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

ATTORNEYS AT LAW

LABOR & EMPLOYMENT LAW NEWSLETTER

8912 BURTON WAY • BEVERLY HILLS, CALIFORNIA 90211

(310) 553-4746 • cgoldsteinesq@gmail.com

AUGUST 2016

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

SIGN UP NOW! THE 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. GOVERNOR BROWN SIGNS SB 1342 GIVING CITIES, COUNTIES, AND DESIGNATED DEPARTMENT HEAD THE AUTHORITY TO ISSUE SUBPOENAS FOR RECORDS TO ENFORCE LOCAL WAGE LAWS

In California, fourteen (14) local jurisdictions have enacted minimum wage laws that are higher then the California Minimum wage. Major jurisdictions that have enacted local wage ordinances include the City of Los Angeles, the County of Los Angeles, the City of San Diego and the City of San Francisco. Many of these jurisdictions have designated or created local agencies to enforce local wage laws. On July 25, 2016 Governor Brown signed SB 1342. The new law answers the question of whether local jurisdictions could compel employers to provide records of compliance through court subpoenas and could seek court sanctions for employers that refused to comply with the subpoena for records.

SB1342 makes it clear that local governments can secure a subpoena records from employers to determine whether the employer is violating the local wage ordinance in order to enforce its local wage ordinances. Therefore, our clients and newsletter readers should be familiar with the provisions of any local

wage ordinance that would be applicable to their businesses because local jurisdictions will now have the unquestioned power to enforce their wage ordinances that include severe penalties for non-compliance.

We Received Many Questions About the New Los Angeles City Minimum Wage Law and Increase in Paid Sick Leave – Here are some of the questions we have been asked

1. Q: Our company's headquarters is located in Orange County, but we have employees who spend more than two (2) hours a week working at customer locations in the City of Los Angeles. Do we have to comply with the new City of Los Angeles minimum wage and sick leave laws?

   A: Yes. The Los Angeles ordinance defines "**employees"** who are to be paid the City minimum wage and sick leave as "any individual who: 1. In a particular week performs at least two hours of work within the geographical boundaries of the City for an Employer and 2. Qualifies as an Employee entitled to payment of the minimum wage from any Employer under the California minimum wage law..."

2. Q: We have fewer than 26 employees, does this mean we are exempt from the new city ordinance?

   A: No. If your organization has fewer than 26 employees or is a non- profit organization the new ordinance will not take effect until July 1, 2017.

3. Q: We use a temporary agencies to provide us with employees and therefore none of our regular employees perform any work in the City of Los Angeles. Do we have to comply with the Los Angeles City Ordinance?

   A: Yes. Your company will still have to comply with the Los Angeles City Ordinance based on the definition of the term "employee" in the Ordinance.

5. Q: We have a vacation policy that allows employees to accrue up to 80 hours of paid time off during the first year of their employment. Do we still need to comply with providing the additional three (3) days of sick leave under the Los Angeles City Ordinance?

   A: The Los Angeles City Ordinance states that, "If an Employer has a paid leave or paid time off policy or provides payment for compensated time off, that is equal to or no less than 48 hours, no additional time is required." The law is vague because it does not specifically define what paid time off could be used by the employer to be exempt from the law and when the paid time off has to be made available to the employee for the employer to be exempt. For instance, paid holidays constitutes paid time off. If an employer provides six (6) paid holidays (48 paid time off hours) over the period of a year, would paid holidays provided over a period of a year constitute paid time off of 48 hours and relieve the employer of the obligation to provide an employee with an additional 3 days of paid sick leave above the requirements of state law? If the employer provides employees with paid vacation of 48 hours accrued each year, would the paid vacation constitute paid time off exempting the employer from the sick leave requirements of the City of Los Angeles Ordinance? To my knowledge, I have not seen any answers to these questions provided by the City. Therefore, any employer who decides that the additional three (3) days of paid sick leave does not apply because they provide six days of paid holidays and forty-eight (48) hours of paid vacation does so at their peril.

