THE GOLDSTEIN LAW FIRM, A.P.C.
Established 1977

ATTORNEYS AT LAW

LABOR & EMPLOYMENT LAW NEWSLETTER

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I. HAVE YOU SENT IN YOUR REGISTRATION FORM FOR THE GOLDSTEIN LAW FIRM'S 39TH ANNUAL LABOR, EMPLOYMENT, AND WAGE AND HOUR LAW SEMINAR HELD ON OCTOBER 26, 2016?

SIGN UP NOW! OUR 39TH

ANNUAL SEMINAR WILL BE HELD ON WEDNESDAY, OCTOBER 26, 2016 FROM 8:30 AM T0 12:00 P.M. AT THE CERRITOS CENTER FOR THE PERFORMING ARTS.

Our seminars discuss practical and effective strategies that employers and their management can use to respond to new legal trends and challenges. Business owners, key executives, and managers who deal with labor, employment and/or wage and hour issues should attend.

THE SEMINAR REGISTRATION FORM IS ATTACHED TO THIS NEWSLETTER

2016 SEMINAR TOPICS INCLUDE:

1. **Demystifying the New Federal Rules for Salaried Exempt Employees and Complying with California's "Stricter" Job Duties Standards for Exemption; Local Living (Minimum) Wage Laws and How to Take Preventive Action to Avoid Costly Wage and Hour Class Actions and PAGA Claims.**

2. **Adapting Your Hiring, Discipline, and Firing Practices to the New Available Technologies, Social Media and a Changing Millennial Workforce.**

3. **Family Businesses: What Do You Do When the Target of a Workplace Complaint, Lawsuit or Administrative Action is a Member of Your Own Family?**

4. **A Practical Review of the New Labor, Employment and Wage and Hour Trends, Such as Criminalizing Wage and Hour Violations;**

5. **New Cases and Legislation that will directly affect your business in 2016-2017.**

II. Employer Loses the Right to Compel Arbitration of Employee Claims By Having Employee Sign Acknowledgement of Receipt of Employee Handbook that Contained the Agreement to Arbitrate

T he Goldstein Law firm has stressed for many years the significant benefits of having employee employment and wage and hour disputes decided through final and binding arbitration, rather than by Courts and juries. Attorneys and special interest that represent employees continue even 20 years after the U.S. Supreme Court approved the use of binding arbitration to resolve discrimination cases, to attack pre-employment mandatory arbitration agreements.

A. How Employers Can Lose the Right to Arbitrate Employment and Wage and Hour Claims?- Fail to Have Employees Sign Separate Arbitration Agreements

In *Esparza v. Sand & Sea, Inc. the 2nd* the *District Court of Appeal on August 22, 2016* held that the arbitration provision of an Employee Handbook did not create an enforceable agreement to arbitrate merely because the employee signed a form acknowledging receipt of the Employee Handbook. In addition, the Employee Handbook had a statement that is contained in most Employee Handbooks that "This handbook is not intended to be a contract (express or implied), nor is it intended to otherwise create any legally enforceable obligations on the part of the Company or its employees." The acknowledgement form did not state that the employee agreed to the arbitration provision and expressly recognized that the employee had not read the handbook at the time she signed the form.Frankly, had the acknowledgement form contained statements that the employee was agreeing to arbitration and had read the employee handbook I still believe that the Court would have ruled against the enforceability of the arbitration provision of the Employee Handbook.

The employer had unsuccessfully argued that the employee's acknowledgement that she received the Employee Handbook, coupled with the fact that the employee handbook contained an arbitration provision was sufficient to show the employee agreed to the arbitration provision.
The *Esparza Court* reject both of these arguments and noted that the Employee Handbook language about the Employee Handbook not creating an agreement further undermined the employer's arguments that the acknowledgment and arbitration provision were intended in and of themselves to create an agreement between the employee and the company to arbitrate.

B. How Employers Can Avoid Losing The Valuable Right to Have Employee Claims Resolved Through Final and Binding Arbitration and Not By Courts and Juries

1. Have employees sign separate Arbitration Agreements even if the Arbitration Agreements are mentioned in your Employee Handbook.
2. Make certain that a duly authorized member of management also executes the Arbitration Agreement at the same time.
3. Don't have the Arbitration Agreement electronically signed.
4. Should you receive any demand letter from an attorney representing an employee insist that your lawyer immediately demand arbitration and file a motion to compel arbitration with the Court should the attorney for the employee refuse to voluntarily take necessary action to submit the dispute to final and binding arbitration..
5. Should you be sued in Court your attorneys should take all steps necessary to preserve your right to have the dispute resolved in arbitration and not by a Court and/o a jury.
6. Contact THE GOLDSTEIN LAW FIRM to assist you in protecting your right to have all employee claims permitted by law resolved through final and binding arbitration, rather than

through a Court and/or by a jury.

