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Effective January 1, 2004, the Labor Code Private Attorneys General Act of 2004 Will Enable California Employees to Bring Class Action Lawsuits Seeking Substantial Penalties From Their Employers for Any Violation of the California Labor Code.

THE PRIVATE ATTORNEYS GENERAL ACT OF 2004: ONE OF CALIFORNIA'S NEWEST LAWS THREATENS TO FLOOD EMPLOYERS WITH CLASS ACTION LAWSUITS WHEN AN OUNCE OF PREVENTION COULD AVOID THEM

By Douglas A. Wickham

In one of the most sweeping pieces of legislation affecting employers in California this year, (recently recalled) Governor Davis signed into law a bill that authorizes – and seemingly invites – class action lawsuits against every small, medium and large employer in the state.

Under the new law, ominously entitled the Labor Code Private Attorneys General Act of 2004, every employee of every California employer is granted authorization to bring a class action lawsuit seeking thousands of dollars in monetary penalties based on *any* violation of the California Labor Code, no matter how small, technical, or short in the duration of the alleged violation, all without any need to show that the plaintiff-employee was actually harmed or suffered any damage. Indeed, this new law rewards employees for bringing these lawsuits, by giving them a percentage of any recovery of monetary penalties. Unless employers in California take immediate, effective preventative measures, the Private Attorneys General Act will potentially result in a dramatic increase in costly class action lawsuits.

WHY DID THE STATE LEGISLATURE PASS THIS NEW LAW?

Many employers will surely ask, "What in the world was the State Legislature thinking when it passed this law?" That is a fair question, but the Legislature's rationale is less than clear. In this new statute, the Legislature justified this sweeping change, explaining: "Adequate financing of essential labor law enforcement functions is necessary to achieve maximum compliance with state labor laws in the underground economy and to ensure an effective disincentive for employers to engage in unlawful and anticompetitive business practices." Thus, according to the Legislature, they enacted the law because of concerns for adequately financing labor law enforcement because of perceived compliance problems in an "underground economy," and to provide "disincentives" for employers from engaging in "anticompetitive business practices." However, the Legislature does not explain what this means, neither identifying the alleged "underground economy," nor explaining how saddling businesses with the threat of more class actions lawsuits (often with respect to practices that neither caused employees any harm or provided employers with any tangible benefit) squelches purported anticompetitive behavior or promotes competition.

The Legislature also explained that "[a]lthough innovative labor law education programs and self-policing efforts by industry watchdog groups may have some success in educating some employers about their obligations under state labor laws, in other cases the only meaningful deterrent to unlawful conduct is the vigorous assessment and collection of civil

penalties as provided in the Labor Code." Apparently the Legislature believes that only if lots of penalties – *de facto taxes* – are assessed against employers, will employers comply with the Labor Code. Finally, the Legislature explained that "[s]taffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future." For these claimed reasons, the Legislature concluded that "[i]t is . . . in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general, while also ensuring that state labor law enforcement agencies' enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act." In short, because, in the Legislature's view, the Labor Commissioner's office is understaffed (largely because the Legislature itself has failed to adequately fund that State agency), employees should be deputized as Private Attorney Generals to perform the duties of the Labor Commissioner.

Critics of this new law, in turn, have described it as little more than political payback by the Legislature and the (soon to be former) Governor to the Plaintiffs-side trial lawyers groups who have financially supported the majority party in the Legislature and the Governor. Either way, the Private Attorneys General Act of 2004 is now law and employers need to take prompt measures to comply in order to avoid its punishing effects.

WHAT DOES THE LAW DO?

The Private Attorneys General Act does two essential things. First, it purports to take every single provision in the California Labor Code (including, quite possibly, each of the Industry Wage Orders) and, if no penalty currently exists, establishes a $100 penalty for the first violation and $200 for each subsequent violation of each such provision. Such penalties potentially may be assessed on a per employee, per pay period basis. By way of illustration, if an employer mistakenly omits required information on its paystubs, that employer could be subject to a $100 penalty for each of its 250 employees whose paychecks contained this error *in the first pay period*, or $25,000 in penalties. Then, if this error persists during the employer's 25 remaining pay periods, the employer potentially is liable for an additional $1,250,000 in penalties. If more than one violation occurs, then the potential penalties double.

