

**THE GOLDSTEIN LAW FIRM, A.P.C.**

*Established 1977*

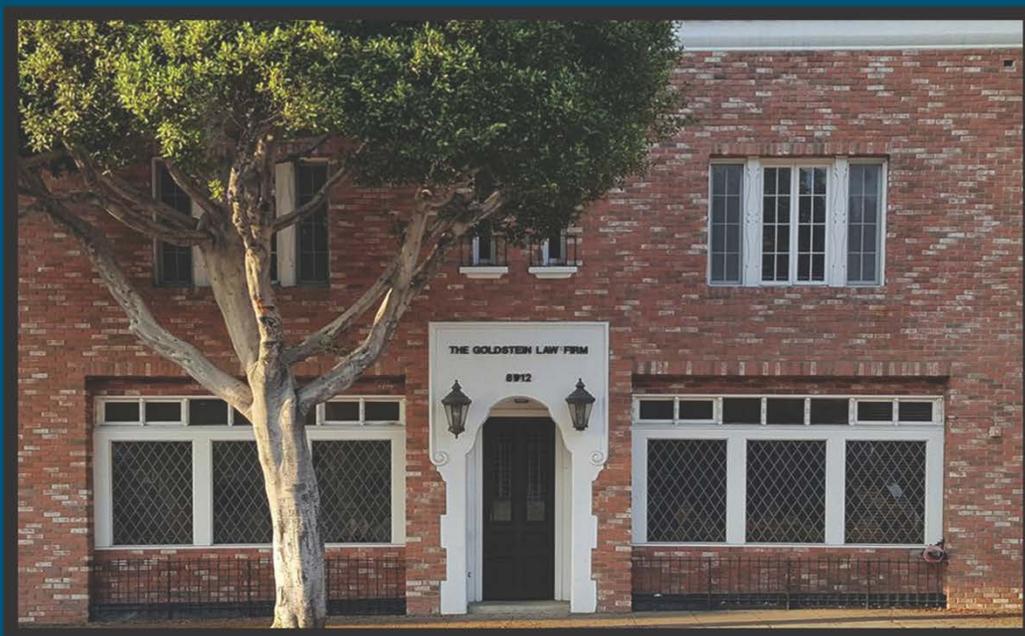
**ATTORNEYS AT LAW**

**LABOR & EMPLOYMENT LAW NEWSLETTER**

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**NOVEMBER-DECEMBER 2017**



**Representing Employers Since 1977**

*“An ounce of prevention is worth a pound of cure”*

**“PREVENTIVE LEGAL PLANNING IS WORTH MORE THAN  
A POUND OF CURE, ESPECIALLY IN THE LEGAL  
ENVIRONMENT OF CALIFORNIA”**

**THE GOLDSTEIN LAW FIRM WISHES YOU AND YOURS A  
HAPPY HOLIDAY SEASON.**

**I. The Hollywood Sexual Harassment Scandals Will Cause Sexual Harassment Claims to Rise in 2018- Employers Should Be Prepared to Deal With These Issues in Their Workplaces**

Wide-spread sexual harassment revelations in the entertainment community dominate the media. These well-publicized sexual harassment, sexual assault and rape claims against Harvey Weinstein and other important members of the entertainment world will spur a significant increase in sexual harassment claims in 2018 outside of the Hollywood community. Employers must be prepared to effectively deal with sexual harassment claims that can cause serious legal and morale issues, as well as being disruptive to your business. Merely being charged with sexually harassing conduct and being investigated can negatively affect the career of anyone. Like a high government official once said after being exonerated by a Court and jury in a criminal matter “Where do I go to get my reputation back?” Therefore, claims of sexual harassment should be treated carefully by knowledgeable professionals who do not bring with them an inherent bias against anyone who might be involved in the investigation.

The sexual harassment, sexual assault and rape claims against Harvey Weinstein are supported by many credible women who over many years were victimized by him. He is in the process of receiving the justice he so rightly has earned.

In the world outside of Hollywood, sexual harassment in the workplace exists and must be rooted out of the workplace. When brought to the attention of management a claim of sexual harassment should be taken seriously, vigorously investigated and if true, the perpetrator or perpetrators, no matter how high in the organization, should be swiftly sanctioned.

The problem is that not every claim of sexual harassment is as clear as the case against Harvey Weinstein. Both men and women can make unfounded and reckless claims of sexual harassment that can destroy the career of any executive, manager, supervisor or fellow employee. Over the many years that The Goldstein Law Firm has investigated and litigated claims of sexual harassment, we do not presume that the alleged victim or person or persons accused of sexual harassment is telling the truth. We let the investigation and the credible evidence lead us to the conclusion of who is telling the truth. A finding that someone has engaged in conduct that is serious and or pervasive sexual harassment can end the career of anyone. It is not a finding that should be made for conduct that a reasonable person would consider trivial and that does not meet the legal definition of sexual harassment.

