A Timely Analysis of Legal Developments

ASAP®

January 2012

A Moving Target: The California DLSE Modifies Again Its FAQs on California's New Wage Notice Required for Hourly Employees

By Christopher Cobey and Jose Macias, Jr.

On January 23, 2012, the California Division of Labor Standards Enforcement (DLSE) announced on its website[1] modifications to the answers to two of its Frequently Asked Questions (FAQs), and added 10 new FAQs and answers concerning the wage notice required by the California Wage Theft Prevention Act (WTPA) in Labor Code section 2810.5.[2]

Overview

California employers may be excused their frustration at the challenge of complying with a new requirement that mixes statutory and non-statutory provisions (including a provision eliminated in the legislative process, but later imposed by the agency in its template form), and Frequently Asked Questions (FAQs) which include a designated "best practice" not included in the authorizing statute.

The key additions, changes, and advice contained in the January 23 modifications to the WTPA's wage notice provision's FAQs are:

- The DLSE considers it to be a "best practice" for employers to provide the wage notice to all current employees, though the statute only requires the notice be provided to new hires and to employees whose wage-related information has changed. (FAQ 2.)
- Compensation data that cannot be included on the notice itself may be set forth on sheets attached to the wage notice, as long as the attachments are clearly described in the notice. (FAQs 12 and 18.)
- A reminder that notice of modifications to information relating to an employer's workers' compensation carrier may be provided by the postings already required by Labor Code sections 3550-3551, if posted within seven days of the change (FAQ 22.)
- In wage notices to new hires, employers need only include rates of pay that are ascertainable in dollar amounts ("known and determinable") at the time of the notice. An employee's eligibility for payment by a "regular rate of pay" (a distinct and important categorization) may be designated on the notice as a rate "which is subject to upward adjustment when other specified forms of wages are earned during the applicable pay period." (FAQ 19.)
- The DLSE template and FAQs continue to view an employment agreement relating to wage information as being either written or oral only, but not both written and oral. (FAQ 21.)

Modified FAQs

The January 23 modifications were made to two existing FAQs (Nos. 2 and 12).

FAQ 2 ("Who is covered by the law?") was modified to add two sentences at the end of the answer:

> "Subject to the foregoing exceptions, as of January 1, 2012, employers are required to provide the written notice to each employee '[a]t the time of hiring.' The notice requirement was intended to apprise employees of basic information material to their employment relationship, and to ensure employees are given up-to-date employment information through notice of any changes to that information; as such, it would be a best practice for employers not only to provide the notice to new hires, but also to current employees." (Emphasis added)

This FAQ answer does not clearly distinguish between employees covered by section 2810.5 and all employees. This comment is also at odds with the agency's previous advice on this subject. In its late December version of the FAQs, the DLSE suggested that the notice should be given to all affected employees by including in its answer to the FAQ: "The notice should be given to all current employees and then to all new employees at the time of hire." In reaction to employers' stated concern about the overreach of this comment, the DLSE on Tuesday, January 3, revised the FAQs to delete the quoted sentence.

FAQ 12 ("What procedures should be followed if an employee has multiple pay rates?") was modified to add two new sentences to the end of the answer:

> "The notice must include '[t]he rate or rates of pay and basis thereof whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, as applicable.' (Labor Code 2810.5(a)(1)(A)). The Legislature's inclusion of language referring to 'the rate or rates of pay' contemplates that several rates may apply to an employment relationship and thus all applicable rates must be provided in the notice (or may be attached as a separate sheet to the notice with a clear reference in the notice to the attachment, indicated in the space for Rate(s) of Pay')."

The modified answer is somewhat inconsistent with the response to FAQ 7 (the notice must be on its own form), but indicates that a notice may have attachments at least on this subject, if the attachments are referenced in the notice itself.

New FAQs

In addition, the DLSE's January 23 modifications added FAQs 16-25.

FAQ 16 allows an employer paying covered employees on a piece rate basis to revise the form to reflect the piece rates. Alternatively, the employer could attach a sheet to the form providing the piece rate sheets, as long as the attached sheet is clearly referenced in the "Rate(s) of Pay" space on the form.

FAQ 17 requires an employer paying prevailing wages on a public works project to include in the notice "all rates applicable to such work that are known or can be determined at the time the notice is to be provided." "It would be insufficient to simply state 'appropriate prevailing wage' or 'variable prevailing wage' when providing the rate(s) of pay for purposes of the notice." (Emphasis in original.)

