THE GOLDSTEIN LAW FIRM, A.P.C.

Established 1977

ATTORNEYS AT LAW

LABOR & EMPLOYMENT LAW NEWSLETTER

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THE GOLDSTEIN LAW FIRM WISHES YOU AND YOURS A HAPPY AND PROSPEROUS 2017

I. Twelve (12) Tips for New Years' Resolutions To Avoid Costly Labor, Employment and Wage and Hour Problems in 2017:

1. Make certain that you have an up to date Employee Handbook and legally enforceable Arbitration Agreements that are signed by all employees and a duly authorized representative of your company.
2. Be self-critical and examine your current employment policies and practices. Are they "2017 employment policies and practices" that will withstand an aggressive legal challenge or have you failed to keep up with the latest legal developments that put your company at risk? Most costly labor, employment and wage and hour lawsuits are caused by an organization's and/or company's failure to upgrade its policies, practices and training to comply with current state and federal laws. Just because you have followed the same wage and hour practices for years doesn't mean that they are lawful or will be interpreted as lawful when they are closely scrutinized in the course of a costly class action and PAGA lawsuit.
3. Establish a Labor, Employment and Wage and Hour Law Training Schedule for 2017. It is cost effective and essential that you have effective, timely training by knowledgeable trainers on the latest developments in labor, employment and wage and hour laws. The best lawsuits and arbitrations are the ones that you can avoid because your executives, managers and supervisors know what actions they can and cannot take and the importance of documenting their actions.
4. Make certain that your management training pays dividends because managers and supervisors learn how to spot and report problems early when they can be resolved internally.
5. Make certain that your management training gives managers and supervisors confidence that when they use the proper hiring tools to productively hire the right employees, and use the proper tools to discipline and terminate employees, that their decisions will not be successfully challenged.
6. Have your current labor, employment, and wage and hour policies and practices audited by attorneys so that recommendations for any changes can be made under the Attorney-Client Privilege. Only labor, employment and wage and hour audits conducted by Attorneys are protected from disclosure. Self-audits, audits conducted by consultants, including human resources consultants and payroll companies, must be disclosed upon request during government investigations and in discovery in federal and/or state litigation to private attorneys representing plaintiff employees.
7. If you have had previous cases involving wage and hour claims, make certain that you have taken corrective action to prevent the same or similar claims from being filed again by employees and former employees, who are not bound by prior settlements, in the prosecution of future wage and hour class violations.
8. Make certain that you have Employment Practices Liability Insurance Coverage from a carrier that will issue a **Choice of Defense Counsel Endorsement**, which allows you

to be represented by a lawyer who will represent both your company and the insurance company's interest; instead of a Duty to Defend Endorsement, which requires the appointment by the insurance company of their lawyer to represent both your company and the insurance company's interests.

9. Do not become an employer who has a reputation of simply rolling over and settling even frivolous lawsuits. Do not get the reputation among the Plaintiff's bar of being an "ATM machine" that spits out money. **If you become an "ATM machine" for even frivolous employee lawsuits, then you will be sending the wrong message to your existing employees that if they are fired or have any grievance no matter how slight that they can successfully threaten you and negotiate a "litigation pension."**
10. Companies that fight cases do not have many cases. Join the ranks of those companies in 2017.
11. Enter into a cost effective Monthly Retainer with The Goldstein Law so that you can obtain timely legal advice and counsel on day-to-day labor, employment and wage and hour problems. This is the best way to avoid and/or significantly reduce costly employment lawsuits and claims.
12. **Contact the Goldstein Law Firm to ask about a cost effective monthly retainer.**

II. California Minimum Wage Rises on January 1, 2017:

California's Minimum Wage rises to $10. 50 per hour effective January 1, 2017. **You have to also check to see whether the city or county in which your business is located has increased it minimum wage and sick leave to more than the present California minimum wage and three (3) day paid sick leave California state requirements.**

III. Los Angeles City Ordinance Directs Employers to Remove Criminal History Questions From Job Applications – Should You Anticipate That This Will Become California Law for All Employers In the Near Future?

In December 2016, Mayor Eric Garcetti signed the "Fair Chance Initiative" that restricts employers in the City of Los Angeles from inquiring about whether a job applicant has been convicted of a crime, served time in prison until after a job offer has been made to the job applicant.

California state law Labor Code § 432.9 already bars state and local agencies, except law enforcement, from inquiring about whether a job applicant has been convicted of a crime before making a job offer to the applicants.

The Goldstein Law Firm believes that the Fair Chance Initiative, and other local ordinances banning the box that asks job applicants whether they have been convicted of a crime and if so, for details of the conviction and sentence, will be codified in a new state law introduced in the next several legislatives sessions. We want to prepare our

clients and newsletter readers in California for this new challenge to their hiring practices.