III. HOW YOU COULD LOSE YOUR RIGHT TO ARBITRATE EMPLOYEE CLAIMS AND BE FACED WITH A JURY TRIAL

A. What Happened in *Martin v. Yasuda* that caused the Employer to lose its right to arbitrate?

In **Martin v. Yasuda issued on July 21, 2016 by the Ninth Circuit Court of Appeals**, several students of the Amarillo College of Hairdressing (dba the Milan Institute) filed a lawsuit under the Fair Labor Standards Act as a class claim for back wages arising from the requirement that the students complete 1600 hours of practical unpaid work before graduation.

The students had signed arbitration agreements with the School. However, instead of immediately petitioning to compel arbitration, the School filed various motions with the Court to dismiss the student's claims over a17 month period that were decided by the Court. One of the School's principal claims was that the students were not employees of the School, but were students performing work to complete the 1600 hours of practical work before graduation. The Court did not conclude that California Cosmetology Board rules that permit only licensed persons performing cosmetology work barred the students claim. After the School's motion to dismiss failed; and after setting a discovery schedule and engaging in other acts, the School filed a petition to compel arbitration. The District Court denied the petition to compel on the ground that the School had waived its right to compel arbitration because of the actions that it had taken in Court. The School appealed the District Court's decision to the Ninth Circuit Court of Appeals.

The Ninth Circuit agreed with the District Court and concluded the School had waived its right to compel arbitration because it: (1) knew of the existing right to compel arbitration; (2) acted inconsistent with the right to compel arbitration by delaying their right to compel arbitration through actively litigating their case to take advantage of being in federal court; and (3) the litigation in court prejudiced the Students by forcing them to spend time and resources in defense in court.

B. Ten (10) Reasons Why Employers Prefer Arbitrators Making Important Employment and Wage and Hour Law Decisions and Not Layperson Juries:

1. Arbitrators are usually professionals who are trained to base their decisions on the facts and the law and not to make decisions based on theirs passions and emotions.
2. You can review the background and credentials of the arbitrator and in some cases prior decisions of the arbitrator before they are selected.
3. In contrast, you only have very limited information about the jurors before they are selected to decide your case.
4. Juries in most cases are composed of laypersons that are not managers who have had to make the hard employment and wage and hour decisions that are the subject of employee claims.
5. Both employees and employers have all of the legal rights that they would have in Court except that an arbitrator chosen by the employer and employee makes the final and binding decision instead of a Court and Jury.
6. Arbitration is designed to speed up the process so that the parties do not have to wait for an open courtroom and an available judge and jury to hear the case.

7. When the arbitrator and the parties agree on a hearing date or dates and the parties have prepared their witnesses and exhibits for that date, the arbitration moves forward on the scheduled date.
8. In contrast, when the Court sets a date for trial, there may be other cases scheduled on the same date or not concluded in the Courtroom where your case is set to be heard and you end up with a postponement to an uncertain date and time when your case will be tried.
9. Generally, when your case in before an Arbitrator you end up with a tighter process that leads to earlier resolution of the case.

C. <u>Tips for Employers on How to Avoid Losing the Valuable Right to Have Disputes Resolved in Final and Binding Arbitration and Not By Courts and Juries:</u>

1. Make certain that lawyers do not waive your right to compel arbitration. I once received an email from an attorney from an insurance carrier that stated: "I would rather try a case before a North County [San Diego] jury than before an arbitrator." If your attorney makes this type of statement consider changing counsel because statistically employers fair better before arbitrators than juries.

2. Have your attorney immediately request that the employees' attorneys who filed claims in Court, dismiss their case and file in arbitration. If they fail to do so file a petition to compel arbitration.

3. If one of the claims is for penalties for wage and hour violations under California law the Court will retain that portion of the lawsuit. Your attorney should ask that the PAGA portion of the case be stayed until completions of the remaining claims are determined in final and binding arbitration.

4. You should affirmatively advise you attorneys that you want all claims against your organization litigated in arbitration and not in court and that you want the attorneys to file a petition to compel arbitration as soon as possible if the employees' attorneys do not agree to immediately withdraw their lawsuit and to file their claims in arbitration.