FAQ 18 and its answer should be reviewed in their entirety. The answer reviews the meaning of the terms "pay" and "wages." The answer directs that ". . . if a rate is fixed by hour, commission, piece rate, or a combination thereof, such rates must be provided in terms of a money value and basis for earning such rate. If the rate is ascertained by some other method of calculation, basic information specifying the calculation must be provided and an employer must include all rates of compensation in the notice. An employer need only nominally and briefly provide each type of the pay and rate an employee will receive. For example, specific detail of formulas need not be included, as long as accurate information stating the basis of pay is provided, *e.g.* '$10.00 per hour, plus commissions of ___% of sales closed during prior month.' Any additional reference to or incorporation of another document or attachment must be specifically described on the notice." (Emphasis in original.)

FAQ 19 and its answer should also be reviewed in their entirety. The answer discusses the significant differences in legal meaning between the terms "rate or rates of pay," and the "regular rate of pay." Its key points:

- "A single fixed pay rate does not constitute a variable rate of pay simply because it results in potentially different amounts of total wages earned over different pay periods. But if an employee is to receive different types of pay (*e.g.*, hourly wage plus commission), the rate for each type and basis of pay must be provided in the notice. If any part of the pay (wage) is ascertained by some other method of calculation, then basic information for calculating that rate must be provided in the notice." (Emphasis in original.)
- "Section 2810.5 also requires inclusion of 'any rates for overtime, as applicable.' Simply stating the multiplier for overtime (*e.g.*, 1½ and/or double the regular rate) does not specify an overtime rate." (Emphasis added.)
- "When providing information regarding applicable overtime rates, only rates known and determinable must be specifically provided to the employee." (Emphasis added.)
- "If the employee receives other types of pay (other than the hourly pay such as supplementary commissions, bonuses, or piece rates), such other pay must be included in determining 'the regular rate of pay' for purposes of overtime compensation. In such cases, it is sufficient that an employer provide the minimal overtime rate based upon a multiplier of 1½ or double times the hourly rate and also indicate that such specified overtime rate is subject to upward adjustment when other specified forms of wages are earned during the applicable pay period. This is allowable because statutory overtime is based upon a 'regular rate of pay' which includes all wages earned during the period of time for which overtime compensation is determined as applicable under statute. Only in this context may an overtime rate vary and not be subject to ascertainment for a specific overtime rate." (Emphasis added.)

FAQ 20 ("When does a 'hire' occur for purposes of providing the required notice to an employee?") explains when the notice must be provided to new employees. The FAQ answer states that if an employee's contract of employment commences on the employee's first day of work, with the employee first providing services that day (a unilateral employment contract), the notice may be given that day. However, for those employees hired under a bilateral employment contract (an offer of employment is made by the employer and the employee accepts it), according to the DLSE, the obligation to provide the notice arises at the time of hire which, in this circumstance, the DLSE deems to be on the employee's acceptance of the employer's offer, which will frequently be days or longer before the employee actually commences providing services. The advice on the time by which notice must be given concludes with: "Thus, the employer must provide the notice to new hires reasonably close in time to the inception of the employment relationship, whether it is created under a unilateral contract (commencing only upon performance by an employee) or a bilateral/executory contract (commencing upon acceptance of an offer of employment made by an employer)." (Emphasis added.) The answer provides no explanation of the term "reasonably close in time."

The answer to FAQ 20 concludes with a paragraph that notes: ". . . even where an employment contract in fact does not exist, an obligation to pay wages (minimum wages and overtime) may still exist if the employment is otherwise established under statute or regulation under applicable definitions contained in the Labor Code and/or Industrial Welfare Commission orders." The answer then references a 2010 California Supreme Court case (*Martinez v. Combs*). The *Martinez* case disallowed claims for unpaid minimum or overtime wages of strawberry farm workers whose employer – the grower – had declared bankruptcy. The farmworkers had also sued individuals and business entities with whom their now-defunct employer had contracted for strawberries. The California Supreme Court held that the farmworkers' claims against the third-party individuals and entities were barred, as those persons and entities were not the farmworkers' employers, as defined by the Industrial Welfare Commission's Wage Order No. 14. By citing *Martinez* in this FAQ answer, the DLSE seems to be suggesting it will renew the arguments of the unsuccessful plaintiffs in that case to expand aggressively the scope of an "employer" who may be held liable for unpaid minimum and overtime wages.[3]

FAQ 21 ("Why does specification of a written agreement require that a box be checked to indicate whether it is written or oral? Does this information affect the employment at-will doctrine?"), in its answer, suggests that the contract of employment (which is included in the "WAGE INFORMATION" section of the DLSE template) can be only either written or oral, and cannot be both written and oral (". . . either a written agreement or oral agreement exists."). Employers may wish to indicate on their notice form that, as far as the initial rate of pay is concerned, the employment agreement may be both written and oral (by checking both boxes), and that, to the extent the communication regarding the employee's original rate of pay may be deemed to be an agreement to pay the employee that rate, the employer reserves the right, at its discretion, to modify that rate.