The rationale for the "Fair Chance Initiative" is an attempt to lower criminal recidivism by removing barriers to employment and providing a second chance to people with prior criminal records. According to Mayor Garcetti's office, one in four (4) Californians has an arrest record on file with the state. Also, while statewide the California criminal recidivism rate of individuals is 65%, the rate of individuals placed in jobs shortly after their release is estimate to range from 3% to 8%. The goals of the Fair Chance Initiative and ban the box ordinances are laudable. The purpose of the ordinance covering employers in the City of Los Angeles and the state law covering public employers are laudable. People who have served their time should not receive in effect a lifetime sentence because of their criminal conviction. The problem becomes the implementation of the City of Los Angeles' "Fair Chance Initiative" and the state law and the fact that advocates of these laws have not considered the liability that employers face even if they make an innocent mistake and hire a criminal.

The new ordinance in Los Angeles means that employers in Los Angeles and public employees under state law cannot ask job applicants on their written job applications and in initial job interviewers, questions of whether the applicant has been convicted of a crime. Employer can only ask this question and the details of the crime after the applicant has been given a job offer.

Under the City of Los Angeles' "Fair Chance Initiative" and the state law, an employer is supposed to evaluate a job applicant's qualifications based solely on their written application or resume and an initial interview without knowledge that the person being considered committed a crime. This restriction may work in theory, but may be difficult to apply. For instance, if an applicant is truthful on their application or resume they will have to list their previous job history to demonstrate their qualifications for the position. Listing a false job history or significant unexplained gaps in their job history could disqualify a job applicant, even if the application does not require the applicant to disclose any information of whether they were convicted of a crime until after they were given an offer of employment.

What if the applicant disclosed their criminal record in response to questions about gaps in their work record? Does an employer violate the "Fair Chance Initiative" by pursuing details of the criminal convictions of the applicant? Can the applicant sue the employer when the employer decides based on the interview not to offer the applicant a job?

Unfortunately, these questions are not answered by the Ordinance and state law for public sector employers and will have to be answered in the courts.

The Los Angeles City Ordinance and the state law covering public employers does not

provide any protection to employers who make a decision to give a person convicted of a crime and who has spent time in jail or prison a second chance, from being sued for negligent hiring or negligent retention of the applicant. There is no "safe harbor" under the City Ordinance or the present state law that only covers public agencies, if a job applicant with a prison record is given a second chance, becomes an employee and engages in harassing and/or violent conduct toward fellow employees, customers or vendors.

Ten (10) Tips For Hiring Qualified Job Applicants With Prison Records

1. To avoid liability for negligent hiring or retention, you must ask a job applicant who has been given a firm offer of employment and met the minimum qualifications for the job whether they have been convicted of a crime and the circumstances of the convictions, including any sentence they received.
2. Once you make a firm offer of employment based on a job applicant's qualifications as set forth in the applicants written employment application and resume, you should request the applicant who has been given a job offer in a properly drafted written form whether the applicant has been convicted of a crime and other relevant information regarding the crime or crimes the applicant was convicted of, including any sentence that the applicant received for the crime.
3. Any job offer given to a job applicant should be conditioned on the applicant truthfully completing the written form asking whether the applicant has been convicted of a crime and other relevant information regarding the crime or crimes the applicant was convicted of, including any sentence that the applicant received for the crime.
4. To avoid liability for negligent hiring or retention you should condition the job offer on the applicant passing a background check to verify the statement made in the application process and a substance abuse screen as part of a physical examination related to the job they have applied for.
5. Once you are informed by a job applicant that has met the minimum qualifications for the job and has been given a firm, but conditional job offer, you should seek to independently verify the information provided by the applicant.
6. If you use a third party screening firm (consumer reporting agency) to obtain background information on applicants or existing employees, you must follow the requirements of the federal Fair Credit Reporting Act ("FCRA"), including the FCRA's provisions requiring advance consent for a background check and providing appropriate notices when any adverse employment decision is based, in whole or in part, on the information disclosed in a background report.
7. Your decision to hire a person with a criminal record should be based on an assessment of the qualification of the individual job applicant's qualifications.
8. Your decision should be based on the following: (1) on the nature of the crime they committed, violent or non-violent; (2) the nature of the sentence imposed for the crime; (3) whether the crime was a single offense or multiple offenses; (4) how long ago they were convicted of the crime or crimes and if they completed their sentence; (5) what

they have done to rehabilitate themselves; and (6) whether in fact they are more qualified for the position then other applicants for the same position.

9. At present employers, excluding hiring job applicants because they have been convicted of a crime or crimes can subject your organization to charges of Title VII violations by the U. S. Equal Employment Opportunity Commission. This is because the impact of such a policy of automatic exclusion of persons with a criminal record disparately falls on job candidates who are members of minorities and who are more likely to have jail or prison records.

10. If you have any questions about how to deal with the hiring of job applicants who have a criminal record contact The Goldstein Law Firm for advice and counsel.

