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 MERRY HOLIDAY SEASON AND A HAPPY AND PROSPEROUS 2017

I. How to Prevent Costly Legal Problems from Effecting Your Holiday Bonuses and Holiday Parties in the New Year.

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, regardless of business conditions, if the employer has consistently done so over the years, if the bonus was based on the employee's performance or productivity, or the bonus was to encourage increased productivity or performance, 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. Under these circumstances, the employer has converted a discretionary act of giving employees a "bonus" based on the employer's sole discretion and judgment to a non-discretionary mandatory bonus that is part of the employee's overall monetary compensation. There can be non-monetary discretionary bonuses that employers can convert to non-discretionary bonuses by their conduct. For example, some employers used to give their employees turkeys before Thanksgiving. There were cases where the employer for one reason or another stopped giving employees turkeys and a government agency found that the employer had converted a non-monetary discretionary benefit to a non-discretionary benefit, and the employer violated the law by no longer giving turkeys to its employees at Thanksgiving.

B. Steps you can take to prevent your discretionary holiday bonuses from becoming non-discretionary bonuses and a part of the employee's regular compensation.

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 stating 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 as non-discretionary bonuses and have consequences for non-exempt employees beyond merely being required to be paid regardless of the economic conditions of the employer.

4. **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.**

Eight (8) Suggestions that Employers Should Take to Avoid Holiday Season Sexual Harassment Claims and to Prevent Other Problems that Commonly Arise During the Holiday Season and at Holiday Parties:

1. Reissue your organizations' Sexual Harassment Policies and state that Sexual Harassment Policies still apply during the Holiday Season.

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, 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, 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.

II. The Ten (10) Steps You Should Take To Survive And Thrive in 2017:

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 the new federal salary regulations for exemption under the federal Fair Labor Standards Act effective December 1, 2016 and with California's stricter exempt job duties test.

3. Use the advent of the new federal salary test – that will increase audits of salaried employees by the Wage and Hour Division of the U.S. Department of Labor and by the California Labor Commissioner – to have a self audit conducted by The Goldstein Law Firm that is protected by the attorney client privilege and the attorney work product to determine whether your salaried exempt employees are being properly classified and to avoid unfunded liability from misclassification.

4. 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. **You do not want this to be the year when you are fined from between $5,000 to $15,000 for improperly dealing with independent contractor issues in your company. The Department of Labor Standards Enforcement (The California Labor Commissioner) strictly construes the requirements to create and maintain independent contractor relationships and routinely finds that independent contractors are employees, subjecting employers to significant liability.**

5. 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.

6. 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 ("PAGA") wage and hour claims that must be tried in court.

7. 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.

8. **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 employment law, including mandatory sexual harassment and bullying training and provide relevant real-life scenarios as part of our training programs. Set training goals for 2017. Training pays significant dividends.**

9. Make certain that you have Employment Practices Liability Insurance coverage from a carrier that will issue a **Choice of Defense Counsel Endorsement**, allowing 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.

10. **To avoid serious and costly labor and employment law 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 2017 the year that you contact The Goldstein Law Firm to learn the benefits of signing up for cost effective, timely, and preventive monthly retainers for legal advice and counsel.

III. New California Laws That Employers Should Be Aware of in 2017.

SB 3 – Establishes California's minimum wage of $10.50 per hour effective January 1, 2017 and raises it to $15.00 per hour by 2022.

SB 1063 – Expands the California Equal Pay Act to include race and ethnicity-related wage differentials.

AB 1676 – Amends the California Equal Pay Act to preclude prior salary history justifying gender-related wage differentials.

SB 1001 – Expands the law prohibiting unlawful immigration-related practices.

AB 1843 – Prohibits hiring-related inquiries concerning juvenile arrests.

AB 2337 – Requires Employers to provide notice of domestic violence law and accommodation rights.

AB 1732 – Effective March 1, 2017 employers are required to provide single-user restrooms

AB 2261 – Department of Labor Standard Enforcement ("DLSE") enforcement authority has been expanded to give the DLSE authority to bring lawsuits against an employer that terminated or discriminates against an employee in violation of law under the Labor Commissioner's jurisdiction. The DLSE can bring a lawsuit against an offending employer with or without the consent of the employee.

AB 2535 – Amends the wage statement requirements to remove the duty to track hours worked for many exempt employees.

SB 1241 – Precludes employment contract provisions from requiring California employees to agree to non-California venue to litigate or arbitrate their claims against their employer.

SB 269 – Took effect May 10, 2016 and establishes a rebuttable presumption, for the purposes of an award of minimum statutory damages, that certain technical violations do not cause a plaintiff to experience difficulty, discomfort or embarrassment if specified conditions are met. The law exempts a defendant from liability for minimum statutory damages with respect to a structure or area inspected by a certified access specialist for a period of 120 days if specified conditions are met.

If you have any questions about how these new laws apply to your business, please contact The Goldstein Law Firm

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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