III. Ludicrous is the Name of a Rap Artist, It Could Also Characterize A New Line of Potential Wage and Hour Class Actions Awaiting The Go Ahead from the California Supreme Court

Douglas Troester, a California employee of Starbucks filed a lawsuit in Federal District Court alleging that Starbucks failed to pay him for the short time he spent at the end of his workday walking out of the store after activating the security alarm, for the time he spent turning the lock on the store's front door, and for the time he spent occasionally reopening the door so that his co-workers could retrieve a coat. Believe or not these factual allegations formed the basis in California for Mr. Troester to file a class action for violations of the California Labor Code for failure to pay minimum wage and overtime wages because this time was not paid for, failure to provide accurate written wage statements and failure to timely pay all wages due upon termination or resignation. Starbucks contended that the amount of time Mr. Troester "worked" based on the ***de minimus*** doctrine long recognized in federal law interpreting the Fair Labor Standards Act was so insignificant that it was not required to pay the employee for this time. The trial court agreed and granted summary judgment to Starbucks and dismissed the case. The U.S. Ninth Circuit Court of Appeals requested the California Supreme Court to review the issue of whether Mr. Troester's California wage and hour claims were subject to the de minimus doctrine. *Troester v. Starbucks* is presently pending before the California Supreme Court.

A. What is the de minimus doctrine and why should I care?

The de minimus doctrine in effect states that working time need not be paid if it is trivially small, a few seconds or minutes of work beyond the scheduled working hours. The de minimus doctrine has been upheld in California in *See's Candy Shops, Inc.* where the 4th District Court of Appeal applied the federal standard and upheld the dismissal of employees' time records claims because of rounding employee time entries to the nearest 5 minutes, one-tenth, or quarter of an hour as long as the result over time was neutral. **Some employees at all business and organizations perform minor incidental tasks that would not presently be considered work time and not paid under the de minimus doctrine.** As a practical matter it would be difficult to control or to realistically account for time employees spend inputting data outside of work; turning off computers, turning off the lights; or in the retail trade walking out of the store after activating the security alarm, or spending time turning the lock on the store's front door. Therefore, your company or organization may has a potential hidden liability if the California Supreme Court rules that the **de minimus rule** does not apply to claims for violation of California's Labor Code wage and hour provisions. **The decision will most likely not be issued until 2017.**

B. **<u>What Can You Do to Protect Your Business or Organization From Potential Liability for Unpaid Wages If the California Supreme Court Eliminates the De Minimus Doctrine Defense</u>**

1. If the California Supreme Court rejects the use by employers of the de minimus doctrine employee lawyers will attack employers with rounding policies. This is because the rounding policies rely on the **de minimus doctrine** for legitimacy and are uniformly applied to a large number of employees. In contrast the failure to pay for incidental "work" described in the Troester case will be more difficult to prove on a class-wide basis.

2. If your company time keeping practice uses "rounding" make certain that your policy is lawful on its face and in practice. Rounding up or down by 5, 7, or 10 minutes has been approved by California and federal courts.

3. Make certain that your rounding policy does not disadvantage employees, but results in employees being paid for all time the employees actually work and are under your control.

4. Make certain employees are paid for all time actually worked if the time is reported by the employee.

5. Find out how much time your hourly-non exempt employees spend performing minor tasks, such as activating or turning off the security alarm, turning the lock on the store's front door to open a facility, or inputting data from outside of work into the company computers or responding to work related calls from co-workers and others after normal work hours. This information will assist you in supporting your claim that the time spent is truly de minimus or is so minor that any damage arising from this work time would be speculative, individualized and could not be considered on a class wide basis.

6. Have employees regularly sign documents confirming that they are being paid for all time worked and are receiving their meal breaks and rest periods as mandated by California law.

