




**California 2016 Employment Law Update**  
**San Diego Association of Health Underwriters**

Presented by: Christopher W. Olmsted



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**California Minimum Wage**

- Jan. 1, 2016: \$10
- More to come?



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**Federal Regulations**

**FLSA Salary Basis**

- \$455/wk → \$970/wk
  - \$50,440/year minimum
- HCE: to \$122,148 per year
- Final Rule Expected mid-2016



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## San Diego Ordinance (Proposed)

On voter ballot June 2016

If approved by San Diego voters:

- (1) Minimum wage to \$10.50 in June, 11.50 in January 2017, and COLA increases beginning 2019.
- (2) Sick pay: up to 5 days / 40 hours per year (more generous than California law).



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## AB 1513 Piece Rate

Severe limitation on piece rate wages:

- Employees must be separately compensated for **rest and recovery breaks**. Paid at greater of minimum wage or average hourly wage for the week.
- Also compensated for “**nonproductive time**” as defined by statute.
  - Or, pay minimum wage for all hours plus piece rate.



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## AB 1513 Piece Rate

- Provides a “fix it” for all past violations from 7/1/12 through 12/31/15.
- Requires employers to provide written notice to piece rate employees
  - Total hours compensable rest / recovery time
  - Rate of compensation
  - Gross wages paid for those periods

**To Do:** Reconsider paying piece rate.



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## SB 588 – DLSE Enforcement Power

- Adds Labor Code §§96.8, 238, 238.1-238.5, 558.1
- Gives Labor Commissioner power to collect!
  - Levy bank accounts
  - Levy assets
  - Liens on property
- Issue **Stop Order**



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## SB 588 – DLSE Enforcement Power

- Employer must **pay, post bond** or, **stop** business
- \$5,000 owed to employee?
  - \$50,000 bond!
- \$10,000 owed to employee?
  - \$100,000 bond!
  - or –
- Payment plan agreed with employee!



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## SB 588 – DLSE Enforcement Power

- Wage liability extends to owner, director, officer, or **managing agent (HR?)** who caused violation
- Conducting business in violation can result in fines up to \$100,000
- Employees paid for 10 days after shutdown!



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## AB 970 – DLSE Enforcement Power

- Amends Labor Code §§558, 1197, 1197.1, 2802
- Labor Commissioner can enforce local wage laws
  - City of San Francisco
  - City of San Diego?
- Adds citation power for cost reimbursement (§2802)



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## AB 1506 PAGA Amendment

- Employer's Right to Cure
  - Limited to correction of pay stubs re pay period dates and name of employer.
  - Available once each 12 months
- Result is no PAGA lawsuit.



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## SB 358: Fair Pay Act

- Targets gender-based wage differentials by expanding California's Equal Pay Act
- Equal pay for "equal work" changed to "substantially similar work"
- "At same establishment" dropped, so that comparisons may now be made between employees at different worksites.

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## SB 358: Fair Pay Act

- Pay differentials based on “bona fide factors” must be job related, consistent with business necessity, applied reasonably, and account entirely for any wage differential.
- Employee right to discuss wages and ask other employees about pay rates. (Company not obligated to disclose.)

**To Do:** Wage audit, restructure pay policies.



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## Healthy Workplaces, Healthy Families Act of 2014



### AB 304

- Accrual reach 24 hrs by 120<sup>th</sup> day (alternative to 1 hr/30 worked)
- Lump sum allocation must be given to new employees by 120<sup>th</sup> day.
- Pay out at “regular rate” or 90 day average.



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## Independent Contractors

### DOL Interpretation letter July 2015

- the work performed is an integral part of the employer’s business (emphasis);
- the worker’s managerial skill affects the worker’s opportunity for profit or loss;
- the worker is retained on a permanent or indefinite basis;
- the worker’s investment is relatively minor as compared to the employer’s investment;
- the worker exercises business skills, judgment, and initiative in the work performed; and
- the worker has control over meaningful aspects of the work performed.



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## Wage & Hour

*Alvarado v. Dart Container Corp*

Employee paid daily flat sum bonuses for working a full Sat or Sun shift. OT on bonus owed and properly paid:

- (1) Total regular pay for the workweek (including attendance bonuses); plus OT hours at straight hourly rate; divided by total hours worked (= "regular rate")
- (2) OT hours x "regular rate"; divide by half to obtain the overtime premium amount.

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## Wage & Hour

*Integrity Staffing Solutions, Inc. v. Busk*

- Warehouse security screen
  - 30 minutes a day?
  - 9<sup>th</sup> Circuit: Compensable
- SCOTUS
  - Not "integral and indispensable" to job
- California result?




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## Retaliation

### *Cardenas v. M. Fanaian, D.D.S., Inc.*

- Employee suspects co-worker stole wedding ring, reports to police
- Employer bothered, fires employee
- Labor Code §1102.5: Employer may not retaliate for reporting to law enforcement or other government agency
- Court: Any report of a violation of law, not just about the employer
- **To Do:** Carefully evaluate before taking adverse action against employee who has made a report regarding violation of law



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## Age Discrimination

### *France v. Johnson (Federal 9<sup>th</sup> Circuit)*

- How much older must the employee be than his or her replacement to create a presumption that age is a factor in the termination?  
**10 years or more.**
- Less = a rebuttable presumption that difference is insubstantial.



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## Disability Discrimination

### *Higgins-Williams v. Sutter Medical Foundation*

- Stress = “disability” under CA disability law (FEHA)?  
**Possible if makes the “major life activity” of “working” more difficult.**
- What if the stress is caused by working for a particular supervisor?  
**No.**



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## Harassment

### *Hirst v. City of Oceanside*

- Do FEHA's anti-harassment protections apply to claims by contractors rather than employees?

Yes.

### *Pryor v. United Airlines, Inc. (Federal 4<sup>th</sup> Circuit)*

- Can there be liability for harassment where the harassment is anonymous and there is no proof that the employer caused it?

Yes.



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## Arbitration

### Key Takeaways:

- Distribute arbitration agreements with class action waivers
- PAGA claims are exempt from waiver
- Agreements must be carefully drafted to avoid unfair terms
- Consider giving arbitrator (rather than court) authority to decide whether agreement is enforceable



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## Other Trends

- FCRA credit check class actions
- Suitable seating class actions
- PAGA litigation (the ongoing saga)
- California minimum wage increase, and more sick pay
- Expansion of local ordinances – sick pay, minimum wage, others)
- Marijuana legalization?



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