In California, when executives, managers and supervisors are charged with sexual harassment it does not matter, whether the responsible person who managed or supervised the alleged harasser knew or should have known of their subordinates sexually harassing behavior, the employer is still liable for the actions of these individuals.

From The Goldstein Law Firm's experience in dealing with sexual harassment issues, the informal festive environment of holiday parties and the festive holiday season itself, where alcoholic beverages are served presents circumstances that can give rise to claims of sexual harassing conduct in the New Year. The festive holiday season and lead up to the New Year can create an informal environment when employees may act as if your company's policies regarding their conduct has been suspended or should be ignored as part of holiday season revelry. Of course, the truth is that inappropriate conduct in the workplace toward women, who are the primary victims of sexual harassment, should never be tolerated, ignored or excused by the informal, convivial atmosphere of the holiday season.

## **II. Ten (10) Suggestions that Employers Should Take to Avoid Holiday Season Sexual Harassment Claims**

1. Reissue your organizations' Sexual Harassment Policies and state that Sexual Harassment Policies still applies during the Holiday Season. If your organization has not complied with the California law requiring that every employer with 50 or more employees must conduct two (2) hours of sexual harassment training, including anti-bullying training every two (2) years, the holiday season is the best time to do this training. Comply with SB 396 effective January 1, 2018 to include training gender identity, gender expression and sexual orientation. The Goldstein Law Firm has conducted sexual harassment training for over 15,000 executive, managers and supervisors since the law was enacted in 2006. Contact The Goldstein Law Firm to conduct your sexual harassment training.
2. Encourage employees to bring their spouses or significant others to holiday parties because their presence can discourage inappropriate conduct between employees.
3. If alcohol is served at the party, make certain that you limit the alcohol that is served and that you have plenty of non-alcoholic beverages on hand as well.
4. Designate some managers in advance to make certain that employees do not consume too much alcohol.
5. If a manager reasonably believes that an employee has consumed too much alcohol and may be intoxicated, the manager should arrange for alternative transportation for the employee, such as a taxi cab or an Uber or Lyft, so that the employee can be taken home safely.
6. Many experts recommend that you stop serving alcohol ninety (90) minutes before the party ends.
7. Make it known that you will promptly investigate and discipline up to, and including termination, for any misconduct that occurs as result of a holiday party or during the holiday season.

8. Never permit illegal drugs to be consumed at a holiday party.

9. Immediately investigate any claims of sexual harassment made during the holiday season or as a result of a holiday party. Don't wait until after the holiday season is over because you don't want to upset anyone's holiday.

**10. If you have any questions regarding how to deal with issues of sexual harassment during the holiday season, contact The Goldstein Law Firm.**

### **III. How to Prevent Costly PAGA and Wage and Hours Claims From Your Holiday Bonuses**

Many employers still give their employees year – end bonuses during the Christmas/New Year holiday season. Some of these bonuses are tied to the employee's performance during the year and other bonuses may be required by an employment contract. Some bonuses are completely discretionary. This means that the employer has the sole discretion to decide whether or not to grant the bonuses, who will receive bonuses, and the amount of the bonuses. An employer can lose their discretionary right to decide whether or not to give holiday bonuses and the amount of any bonuses, regardless of business conditions by engaging in conduct that converts a discretionary holiday bonus into compensation that the employer is required to pay and the employee comes to expect as a regular part of their annual pay.

#### **A. How can an employer be required by law to pay an employee a bonus regardless of business conditions?**

An employer can be required by law to pay an employee a bonus, even a holiday bonus that the employer believes is completely discretion and based on existing business conditions if (1) the employer has consistently done so over the years; (2) the bonus was based on the employee's performance or productivity; (3) or the bonus was to encourage increased productivity or performance; and (4) or the employer's conduct created conditions that would signal to the employees that they could expect a bonus each year as part of their overall monetary compensation.

#### **B. Five (5) Steps You Can Take To Prevent Your Discretionary Holiday Bonuses From Becoming Non-discretionary Bonuses and Becoming A Part Of A Non-Exempt Employee's Regular Rate of Pay For The Calculation of Overtime**

1. Make certain that you maintain your discretionary right to give bonuses by having a written statement in your employment policies or a statement handed out to your employees with any year – end and/or holiday bonuses that their bonuses are based on the sole

discretion of the company and employees are not to expect bonuses in any other year.