Second, the law authorizes employees to sue as so-called Private Attorneys General to recover the monetary penalties for violations of the Labor Code. Under prior law, most, if not all, penalty provisions in the Labor Code could *not* be enforced by employees in civil actions in court; rather, penalty provisions were enforced solely by the State Labor Commissioner and its Division of Labor Standards Enforcement ("DLSE"). Now, however, employees are deputized and they and their lawyers are allowed to sue to enforce these penalty provisions in court.

Furthermore, the law authorizes, if not actively encourages, employees to bring class action lawsuits to recover such penalties, expressly providing that "[a]n aggrieved employee may recover the civil penalty described in subdivision (e) *in a civil action filed on behalf of himself or herself and other current or former employees* against whom one or more of the alleged violations was committed." As a further incentive to Plaintiffs-side class action lawyers, the law makes clear that the class action lawyers get paid: "Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs."

An interesting side note regarding this ominous law is the fact that while the aggrieved employees – the so-called Private Attorneys Generals – have to share their recovery with the State (with 50% of any penalties recovered going to the State's General Fund, 25% going to the California Labor and Workforce Development Agency, while only 25% of the penalties going to the so-called "aggrieved employees"), the plaintiff's lawyers get to keep *100%* of their fees.

No defenses to this statute are set forth in the law itself. However, normal defenses to claims of alleged violations of the Labor Code should apply. In defense of such lawsuits, employers may argue, among other things, that there is no violation, there is no proper basis for a class action, the claim is time-barred by the statute of limitations, or the law as written or as applied is illegal and unconstitutional. As a penal statute, a one-year statute of limitations should arguably apply to such claims, although the longer three-year statute of limitations applicable to statutory violations will be urged by the so-called Private Attorneys Generals.

WHAT CAN YOU DO TO AVOID THE DELUGE?

The best way for employers to defeat claims under this new law is to undertake substantial, effective measures to bring their businesses into full and complete compliance with the California Labor Code. Of course, many employers may believe that they have nothing to fear from this new law because *their* business already is in full and complete compliance with every single provision of the California Labor Code.

For some employers, this may possibly be true. However, the California Labor Code has literally many thousands, if not tens-of-thousands, of provisions that present traps for unwary employers, large, medium and small. It can be safely said that

the Plaintiffs-side class action lawyers are banking that it will be the rare employer whose business in 100% compliance with every single provision of the Labor Code. For example, how many employers have recently reviewed their vacation policies and measured them against the recent opinion letters of the Division of Labor Standards Enforcement to determine compliance? How about employee meal and rest periods? Is every single non-exempt employee receiving meal and rest periods in accordance with the rigid standards under the Labor Code and the applicable Wage Orders?

Postings, record keeping, payment of overtime, employee classifications, restroom facilities, the list of compliance items goes on and on. Suddenly, employees – and their lawyers – will be checking to see if a business is truly in full compliance, and if so much as a single violation of the Labor Code exists, a business can potentially be the target of a class action lawsuit seeking to recover tens of thousands of dollars in penalties and attorneys' fees.

An employer's best defense to claims under this punishing new statute is a proactive, thorough evaluation of each and every one of its employment practices and policies to ensure 100% statutory compliance. Such a comprehensive statutory compliance audit can be done internally or with the assistance of outside human resource consultants or employment law counsel.

In years past, employers have been given warnings about problems associated with employing significant numbers of temporary employees and independent contractors in the context of recommending so-called "Microsoft Audits." Similarly, employers have been strongly urged to ensure full and complete compliance with unlawful and sexual harassment laws including the need for proper policies, notices and postings and for conducting thorough, lawful investigations. These warnings remain. But, with the Private Attorneys General Act now sitting on the horizon, given the magnitude of the potential exposure arising from *each alleged violation*, all California employers should immediately give serious consideration to conducting prompt, thorough compliance audits before this law goes into effect on January 1, 2004.

Douglas A. Wickham is a shareholder in Littler Mendelson's Los Angeles office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Wickham at dwickham@littler.com.
