

KD Alert: Countdown to March 2, 2015: Oakland's New Sweeping Wage-and-Hour Law

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Far from Gertrude Stein's description of her former hometown – “there is no there there,” the City of Oakland is poised to be a frontrunner establishing some of the most progressive wage-and-hour protections in the State of California. The transportation industry, hotels, and restaurants will likely be the first to feel its impact.

As you may recall, in November 2014, Oakland voters overwhelmingly passed Measure FF, a ballot measure that amends Oakland's Municipal Code to raise the minimum wage, guarantee employees sick leave beyond what the State requires, and mandate employers who charge customers a gratuity fee to provide all the gratuities to its hospitality workers.

Last week, the City of Oakland finally enacted Regulations interpreting Measure FF – eleven days before this law becomes effective on March 2, 2015 to help employers understand how to implement the new law.

Starting on March 2, Oakland will have the highest minimum wage in California (San Francisco's minimum wage will rise to the same level in May 2015). Oakland's minimum wage will rise every year in an unpredictable fashion, tied to the rate of inflation. Employers will also have to provide guaranteed paid sick leave to virtually all employees who perform as little as two hours of work within Oakland's boundaries. Oakland's 72-hour cap on the amount of sick leave qualified employers will have to provide goes well beyond the 24-hour cap contained in California's statewide sick leave law, effective July 1, 2015.

Additionally, hospitality companies, such as restaurants and hotels, who bill patrons for service charges must now provide the entirety of the service charges to the employees who actually render the service, which is a radical departure from existing California law that allows employers to distribute the service charge in any manner they see fit. This change will also have a significant impact on potential overtime claims if employers fail to include the mandatory service charge as part of an employee's “regular rate of pay” when calculating overtime pay on days the employee works over eight hours. In any event, Measure FF and its Regulations add administrative complexities in determining payroll.

We summarize key aspects of the newly adopted Regulations below.

New Oakland Minimum Wage of \$12.25 per Hour

As of March 2, 2015, all employees who perform at least two hours of work in Oakland during a given week must be paid at least \$12.25 per hour. It is irrelevant whether the employee is part-time or full-time or whether the employer is located in Oakland or elsewhere. For example, a non-Oakland based delivery company will have to pay its delivery drivers who spend at least two hours driving through, or making deliveries in Oakland, the new Oakland minimum wage. Likewise, Oakland residents working from home will be entitled to this higher wage for those hours worked from home in Oakland.

Oakland's minimum wage is 36% more than the \$9 per hour California minimum wage (which increases to \$10 per hour on January 1, 2016). The Oakland minimum wage will increase on January 1, 2016 and every year thereafter on January 1 in an amount pegged to the Consumer Price Index for urban wage earners and clerical workers for the San Francisco-Oakland-San Jose, CA metropolitan statistical area. Employers are advised to check www.oaklandbac.com before the beginning of each calendar year to find out what the Oakland minimum wage will be for the upcoming year.

Affected employers must give written notice to all current and new employees when they start of Oakland's minimum wage. This notification must be written in all languages spoken by at least 10% of the employees. It must also be posted in a prominent place.

Guaranteed Paid Sick Leave for All Employees Working in Oakland

Beginning March 2, 2015, employees working at least two hours during a workweek in Oakland will accrue one hour of paid sick leave for every thirty hours worked in Oakland. Employees hired after March 2 will accrue sick leave immediately but are not entitled to use accrued leave until ninety calendar days after the start of their employment. Employers can provide this sick leave through existing or new paid time off or vacation policies as long as those policies provide at least as much time off as guaranteed under the law. This sick leave law has similar notification requirements as the new minimum wage law.

Employers may cap accrued sick leave at seventy-two hours. Employers who have less than ten people working during a given week (including full-time, part-time, and those staffed through an agency) can cap accrued sick leave at forty hours. Employers who wish to cap accrued sick leave must implement a policy to do so. These caps are much larger than the twenty-four hour cap under California's sick leave law, which becomes effective July 1, 2015. Accrued sick leave does not expire at the end of the year and will carry over but is subject to any permissible cap the employee sets.

Employees can use sick leave: (1) when they are physically or mentally unable to perform their duties; (2) to obtain a professional diagnosis or treatment for a medical condition; or (3) to aid or care for a child, parent, legal guardian, sibling, grandparent, grandchild, spouse, registered domestic person, or a "designated person" who is ill, injured, or receiving medical care, treatment, or diagnosis. If an employee has no spouse or registered domestic partner, he or she may designate an individual the employee will aid or care for under this law.

Employees who believe their employer is violating this law can file suit in court and obtain remedies for violations that include back pay, reinstatement, attorney's fees, expert witness fees, and costs as well as civil penalties of up to \$1000 for each negligent or willful violation. The City of Oakland can also bring suit on behalf of employees.

Service Charges Must be Paid to Employees Providing the Service

The final portion of the law requires a "hospitality employer" (defined as one who owns, controls, or operates any part of a hotel, restaurant, or banquet facility within Oakland) to provide the entirety of service charges, which can include mandatory gratuities, delivery charges, and portage charges, to the employee who performed the service. The service charge must be paid no later than the next payroll following either when the fee was collected or the service was performed (whichever is later).

The payment of service charges does not count towards an employer's obligations to pay the Oakland minimum wage. In other words, hospitality workers must be paid at least the minimum wage in addition to any service charges incurred by customers for services rendered. Supervisors and managers cannot share in the service charge unless they spent time on non-supervisory work serving customers in which case, the payment cannot be higher than the average rate paid to hospitality workers performing similar duties.

This is a steep departure from existing California law. Although, under California law hospitality workers are entitled to the full amount of any discretionary tip left by a customer (which can be pooled amongst all service staff), mandatory service charges typically are owned by the employer, who generally has discretion on whether to provide any portion to employees. This will no longer be the case in Oakland, where the service charge must now be paid entirely to those performing the service.

Employers should also know that under California law, if they provide these service charges to employees – whether because of the law or, for employers outside Oakland, pursuant to a policy – these payments must be included in the regular rate of pay when calculating overtime compensation on days employees work over eight hours or weeks employees work over forty hours. The service

charges provided to employees must also be reported to tax authorities for withholding purposes pursuant to recent IRS regulations.

Given these new and existing laws and regulations, employers should carefully consider whether they want to charge customers mandatory service charges.

The City of Oakland will continue to roll out regulations interpreting the new law. KD is available to assist employers updating their policies and drafting compliant notices before the looming March 2 deadline.