2. Your policy statement should advise employees that the amount of any bonus, the criteria for determining the employees who will be given bonuses, and whether business conditions warrant curtailing some or all bonuses in the future, remains within the sole discretion of the company and that employees should not expect to receive holiday bonuses each year.

3. Your policy statement should also state that the bonus is not for past performance or to encourage future performance or based on individual or group productivity. Bonuses that are tied to productivity or performance of the recipient of the bonuses are treated for wage and hour law purposes as non-discretionary bonuses and have consequences for non-exempt employees beyond merely being required to be paid the bonuses regardless of economic conditions of the employer.

4. If your bonuses are for past performance or to encourage future performance or based on individual or group productivity, you are required to consider the bonus as part of the employee's hourly rate of pay for the period of the bonus and the increased hourly rate of pay must be used to calculate overtime for non-exempt employees.

**5. If you have any questions regarding how you can prevent your discretionary bonuses from becoming non-discretionary and the negative wage and hour consequences of non-discretionary bonuses, contact The Goldstein Law Firm.**

#### **IV. The Eight (8) Steps You Should Take To Survive And Thrive in 2018:**

1. Make certain that you have your Employee Handbook updated to reflect your current policies, practices and new California and federal laws.

2. Make certain that your policies relating to classifying employees as exempt comply with California's strict exempt salary and job duties test.

3. If you use independent contractors, make certain that you have properly drafted independent contractor agreements. Make certain that your independent contractor practices meet the rigid criteria for determining independent contractor status imposed by the California EDD, the federal IRS, and other state and federal administrative agencies.

4. Make certain that your practices for the documentation of overtime, unpaid meal periods, paid break periods and California paid sick leave fully comply with the California Wage Orders and California Labor Code Section 245 et. seq.

5. If you have not required all of your employees to sign validly drafted and enforceable Arbitration Agreements, you should do so immediately. Your Arbitration Agreement for California employees should be updated and contain a class action waiver, but not a waiver of court action for Private Attorney General Act wage and hour claims that must be tried in court.

6. Make a decision to secure early advice on any “**budding employee problems**” rather than waiting until you are served with a lawsuit or an administrative charge.

7. **Make a commitment that your organization will train managers and supervisors, who are your first line of defense, and if not properly trained, can create substantial liability for your organization. We conduct training programs on all areas of labor, employment law, including mandatory sexual harassment and ante-bullying training and provide relevant real life scenarios as part of our training programs and wage and hour law. Set training goals for 2018. Training pays dividends.**

8. **To avoid serious and costly labor, employment law and wage and hour problems, an overwhelming number of our clients have chosen to maintain Monthly Retainers with The Goldstein Law Firm for proactive, preventive, and cost-effective legal advice and counsel. Make 2018 the year that you contact The Goldstein Law Firm to learn the benefits of signing up for cost effective, timely, and preventive monthly retain for legal advice and counsel.**

V. **The California Labor Commissioner Enforces 41 Laws Prohibiting Retaliation and Discrimination- SB 306 Gives the Commissioner New Powers To Seek Immediate Injunctive Relief Against Employers for Retaliation Against Employees**

The California Labor Commissioner enforces 46 laws prohibiting retaliation. SB 306 significantly increases the power of the Labor Commissioner to enforce those laws.

Effective January 1, 2018, SB 306 gives the Commissioner the power to begin investigation of an employer with or without a present or former employee’s complaint of retaliation. This means that when inspectors make a field investigation of an employer or suspect immigration related threats, the inspector, a Deputy Labor Commissioner, can also begin a retaliation and discrimination investigation. If the Deputy Labor Commissioner finds reasonable cause to conclude that retaliation and or discrimination exists, the new law authorizes the Labor Commissioner to petition the Superior Court for injunctive relief on a temporary or permanent basis. Under the previous law the Labor Commissioner had to wait until the investigation was completed and the employer was found liable before initiating an action in Court.

The prior law required the Labor Commissioner to establish irreparable harm and the likelihood of success at trial, both traditional requirements for the issuance of injunctive relief by a Court. The new law only requires the Labor Commissioner to prove that they believe that a violation has occurred and the Court to determine whether it would be “just and proper” for relief to be granted. The new law also requires the Court to consider the chilling effect on other employees asserting their rights under those laws in determining whether the relief sought is just and proper. **The new law does state that the law does not prohibit an employer from disciplining or terminating an employee for conduct that is unrelated to the retaliation. Just how this provision would be applied in the “real world of the workplace” will be the source of costly litigation for employers.**

The new law gives the Deputy Labor Commissioner the right to issue citations to those determined to be responsible for violating the law. The new law allows the Labor Commissioner to seek reasonable attorneys’ fees if the Commissioner is the prevailing party in an action against an employer.