5. Make certain that your arbitration agreements are clear and provide a class action waiver or whether your arbitration agreement requires class claims to be resolved through final and binding arbitration because under the recent **California Supreme Court decision issued July 28, 2016 in <u>Sandquist v. Lebo Automotive, Inc.</u>** arbitrators and not the courts will be the real decision makers as to whether your arbitration agreement contains a lawful, clear class action waiver and/or requires that class action claims be resolved through final and binding arbitration.

6. Contact The Goldstein Law Firm for advice and counsel on how you can prevent your company from losing your right to arbitration and to make certain that your arbitration agreements are enforceable and provide your company with the protections and benefits of having disputes with employees resolved through final and binding arbitration and not by courts and juries.

IV. Investigations of Potential Employment Law Claims By Former Employees that May Lead to an Employee Lawsuit Should Be Investigated By Attorneys:

If you believe that a former employee may be planning to sue your organization because the employee has filed complaints with any federal or state administrative agency such as the EEOC, DFEH, and/or the California Labor Commissioner, your organization should retain legal counsel, The Goldstein Law Firm, to investigate and respond to these claims.

While many human resources professionals are capable of successfully investigating and resolving employee issues of current employees, when the investigation and response involve a former employee you can anticipate that statements made by witnesses during the investigation and recommendations to higher management on how to deal with the former employee's complaint will be subject to disclosure to the employee's lawyer and are not protected from disclosure. Failing to protect from disclosure an internal investigation of a former employee who is considering filing a lawsuit against your company can create serious problems when, and if, a lawsuit is filed by the former employee.

In a recent 2016 case, ***City of Petaluma v. Superior Court*** the City hired an outside counsel to investigate the sexual harassment claims of a former employee. The employee had filed a complaint with the DFEH and the EEOC alleging a hostile environment of harassment, among other claims. The former employee than filed a lawsuit for sexual harassment and other claims. During the course of the lawsuit, the employee's lawyer moved to compel production of the investigation conducted by outside counsel for the City hoping to find admissions made by managers and employees who were interviewed by the attorney that would support the former employee's claims. The City did not claim that they made any decision regarding the former employee based on the investigation of the attorney who was hired after the employee left the City.

The Court stated that the City had an attorney-client relationship with outside counsel. Outside counsel was retained to provide legal services by bringing her legal skills to bear to assist the city in developing a response to the employee's EEOC complaint and the anticipated lawsuit. The dominant purpose of outside counsel's representation was to provide professional legal services to the city attorney so that she, in turn, could advise the city on the appropriate course of action.

This decision follows a line of cases that give employers protection from disclosure where they seek the advice and counsel to perform any audit of their wage and hour practices and seek to make changes based on the recommendation of their legal counsel.

Four Take Aways for Employers From the City of Petaluma Case

1. If you want to protect communications with key witnesses and decision makers that occur when your company is investigating a complaint by a former employee and preparing to respond to a federal and/or state agency, such as the DFEH, EEOC, Labor Commissioner, Department of Labor Standards Enforcement, and the U.S. Department of Labor – the investigation and response must be performed

by an attorney and covered by the attorney client privilege and attorney work product.

2. The retention agreement with the attorney should specify not only the scope of legal services, but that the investigation is conducted in anticipation of litigation and is intended to respond to charges filed by the former employee with a federal and/or state agency.

3. All documents involving the investigation should be marked "attorney client privileged communication" and "attorney work product."

4. The attorney should advise any witness interviewed that he or she is investigating this matter to respond to a complaint by a former employee.

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"*

THE GOLDSTEIN LAW FIRM – EXPERIENCE AND SUCCESSFUL REPRESENTATION OF EMPLOYERS SINCE 1977 COUNTS.

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

The Goldstein Law Firm
8912 Burton Way
Beverly Hills, California 90211
Telephone: (310) 553-4746
Facsimile: (310) 282-8070

cgoldsteinesq@gmail.com
josephgoldsteinesq@gmail.com
jonathangoldsteinesq@gmail.com