IV. A Common Sense Decision Interpreting An Employer's Meal Period Policy For Employees Whose Work Schedule Activities are Unpredictable

California Sixth District Court of Appeal in *Driscoll v. Granite Rock Company* recently issued a common sense based decision interpreting the California Industrial Wage Order requirements for employers to provide employees with an unpaid paid thirty (30) minute meal break after every five (5) hours of work. **The case involved a class action filed by cement mixer drivers against their employer Granite Rock Company ("Graniterock")**. The *Driscoll* decision recognized as the California Supreme Court did in the landmark decision of *Brinker Restaurant Corp. v. Superior Court* that "an employer's duty with respect to meal breaks… is the obligation to provide a meal period to its employees and that the employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30 – minute break, and does not impede or discourage them from doing so. The *Brinker Court* also recognized the problem of a one size fits all approach to this issue when it stated that "**What will suffice may vary from industry to industry and we cannot in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law."** Finally the *Brinker* Court then stated: "On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay……" The *Driscoll* case applies these basic principles to find the employer did not violate the meal break rules of the Wage Order and Labor Code.

The *Driscoll* case was actually tried in a bench trial. The trial court concluded that the employer provided its concrete mixer drivers with an off-duty lunch period that was compliant with the law. The trial judge also found that the employees received a legally compliant Employee Handbook that contained information about the availability and right to a 30 minute off-duty meal period; the concrete mixer drivers acknowledged that they had reviewed the policy; and the employer posted the applicable wage Order advising employees

of their right to meals periods. The trial court found that there was no evidence that any concrete mixer driver who did not sign an On-Duty Meal Period Agreement or revoked such an agreement was not provided one hour of pay as required by law. The court further found that because concrete mixer drivers were aware of their rights and exercised those rights in requesting and always receiving off –duty meals when they wanted them, the employer had met its legal obligations with regard to meal periods.

The appellate court in reviewing the trial court decision noted: "It is important to note that the Graniterock policies regarding meal periods are particularly appropriate in the context of the ready mix concrete industry. The Court stated: "We interpret Brinker with special circumstances found by the trial court. We mean by that that the issue of different industry practices is a factual determination. Here, while on the job, mixer drivers manage a rolling drum of freshly batched concrete at any given time throughout their work day. When a driver is able to take a duty-free lunch period is dependent on the state of the concrete in his or her truck, and the nature of the construction job to which the driver is attending.

Whether an employee was provided the opportunity to take an off-duty meal in which the employer relinquishes all control is separate from whether an employee who decides to work during his meal period and/or was under the employer's control was paid for that time. The Appellate Court found that when a concrete mixer driver requested to have an off duty meal period, Graniterock granted that request, and relinquished all control of the employee for the 30-minute off-duty period. This satisfies the requirement as set forth in *Brinker*.

If You Operate Delivery Trucks in Your Business the Driscoll Decision May Help You Comply with the Meal Break Requirements of the California Wage Orders

If you operate delivery trucks in your business you run the risk of your truck drivers claiming wage and hour violations for missed unpaid first and second meal breaks and for missed paid rest periods. Employers can electronically monitor the location of their trucks and even time between driver deliveries and locations, but in Southern California, traffic delays are always an issue whether a driver is driving on freeways, state highways or side streets. Drivers delivering products to customers may have difficulty parking or have to wait their turn to make a delivery, but Labor Code § 512 Meal Periods and 11. Meal Periods of the Wage Orders states no employee shall work more than five (5) hours without an unpaid thirty (30) minute meal break. How does an employer apply this rigid standard in the real world of transportation commerce? Does the driver stop in the middle of a freeway at five (5) hours and one (1) minute to take their meal break? Does a driver who has been waiting in line to unload or load his/her truck just pull out of line and lose his/her turn, because they have worked five (5) hours and one (1) minute? That would be ridiculous and non-productive. Do you pay a driver one (1) hour of pay penalty every time they cannot take that meal break exactly after their fifth hour of work?

You may able to use the principles set forth in *Driscoll* and *Brinker* to avoid the rigid application of California's meal break policies. In order to use the principles set forth in *Driscoll* and *Brinker* you would have to show the distinct difference in your industry from other industries that are required to strictly adhere to the Wage Order meal period provisions. In addition, you need: (1) a properly drafted Employee Handbook with clearly stated meal break policies specifically applicable to drivers; (2) your drivers would have to be given an opportunity to agree to written on duty meal period agreements; (3) your written policies must provide drivers with the opportunity to take meal breaks without being under the control of the employer; (4) you must direct your dispatchers to offer off duty meal breaks to any driver that makes this request and document the request; (5) pay one hour of pay penalty to any driver that misses a meal break and immediately contact your dispatcher to inform them of this fact; and (6) maintain records to show that the on duty meal break policy was discussed with your drivers; taken by the employees, if applicable; and that your policy was that if the employee missed a meal break they would be compensated provided they notified the company in a timely manner.

Contact The Goldstein Law Firm if you have any questions of how to apply the *Driscoll* and *Brinker* case to your truck drivers or other delivery employees.

THE GOLDSTEIN LAW FIRM PRACTICE AREAS

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

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