Under prior law the employer could challenge the Labor Commissioner’s decision by posting a bond and having the matter decided in a trial de novo. The new law requires the employer who wishes to appeal the decision of the Labor Commissioner to file for a writ of mandate and post a bond. This procedure is much less favorable for employers than the prior procedure.

Under SB 306, employers who willfully fail to comply with the Labor Commissioner’s Orders can be subject to civil penalties of \$100 per day for each day of non-compliance up to a maximum of \$20,000.

Finally, employees are authorized to seek injunctive relief from a Court in addition to their civil action for damages.

## **VI. How To Deal in 2018 With the Labor Commissioner’s New Powers to Seek Injunctive Relief for Employees Who Claim Retaliation.**

1. Have your labor, employment and wage and hour policies and practices audited for potential violations of California’s more stringent legal requirements and the requirements of federal law. Take corrective action based on the audit.

2. If any executive, manager, supervisor or rank and file employee makes any claim of retaliation take the claim seriously; immediately investigate the claim; and notify the person make the complaint of the results of your investigation. Take appropriate corrective action, if warranted.

3. Immediately notify your labor, employment and wage and hour legal counsel if your organization is subject to an investigation by the California Labor Commissioner or the U.S. Department of Labor or any other government agency.

4. Fully cooperate with any state or federal agency to the extent required by law

5. **Immediately contact The Goldstein Law Firm if your organization is being investigated for violations of California law by the Labor Commissioner.**

**VII. Employees in California Who Are Not Injured Can Sue and Still Collect Penalties and Attorneys Fees Under PAGA**

An employee, Eduardo Lopez, filed a lawsuit against his employer seeking recovery of civil penalties under the Private Attorney General Act for Wage and Hour Violations (PAGA). The lawsuit was for his employer's failure to include required information on itemized wage statements. The trial court granted summary judgment in the employer's favor on the basis that the uncontroverted evidence showed the employer's omission was not knowing or intentional within the meaning of section 226 (e) (1) and of course there was no "real injury" to Mr. Lopez. The employer failed to include the last four digits on Mr. Lopez's social security number on his paystub.

The California Court of Appeal for the First District *in Lopez v. Friant & Associates, LLC issues September 26, 2017* reversed the trial court ruling on the basis that Mr. Lopez was only suing for civil penalties and while Labor Code section 226 (e) (1) sets forth the elements of a private cause of action for damages and statutory penalties, its requirement that a plaintiff employee demonstrate injury resulting from the knowing and intentional violation of section 226 (a) is not applicable to a PAGA claim for recovery of civil penalties. The Court of Appeal stated that "Our conclusion is bolstered by the fact PAGA expressly recognizes section 226(a), but does not mention section 226 (c). The Court also stated that while PAGA lists specific "serious" Labor Code violations which an employer does not have the right to cure when the employer received a notice that a PAGA claim has been filed with the Labor and Workforce Development Agency and among the violations employers do not have the right to cure are violations of Labor Code Section 226(a).

**VIII. How to Prevent Your Company From Being Victimize By A PAGA Lawsuit for Failing to Include All Required Information on Employee Paystubs.**

While we can ridicule as absurd the Court's decision in *Lopez v. Friant & Associates, LLC issues September 26, 2017* allowing an employer to suffer civil penalties to failing to list the last four digits of its employee's social security number on paystubs, unless the law is

changed employers are required to abide by the law.

**IX. What Items Employers Must Have on Paystubs to Avoid Being Sued under PAGA For Penalties and Attorneys' Fees for Violation of Labor Code Section 226(a) Even Though Your Employee Suffered No Injury and You Did Not Knowingly and Intentionally Violate the Law.**

(1) Gross wages earned; (2) total hours worked by the employee; (3) if applicable the number of piece rate units earned and the applicable piece rate if the employee is paid on a piece rate basis; (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item; (5) net wages earned; (6) the inclusive dates of the period for which the employee is paid; (7) the name of the employee and the last four digits of the social security number or an employee identification number other than the social security number; (8) the name and address of the legal entity that is the employer.. and (9) all applicable hourly rates in effect during the pay period and the number of hours worked at each rate by the employee. You should also show on the paystub the employee's earned, but unused paid sick leave.

**THE GOLDSTEIN LAW FIRM PRACTICE AREAS**

Employment Law, Wage and Hour Law, Labor Law, Class Actions,  
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Shareholder Disputes, Commercial Law, Appellate Law, Corporate Investigations, Wrongful  
Death, Training & Workshops

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