GRAY•DUFFY, LLP

CALIFORNIA AUTO DEALER®

December 2021

New Laws

By Erin K. Tenner, Esq.

New Minimum Wage Laws go into effect January 1, 2022. If the federal, state and local wage requirements conflict, you must pay the highest minimum wage that applies under federal, state or local law. Generally, the new rate is $15 an hour. Keep in mind this may affect other calculations such as overtime pay calculations and calculations for exemptions from overtime, and the rate of pay for employees who provide their own tools.

New Penal Code Section 487m, effective January 1, 2022, makes it "grand theft" to intentionally withhold wages in an amount greater than $950 for a single employee, or $2,350 from two or more employees in any 12 month period.

It seems clear that this new law is designed to target employers who may already be on the DA's radar for other violations and repeat offenders. Although a repeat offense is not required in order to be charged, it does not help an argument that it was not intentional. "Wages" under the new law is defined broadly to include benefits and all forms of compensation. "Employee" is also defined broadly to include independent contractors.

CNCDA Hotlink and HR Hotlink are resources if you have questions about making sure you are not incorrectly withholding wages. Keep written notes on all advice given on this topic, by whom given and the date given because it could become valuable if you are ever charged with intentionally withholding wages – or could prevent a charge from being filed if you are ever accused of intentionally withholding wages.

Time for Performance. Effective January 1, 2022, any time specified in a standard form contract form (also known as a contract of adhesion) for performance of an act required to be performed by the contract, must be reasonable.

Mandatory Arbitration. The question of whether employers can require their employees to submit to binding arbitration is still up in the air. The 9th Circuit is reviewing the issue. If you want to play it safe, ask employees to voluntarily sign rather than making it mandatory. For the time being, some advisors are giving the okay to making it mandatory, but it could change again.

Effective January 1, 2022, *unless your arbitration agreement says otherwise*, if you require mandatory arbitration in either employment or consumer contracts, when you get the bill from the arbitrator to initiate the arbitration, you must pay it within 30 days, and you must pay any other

invoices from the arbitrator(s) upon receipt. If you have not paid in accordance with the contract, the employee can choose to withdraw from arbitration, the statute of limitations is automatically extended to accommodate this choice, and sanctions will be imposed by the court on the drafter of the contract. It is unclear how a provision stating that neither party is the drafter of the contract would affect the statutory sanctions requirements, but presumably even if the contract was negotiated, the court would have discretion to ignore the provision.

Settlement Agreements. California Code of Civil Procedure Section 1001 expands the prohibition on provisions in settlement agreements preventing disclosure of factual information. Effective January 1, 2022, any settlement agreement regarding any administrative (EEOC or DFEH) or civil complaint of sexual assault, sexual harassment, workplace harassment whether or not based on sex, discrimination or retaliation, is void as a matter of public policy, if it prevents disclosure of factual information pertaining to the claim except in limited situations and limited facts. For example, any person complaining of any of the foregoing may include in any such agreement a provision that shields the identity of the claimant and of all facts that could lead to the discovery of the identity of the claimant provided the offending party is not a public official or government agency. It also does not prohibit keeping confidential the amount paid for settlement of the claim.

It is also unlawful for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment under Government Code Section 12964.5, to require an employee to sign a release, including any statement that the employee does not have any claim or right as a general matter. This does not apply to negotiated settlement agreements to resolve an underlying claim to resolve a dispute that has been filed in court, before an administrative agency, or through the employer's internal complaint process in return for value. This does not completely restrict the use of separation agreements, but it does restrict the manner in which they can be offered.

All non-disparagement agreements must now include the following language: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."

Erin K. Tenner is a partner with Gray·Duffy, LLP and has been legal counsel representing auto dealers in buying and selling auto dealerships for more than 30 years. She can be reached at 818-907-4071 or etenner@grayduffylaw.com.

Return to the newsletter.