

# 2015 California Employment Laws\*

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\*This is a summary of the law, and not intended as legal advice. Please consult an attorney for advice on specific legal questions.



# Law Barring Staffing Agencies From Self-Insuring Upheld

- Under California Labor Code Section 3701.9 , staffing agencies are forbidden from receiving the certificates after January 2013, and all outstanding certificates were to be revoked in January 2015.
- Staffing agency appealed a trial court's dismissal of its lawsuit challenging the law. The Appeals court upheld the law, finding that a rational basis exists for treating temporary services employers and leasing employers differently than others.
  - While staffing agencies' income and profit grows as its payroll expands, worksite employers do not have the same incentive to expand so rapidly because it does not immediately generate earnings with each new hire, the state argued.
  - "The potential for a rapid increase in the number of employees, coupled with the delay in adjusting the amount of the self-insurance security deposit, is a rational basis for excluding TSE's and LE's from the workers' compensation self-insurance program," the judges said in the opinion.

# Overview of New Contractor Law



- **AB 1897** -- Businesses are liable to workers supplied by labor contractors (including temporary and other staffing agencies) when those labor contractors fail to:
  - correctly and completely pay wages to the worker, or
  - provide workers' compensation insurance coverage.
- Prohibits shifting liability for Cal-OSHA compliance to labor contractor for workers supplied by the labor contractor.
- Effective January 1, 2015; added to Lab. Code as § 2810.3.
- Before the new law, a worker supplied by a labor contractor is required to prove the existence of a “joint” or “co-employment” relationship to impose liability on the business.
- New law makes it unnecessary for employee to prove “joint employment” for failure to pay wages or secure workers' compensation insurance. One less hurdle....

# Contractor Law: Applicability – Defined Terms

- Applies to businesses...
  - with 25 or more employees (counting those supplied by the contractor),
  - that obtains or is provided five (5) or more workers “at any time,”
  - to perform labor within the “usual course of business.”
  
- “Labor Contractor” is defined as...
  - an individual or entity,
  - that supplies, either with or without a contract, a client employer with workers,
  - to perform labor within the client employer’s usual course of business.
  - Does *not* include employees covered by labor unions
  
- “Worker” is defined to *not include*
  - those “properly classified” as exempt from overtime.
  
- “Usual Course of Business” is defined as, “regular and customary work” of the client employer’s business.
  - Restaurant would not be liable for the wages of a plumber who is brought onsite to repair a plumbing issue, but would be liable for the wages of servers provided by a temporary agency for a banquet event.

# Contractor Law: Indemnity?

- Businesses using workers from labor contractors are liable to such workers for unpaid wages, even if they have already fully paid the labor contractor.
- Businesses should ensure that labor contractors' service agreements provide for *indemnification* for:
  - Liability – i.e., the labor contractor's violations of laws; and
  - Legal fees and costs incurred in defending against such claims.
- Indemnity only valuable if labor contractor can fulfill its indemnity obligation – i.e., consider the contractor's financial ability to defend claims.
- Unclear if “wage violations” under the new law will be interpreted to include meal and rest break violations.
- Unclear to what extent employee-side attorneys will use the new law to add defendants to claims.
- Unclear to what extent workers' compensation carriers will seek to bar claims from workers provided by a labor contractor to the insured company.

# Contractor Law: Practical Guidance

- Carefully select *new* labor contractors and reevaluate *existing* contractor relationships, focusing on the contractor's compliance with relevant labor laws, especially re: payment of wages.
  - When the financial viability of a contractor is in question, businesses may wish to consider hiring workers directly.
- Monitor *existing* labor contractors to ensure compliance with relevant labor laws. Periodic audits of time records, pay stubs, and workers' compensation insurance certificates may be useful to encourage compliance.
  - Require labor contractors to provide certificates evidencing workers' compensation insurance for workers supplied by the contractor.
- Be mindful of time records and unique employee pay issues (e.g., piece rate, premium rates, etc.)
- Ensure that workers are provided with appropriate safety training to comply with Cal-OSHA requirements, including under the required IIPP.
- <http://www.dwt.com/New-Law-Makes-California-Businesses-Liable-to-Workers-Supplied-by-Labor-Contractors-11-03-2014/>

# Paid Sick Leave Now Required – The Basics

- One hour of sick pay for every 30 hours of work
- Employees may use no more than 24 hours (3 days) of accrued sick days in each year of employment
  - Maximum accrual is 48 hours (6 days) provided use is not limited
- Employers can require employees to use paid sick days in *two-hour increments*, but cannot require longer periods
- Effective July 1, 2015
- <http://www.dwt.com/California-Enacts-Mandatory-Paid-Sick-Leave-Law-09-18-2014/>



## Paid Sick Leave: More Basics

- Accrual starts after 30 days of work, but employees cannot use sick days until the 90<sup>th</sup> day of employment
- Prohibits retaliation and discrimination for taking or requesting sick days
- Other paid time off that satisfies all requirements of the Act can be substituted
- No requirement to pay unused sick days at end of employment
- The total available sick hours must appear on the pay stub or a separate notice accompanying the pay stub each pay period
  - Wage Theft Prevention Act notices will change to include a description of sick pay accrual
  - Must keep record of accrued and used sick days for at least 3 years

# Paid Sick Leave: All Types of Employers Are Covered

- Covered Employers
  - “Any person employing another under any appointment or contract of hire”
  - No size or number of employees requirement
- Covered Employees
  - Most employees who work 30 or more days within a year in California
  - Employees under collective bargaining agreements are excluded if the agreement meets certain requirements
- [http://www.dir.ca.gov/dlse/Paid\\_Sick\\_Leave.htm](http://www.dir.ca.gov/dlse/Paid_Sick_Leave.htm)



