

HR in the New Administration

The More Things Change, The More Some Things Stay the Same in California

By Spaulding McCullough & Tansil LLP

Although uncertainty has plagued employers trying to understand the new administration, California remains the most employee-protective state in the country; that won't change under the Trump Administration. While there will continue to be changes to federal employment laws, employers should focus on the more strict California laws that nearly always "trump" federal law when it comes to protection of California employees. At the same time, changes in immigration and health insurance laws can greatly impact California employers, so changes there may have substantial impact.

Some federal law proposals under the Trump Administration and potential costly mistakes to avoid in California include:

Changes in Overtime Standards and Exempt Status Tests: The Trump Administration is proposing changes that would limit overtime and lower the standards for establishing exempt status under federal law. These changes would NOT apply to non-exempt employees in California if they are less employee-friendly or result in lower overtime pay. Employers should continue to watch these changes and check both state and federal law carefully before classifying employees as exempt.

Changes in Discrimination Laws: The Trump Administration has proposed denying employee protections related to gender identification and sexual orientation, and this list may expand. California employees retain protected status no matter what position is taken by the Trump Administration, because California law is more protective of employees in this area.

Immigration/Legal Work Status: Immigration is a federal law issue. Changes in these laws and Administration enforcement policies will impact California employers and employees. It is important for California employers, particularly those who traditionally employ more immigrant employees (agriculture, hospitality, construction, manufacturing), to

be prepared for a surprise inspection by Immigration and Customs Enforcement (ICE). Also, a new I-9 Form is required for employees hired after September 18, 2017. While the actual ICE enforcement level remains to be seen, California employers are already experiencing the impacts of labor shortages and the loss of experienced employees. These changes, along with potential cuts to legal immigration, will continue to impact employers' ability to recruit and retain skilled employees. Wise employers will take steps to enhance recruiting and retention practices to ensure that they remain competitive and in legal compliance.

Health Insurance as an Employee Benefit: We would not be so foolish as to predict the final outcome of any changes in the Affordable Care Act other than to say that this is a legal and budgetary issue California employers need to continue to watch.

In these times of uncertainty, the following "certainties" still require close attention by California employers:

Final Pay: Federal law doesn't require immediate final pay, but California employers must deliver final pay on the last day worked (or within 72 hours under limited circumstances). Unlike federal law, final pay in California must include accrued vacation/PTO. Violations carry hefty penalties, up to a maximum of 30 days' pay, so timely payment is critical.

Rest and Meal Breaks: Federal law doesn't require breaks, but California rest and meal break law is strict. Issues arise when employers don't "authorize and permit" rest breaks and "provide" meal breaks, or don't properly document that an employee chose not to take a break. Employers should adopt and enforce written time-keeping and break policies, utilize signed waivers, and train supervisors and staff.

Misclassifying Employees as Exempt: While employees must be paid on a salary basis to be exempt from overtime and

break requirements, simply putting an employee "on salary" isn't enough. Both salary and duties tests must be met to classify an employee as exempt. California law requires that exempt employees spend more than half their time performing exempt duties, a requirement that doesn't exist under federal law. Misclassification can result in claims for unpaid overtime, penalties, interest and attorneys' fees. Uncertain employers should conduct a self-audit with the advice of counsel.

Misclassifying Workers as Independent Contractors: While the Administration has given indications of loosening enforcement on this issue, California government agencies are aggressively pursuing employers who contract with individuals to perform services as independent

contractors, rather than as employees. If misclassified, such employers risk liability for work-related injuries, payroll taxes, criminal/civil sanctions, personal income tax, and penalties. California law presumes a worker is an employee and the burden to prove independent contractor status is on the hiring party. The independent contractor test is complex, so either classify the worker as an employee, or seek legal counsel about the independent contractor issues before hiring.

The Trump Administration has changed or caused uncertainty about the future of certain federal employment laws. California employers need to be aware of the changes, while still making sure they are in compliance with California's far stricter employment laws.

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