom accommodations in a hotel, motel or similar transient lodging establishment;
- Retail or wholesale tobacco shops and private smokers' lounges;
- Cabs of "motortrucks" or truck tractors;
- Theatrical production sites, if smoking is an integral part of the story in the theatrical production;
- Medical research or treatment sites, if smoking is integral to the research and treatment being conducted;
- Private residences, except licensed family day care homes; and
- Patient smoking areas in long-term health care facilities.

Violations are punishable by a fine not to exceed $100 for a first violation, $200 for a second violation within one year and $500 for a third and for each subsequent violation within one year.

Overtime Pay Increasing for Agricultural Workers

Existing law affords ag workers who work more than 10 hours per day overtime pay at one-and-one-half times the regular rate of pay. AB 1066 (Phase-In Overtime for Agricultural Workers Act of 2016) amends Labor Code Sec. 554 to, among other things, provide a gradual phase-in of overtime pay expansion to agricultural workers.

For employers with 26 or more employees, beginning Jan. 1, 2019, and continuing until Jan. 1, 2022, the phase-in provides for annual reduction of the daily overtime threshold by a half-hour per day until reaching eight hours, and the weekly overtime trigger by five hours per week until reaching 40 hours. As such, on Jan. 1, 2019, agricultural workers working more than 9.5 hours per day or in excess of 55 hours in any one workweek are to receive overtime pay at one-and-half times their regular rate of pay.

By Jan. 1, 2022, the annual phase-ins will conclude with agricultural workers working more than eight hours per day or in excess of 40 hours in any one workweek receiving overtime pay at one-and-half times their regular rate of pay. In addition, beginning Jan. 1, 2022, agricultural workers working more than 12 hours per day are to receive overtime pay at twice their regular rate of pay.

Finally, this bill authorizes the governor to delay the implementation of the phase-in schedule if he or she also suspends the implementation of the scheduled increase in the California minimum wage (see, Minimum Wage Ascending, above). For employers with 25 or fewer employees, the phase-in schedule begins on Jan. 1, 2022, and continues annually through Jan. 1, 2025.

All-gender, Single-user Restrooms

By March 1, 2017, AB 1732 requires all single-user toilet facilities in any business establishment, place of public accommodation or government agency to be identified with signage as all-gender toilet facilities. For the purposes of this section, "single-user toilet facility" means a toilet facility with no more than one water closet and one urinal with a locking mechanism controlled by the user. This bill also allows inspectors, building officials or other local officials responsible for code enforcement to inspect for compliance.

More Restriction on Criminal History Inquiry of Job Applicants

Under existing law, an employer cannot ask an applicant about

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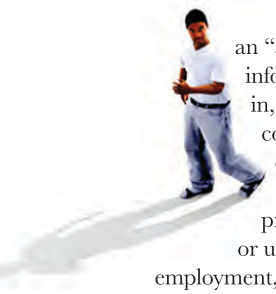


an "arrest or detention that did not result in conviction, or information concerning a referral ;to, and participation in, any pretrial or post-trial diversion program, or concerning a conviction that has been judicially dismissed or ordered sealed pursuant to law."

AB 1843 amends Labor Code Sec. 432.7 to prohibit employers from asking applicants to disclose, or using as a factor in determining any condition of employment, information concerning or related to "an arrest, detention, process, diversion, supervision, adjudication or court disposition that occurred while the person was subject to the process and jurisdiction of juvenile court law."

This bill also alters the definition of "conviction" to exclude "any adjudication by a juvenile court or any other court order or action taken with respect to a person who is under the process and jurisdiction of the juvenile court law." In addition, this bill contains some exceptions for health care facilities involving final adjudications of recent sex crimes and specified controlled substances crimes.

More Talent Services Act Artist Protection

AB 2068 amends Labor Code secs. 1703 and 1703.4 to provide further protect of artists' information and photographs in any form of communication, such as "an online service, online application, or mobile application of the talent service or one that the talent service has the authority to design or alter."

AB 2068 also requires:

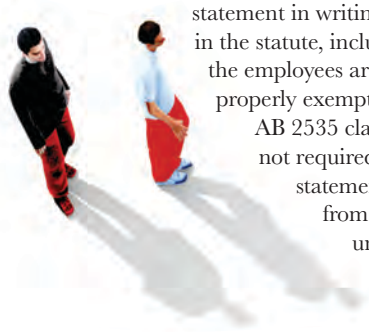
- The talent service to act, within 10 days, on requests of the artist made by any form of electronic communication, including text messages, to remove information or photographs from the talent service's website, online service, online application or mobile application (collectively "electronic medium") or an electronic medium the talent service has the authority to design or alter; and
- That the artist may cancel the contract within 10 business days from the date of the talent service contract or the date on which the artist commences utilizing the services under the contract, whichever is longer.

Domestic Violence, Sexual Assault or Stalking

By July 1, 2017, AB 2337 requires employers with 25 or more employees to provide specific information in writing to new employees upon hire, and to other employees upon request, of their rights to take off time from work and not suffer adverse employment action from doing so under Labor Code Sec. 230.1 (relating to victims of domestic violence, sexual assault or stalking). This bill also requires that, on or before July 1, 2017, the labor commissioner develop and post on its website a compliant form of notice that employers may elect to use. Employers are not required to comply with the notice requirement until the labor commissioner posts the form.

Wage Statement Requirement for Exempt Employees

Labor Code sec. 226 requires employers to provide their employees along with each paycheck an accurate itemized statement in writing containing information listed in the statute, including hours worked, unless the employees are paid solely a salary and are properly exempt from overtime.



AB 2535 clarifies that hours worked are not required to be recorded on wage statements of employees exempt from minimum wage and overtime under a specified exemption for: executive, administrative or professional employees; the "outside sales" exception; salaried computer professionals; parents, spouses, children or legally-adopted children of the employer; directors, staff and participants of a live-in alternative to incarceration rehabilitation program for substance abuse; crew members employed on commercial passenger fishing boats; and national service program participants. This bill does not change the requirement to include total hours worked by non-exempt employees in their itemized wage statements for each pay period.

Bond Required to Contest Minimum Wage Citation

Labor Code Sec. 1197.1 authorizes the labor commissioner to issue, upon inspection or investigation, a citation against an employer who has paid its employees less than the minimum wage. The citation must specify the nature of the violation, and the labor commissioner is to take steps to enforce the citation and to recover the civil penalty assessed, wages, liquidated damages and waiting time penalties.

An employer can contest a citation through the superior court. AB 2899 amends the statute to require that, prior to contesting a citation, the employer must post a bond with the labor commissioner in an amount equal to the unpaid wages assessed under the citation, excluding penalties. The bond must be in favor of the employee and will be forfeited to the employee if the employer fails to pay the amounts owed within 10 days from the conclusion of the proceedings if the citation is not reversed.

What's Next?

Employers should consider how these new laws impact their workplaces, and then review and update their personnel policies and practices with the advice of experienced attorneys or human resource professionals.

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