7. **<u>If you have any questions of how to protect your business or organization from wage and hour claims, contact THE GOLDSTEIN LAW FIRM.</u>**

IV. <u>THE MOST VEXING QUESTION OF THE MONTH- MY WORKERS COMPENSATION CARRIER WANTS ME TO RETURN AN EMPLOYEE TO WORK ON LIGHT DUTY OR MODIFIED DUTY; THE EMPLOYEE RETURNS AND IS ASSIGNED MODIFIED DUTY, BUT COMPLAINS THAT THE WORK IS CAUSING HIM PAIN; OR THAT HIS MEDICATION IS PREVENTING HIM FROM BEING ABLE TO PERFORM.-WHAT CAN WE DO?</u>

California employers pay workers' compensation premiums that are 28 % higher than the average premiums paid by employers in any other states in the U.S. Therefore, when your workers' compensation carrier asks you to return an injured employee to work your natural instinct is to comply. Where the employee is truly fit for duty and wants to work there may be no problem complying with your workers compensation insurance company's request. The problem comes when the employee is not properly released to return to work because the doctor who released the employee does not know or understand the true nature of the essential duties the employee will be required to perform and releases the employee prematurely, or

where the employee does not want to work, but wants to merely collect a paycheck.

Employers are aware that the refusal to return an employee who was on leave of absence for an injury can subject the employer to costly legal claims for discrimination, retaliation and harassment because of the employee's disability or for utilizing federal and or state mandated leave or for violation of Labor Code Section 132(a). On the other hand, returning an injured employee to work can create multiple work related issues as well, including employee morale problems when the returning employee is not pulling his or her weight, but is getting the same paycheck as employees who are productive.

Eight Suggestions For Employers When Your Workers' Compensation Carriers Wants You to Return an Injured Employee To Work on Light Duty Or Modified; The Employee Returns And Is Assigned Modified Duty, But Complains That The Work Is Causing Him or Her Pain; Or His Or Her Medication Is Preventing Him Or Her From Being Able To Perform?

First, your company should have written policies regarding the conditions that employees must meet to return to work from an injury that complies with both federal and state law.

Second, employees should be placed on notice in your Employee Handbook of your return to work policies.

Third, the return to work policy should require that the employee to provide your company with a release that states that the employee is released to return to work and can perform the essential duties of his job, without the immediate risk of re-injury or further injury to the condition that resulted in the employee being on leave. The release should state any reasonable accommodation that the releasing physician recommends that would permit the employee to perform the essential duties of his or her job.

Fourth, the company should provide the treating physician with a comprehensive description of the job duties the employee will be required to perform, including physical demands of the job.

Fifth, do not accept a form release from a doctor that does not provide you with the opinion that the employee can perform the essential duties of the job, but only states what the employee cannot do or can do, such as a release that states the employee is released for "Full Duty Without Restrictions." The releasing doctor may not know what the essential duties of the job are that he or she is releasing the employee to perform.

Sixth, only return an employee to work who can perform the essential duties of the job that they are assigned to perform without risking their immediate re-injury and the safety of themselves and others.

Seventh, if the employee is not returned to work, continue to engage the employee or his or her representative in an interactive process to attempt to return the employee to work.

Eighth, you should seek advice and counsel from THE GOLDSTEIN LAW FIRM when you are dealing with return to work of an injured employee issues. These issues are fact intensive and can create serious legal problems for employer if not handled and documented correctly.

V. CALENDAR OF UPCOMING EVENTS:

For many years, members of The Goldstein Law Firm are available as a public service to speak to business and professional groups. The following is a list of scheduled speeches. If you are a member of a business or professional group, The Goldstein Law Firm would be pleased to provide you with speaker on a vast array of current labor, employment, and wage and hour topics that would be of broad interest to the members of your organization. Our current speaking schedule is as follows:

- **October 26, 2016** – The Goldstein Law Firm 39th Annual Labor, Employment and Wage and Hour Law Seminar

- **October 26, 2016** (Evening) – Speech before the Association of Certified Fraud Examiners – Los Angeles: *"Employee Fraud, Theft & Recovery."*

- **November 16, 2016** – Speech before the California Employer Advisory Council – San Gabriel Valley: *"Recent Trends/Challenges in HR & Employment Law Updates"*

- **December 8, 2016** – Speech before the American Payroll Association – Sacramento: *"Wage & Hour Class Actions – 12 Danger Zones"*

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Employment Law, Wage and Hour Law, Labor Law,

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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