# Paid Sick Leave: Usage

- Diagnosis, care or treatment of existing health condition or for preventative care for employee or employee's "family."
- Seeking aid, treatment, or assistance by employees who are victims of domestic violence, sexual assault, or stalking.
- Children: biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis, regardless of current age.
- Spouse or registered domestic partner.
- Grandparents or grandchildren.
- Siblings.
- Parents: biological, adoptive, or foster parent or stepparent, or legal guardian of an employee or the employee's spouse or registered domestic partner, or a person who stood in loco parentis when the employee was a minor child



## Paid Sick Leave: Other Requirements & Practical Guidance

- For employees with fluctuating hourly wages, weighted average calculation of pay over 90 days required to determine rate
- Employers will be required to post a notice describing the employees' rights under the Act
- Employers cannot require employees to find a replacement worker on the days the employee uses paid sick days
- Employees separated and rehired within one year must have sick pay balances restored and be immediately able to use
- Rebuttable presumption of retaliation if employee is denied right to use sick pay, or employer discharges or threatens to discharge, demote, suspend or discriminate against an employee, within 30 days of employee's filing a complaint with the Labor Commissioner about sick pay, cooperating in an investigation, or *opposing a policy prohibited by the Act*.

# Expense Reimbursement: Cell Phone Expenses Must Be Reimbursed



- *Cochran v. Schwan's Home Service, Inc.* -- employers must reimburse employees who are required to use a personal cell phone to make work-related calls.
  - 1,500 customer service managers for Schwan's, a food delivery company, alleged that they were not reimbursed for expenses when they had to use their personal cell phones for work.
- “Reimbursement is always required” and the employer must pay “some reasonable percentage” of the employees’ cell phone bill to comply with the Labor Code;
  - Even when the employees don’t incur any extra expenses by making the work-related calls because they have an unlimited data plan.
  - Possible approach is to reimburse a certain, nominal flat amount each month for employees’ use of: (i) personal cell phone, and (ii) reasonable % of voice *and* data.
- <http://www.dwt.com/California-Employers-Must-Reimburse-Employees-for-Mandatory-Work-Related-Cell-Phone-Use-08-25-2014/>

# Expense Reimbursement: IRS Mileage Rate Goes Up



- On December 10, 2015, the IRS issued the 2015 optional standard mileage rates used to calculate the deductible costs of operating an automobile for business purposes. Business vehicle expenses do not include only gasoline, but also wear and tear (depreciation), repairs, oil, insurance and other costs.
- On January 1, 2015, standard mileage rates for the use of a cars, vans, pickups or panel trucks:
  - 57.5 cents per mile for business miles driven (up from 56 cents in 2014)
  - 23 cents per mile driven for medical or moving purposes (down half a cent from 2014)
  - 14 cents per mile driven in service of charitable organizations
- Lab. Code § 2802 -- employers must fully reimburse employees for all expenses actually and necessarily incurred. Many employers typically choose to use the IRS mileage reimbursement rate, but its use is optional.
- Labor Commissioner has stated that using the IRS mileage rate will generally satisfy an employer's obligation to reimburse for business related vehicle expenses, absent evidence to the contrary. However, if an employee can show that the chosen mileage reimbursement rate, even the IRS rate, does not cover all actual expenses the employee has incurred, the employer must pay the difference.

## Expansion of “Unfair Immigration-Related Practices”

- **AB 2751** -- expands the definition of an “unfair immigration-related practice” to include threatening to file or filing a false report or complaint with any state or federal agency.
  - Current law extends the protection only to reports filed with the police.
- Clarifies that an employer can’t discriminate or retaliate against an employee who updates his or her personal information “based on a lawful change of name, social security number, or federal employment authorization document.”



## How to deal with I-9s in light of the new drivers licenses.

- Vehicle Code § 12801.9 authorizes the DMV to issue an original driver's license to a person who is unable to submit satisfactory proof that the applicant's presence in the U.S. is authorized under federal law.
- **AB 1660** -- amends California law to prohibit discrimination against an individual because s/he holds or presents one of these driver's licenses.
  - Specifies national origin discrimination includes discrimination on the basis of possessing a driver's license issued under.
  - Law does *not* affect an employer's rights or obligations to obtain information required under federal law to determine identity and authorization to work. Actions taken by an employer that are required by the federal Immigration and Nationality Act do not violate this law.
- The license is *not proof of authorization to work*, but it may be proof of *identity*. Both authorization and identity are required for the I-9. So, presenting the license does not necessarily mean the worker will be unable to complete the I-9.

# Increased Employer Responsibility For Data Breaches

- **AB 1710** -- Requires a business that owns, licenses, or maintains personal information about a California resident to *implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the information* from unauthorized access, destruction, use, modification, or disclosure.
- “Personal information” means an individual’s first name or first initial and his or her last name in combination with any one or more of the following data elements, when either the name or the data elements are not encrypted or redacted:
  - (A) Social security number.
  - (B) Driver’s license number or California identification card number.
  - (C) Account number, CC number, with any access code that would permit access.
  - (D) Medical information.
- If a business providing notification of a breach was the source of the breach, it must offer to provide appropriate identity theft prevention and mitigation services, if needed, at no cost for not less than 12 months if the breach exposed or may have exposed specified personal information.



# Questions?

Thank you for attending today's webinar.

Any questions?



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