The answer to FAQ 21 also contains the DLSE's comment that the requested employment agreement information "has nothing to do with 'at

will' employment." However, for those employers employing at will, their wage notice provides another opportunity to remind the employee of that standard.

FAQ 22 and its answer note that changes to information about an employer's workers' compensation carrier are required by Labor Code sections 3550 and 3551 to be posted and to be given to new employees. Accordingly, if these statutes are complied with within seven days of any change to that information, no separate wage notice is required, per section 2810.5(b)(2) ("another writing required by law").

FAQ 23 explains why an employer representative is required to sign the wage notice.

FAQ 24 and its answer clarify that the "regular pay day" information need not be given by reference to specific pay dates, but should be expressed as "regular day(s) of the month when wages will be paid . . . in addition to the measure of time between pay days (*e.g.*, semi-monthly, monthly, bi-weekly, weekly, etc.). Examples include: 1st and 15th of every month; 1st and 2nd Friday of every month, each Friday of every month."

FAQ 25 and its answer confirm that the California wage notice need not be given annually.

Are the FAQs Enforceable?

The FAQs, first provided less than two business days before the January 1, 2012 effective date of the new statute, have been a source of continuing aggravation to affected California employers because of their late promulgation, and their uncertain status as enforceable administrative directions. The FAQs are not regulations adopted after the comprehensive review and comment process for rulemaking required by the California Administrative Procedure Act (Cal. Gov't Code §§ 11340 *et seq.*). Hence, one view of the consequences of a failure to comply with the FAQs (including following what they term as the "best practice of providing notice to all current employees") is that it only constitutes a violation of advice from the agency responsible for administering the new law, not a violation of a validly adopted regulation, or of a statute.

What California Employers Should Do

Based on the updated FAQs, employers should consider taking the following actions:

1. Make sure the responsible persons in the enterprise know what wage information must be included in wage notices to new hires, and in what form the information must and may be presented.
2. Ensure either that the enterprise's payroll department, or its outside payroll processing service, is thoroughly familiar with the wage information that must be provided on itemized wage statements (pay stubs).
3. Consider adding to the employer's version of the wage notice form, following the "Employment agreement" line in the "WAGE INFORMATION" section, a sentence to the effect that any initial agreement regarding an employee's starting compensation may be modified by the company at its discretion.
4. Confirm that the enterprise's methods of electronic service and acknowledgement of notices are state-of-the-art, and that proof of receipt and acknowledgement can be produced to an agency or court, if required.
5. Consider asking temporary agencies with whom the enterprise contracts to provide advance written confirmation that the agency (not the enterprise) will provide timely and complete wage notices for agency employees provided to the enterprise by the agency.

When in doubt as to the interpretation or enforceability of the WTPA, or if an employee challenges the enterprise's compliance with the Act, consult with experienced employment law counsel.

Christopher Cobey is Special Counsel, and Jose Macias, Jr. is an Associate, in Littler Mendelson's San Jose office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Cobey at ccobey@littler.com, or Mr. Macias at jmacias@littler.com.

[1] California Division of Labor Standards Enforcement, Frequently Asked Questions (FAQ) *Wage Theft Protection Act of 2011 – Notice to Employees*, www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html.

[2] For an analysis of the DLSE's original FAQs, see Christopher Cobey, Brian Dixon, Isela Pérez, and Jose Macias, Jr., *California's New Wage Disclosure Notice and the Wage Theft Prevention Act of 2011*, Littler ASAP (Dec. 30, 2011), *available at* www.littler.com/publication-press/publication/californias-new-wage-disclosure-notice-and-wage-theft-prevention-act-2. The text of Labor Code section 2810.5 may be found at www.leginfo.ca.gov.

[3] For more information on the *Martinez v. Combs* case referenced in the answer, *see* Heather Davis and Lauren Howard, *California Supreme Court Rejects Personal Liability of Third Parties for Violations of Minimum and Overtime Wage Obligations*, Littler ASAP (May 26, 2010), *available at* www.littler.com/publication-press/publication/california-supreme-court-rejects-personal-liability-third-parties-viol.