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News & Types: Employment, Labor & Benefits Update

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HUMAN RESOURCES PROFESSIONALS BEWARE - ANTITRUST LAWS DON'T JUST APPLY TO SALES TERMS

By Nancy E. Sasamoto

Your company has trained your sales force not to discuss prices with competitors or engage in anti-competitive conduct, so you have adequately managed the risk of exposing the company to an antitrust enforcement action, right? Not quite. On October 20, 2016, the Department of Justice (DOJ) and Federal Trade Commission (FTC) issued a guidance for human resources professionals that states that agreements among competing employers with respect to hiring, such as agreements limiting or fixing the terms of employment for potential hires or agreements not to "poach" each other's employees, may violate federal antitrust laws. https://www.justice.gov/atr/file/903511/download

The DOJ has announced that it will criminally investigate "no-poaching" and wage-fixing agreements between competing employers because such agreements eliminate competition for employees. In the past few years, the DOJ and FTC have taken action against employers that entered into agreements not to hire or poach each other's employees. The DOJ has brought three civil enforcement actions against technology companies (eBay and Intuit, Lucasfilm and Pixar, and Adobe, Apple, Google, Intel, Intuit and Pixel) that agreed not to "cold call" each other's employees. All these cases resulted in consent judgments entered based on an agreement by the parties not to engage in certain employment practices. The DOJ also brought an action against the Arizona Hospital & Healthcare Association for acting on behalf of most Arizona hospitals to set uniform pay rates for temporary and per diem nurses.

The FTC has also started cracking down on agreements that reduce competition for employment. The FTC brought a claim against Debes Corp. for entering into agreements to boycott temporary nurses' registries in order to eliminate competition among nursing homes for the purchase of nursing services. The FTC also brought a case against the Council of Fashion Designers of America for trying to reduce fees and other compensation for models. Both cases ended in consent judgments.

CALIFORNIA EMPLOYERS, ARE YOUR PAY STUBS COMPLIANT?

By Asa W. Markel

Many employers rely on their payroll providers to print out proper paychecks and paystubs for employees. Although this most oftentimes gets the job done, California employers are advised to exercise caution to

ensure that each employee's paystubs in California report the information required for that type of employee. This is because, in many wage and hour disputes, lawyers representing employees usually make their presence known with a written demand for the employee's payroll records and personnel file. After the lawyer gets copies of these documents and judges that the employee's pay stubs are not compliant with California Labor Code Section 226, the lawyer will inevitably issue a demand letter, which usually will include some sort of allegation of a paystub violation.

Section 226 of California's Labor Code requires that the following items must appear on every pay stub: (i) gross wages; (ii) total hours worked (for non-exempt employees); (iii) the number of piece-rate units earned and any applicable piece rate (if applicable); (iv) deductions; (v) net wages; (vi) the inclusive dates of the period for which the employee is paid; (vii) the employee's name and the last four digits of his or her social security number (or employee identification number); (viii) name and address of the employer; and (ix) the employee's hourly rate(s) and the hours worked at each rate (or, if employer is a temporary services employer, the rate of pay and the total hours worked for each temporary services assignment). Employers also have to report the employee's accrued paid sick leave time on paystubs (or an alternative document), under another provision of the Labor Code. If an employee is misclassified, or there is some other misunderstanding between the employer and the payroll company, the paystubs can be out of compliance. This can lead to claims against the employer by the employee for both statutory penalties for the noncomplying paystubs and attorneys' fees for all claims brought against the employer. While the statutory penalties will be a fixed amount, the fact that the employee can potentially collect his or her attorneys' fees for the entirety of a lawsuit, even if the lawsuit contains other claims not related to pay stub compliance, will often be a significant burden on an employer considering whether to defend or settle a case.

Though Section 226 seems relatively straightforward on paper, complying with the section has been trickier in reality. A problem with pay stub compliance in California has been uncertainty in the interpretation of Section 226, which, in turn, has led to often dubious allegations of non-compliance. Thankfully, both the California Legislature and Court of Appeals have recently provided some clarifications on pay stub compliance. Pursuant to AB 2535, signed into law in July 2016, the Labor Code will now specify that exempt employees are not entitled to have the total number of hours worked reported in their paystubs. This legislative clarification comes on the heels of AB 1506, adopted in the last months of 2015, which provides that an employer must be given 33 days to correct paystubs before an employee can commence a Private Attorneys General Act ("PAGA") suit against the employer on behalf of all similarly-situated employees. The 33-day cure period will be quite helpful for employers in avoiding expensive PAGA suits, although no such cure period is provided for individual claims by employees.

Most recently, California's Court of Appeal provided further clarification of Section 226 when it dispensed with a dubious paystub claim. In *Soto v. Motel 6 Operating*, LP, No. D069403 (Cal. App. Oct. 20, 2016), an employee had tried to argue that the absence of PTO or vacation balances in paystubs constituted a violation of the Labor Code. The *Soto* Court looked at the text of Section 226 and determined that the list of items stated in the statute was exhaustive and did not require employers to provide an employee's vacation or PTO balance in paystubs. The overarching significance of *Soto* for California employers is that employees should not be able to claim paystub violations for missing information unless that information is specifically listed in Section 226

(or similar sections) of the Labor Code. On the more specific question of whether PTO or vacation balances should be stated on paystubs, employers should still be mindful that if they utilize PTO in lieu of paid sick leave, they are still likely required to provide the balance of that accrued time on employees' paystubs. Nevertheless, the clarifications of the past 12 months will no doubt reduce the kinds of paystub claims that hold California employers hostage.

For more information about this or any other employment law topic, please contact Frank Del Barto, Chair of the Employment, Labor & Benefits Group, at 847.734.8811 or via email at fdelbarto@masudafunai.com.