Procrastinators Rejoice! Employers Handed Extra Time To File Safe Harbor Election Imposed By New Piece Rate Law

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Right before the holiday weekend, a Fresno County Superior Court judge handed California employers some good news by issuing a temporary restraining order in the case of *Nisei Farmers League v. California Labor and Workforce Development Agency, et al.* The court's June 30 decision eliminates the July 1, 2016 deadline which had been in place for qualified employers to notify the Department of Industrial Relations (DIR) of their election to participate in the affirmative defense (also known as the "safe harbor" provision) set forth in Labor Code §226.2.

As of today, qualified employers who pay employees in whole or in part on a piece-rate basis now have until at least July 28, 2016 to notify the DIR of their election to participate in the affirmative defense. California employers are now crossing their fingers and hoping that the court goes one step further and pushes the deadline out again before the end of the month.

Quick Recap: The New Piece Rate Law
California employers have been struggling to comply with Section 226.2 since the law took effect on January 1, 2016. Its impact on employers who pay employees on a piece-rate basis (including a piece rate in addition to a base hourly wage) is two-fold.

First, the law requires employers to provide separate compensation to piece-rate workers for all rest and recovery periods and "other" nonproductive time. Second, the law imposes what its opponents claim to be retroactive liability on employers who failed to compensate workers as provided in Section 226.2.

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However, the statute also creates an affirmative defense for which employers can qualify if they compensate all current and former employees for unpaid or underpaid rest and recovery periods and nonproductive time from July 1, 2012 to December 30, 2015. The formula for paying such retroactive pay also is arguably unclear.

One of the many requirements to assert the defense was that the employer must notify the DIR by July 1, 2016 of its election to participate in the affirmative defense. For those who may be unfamiliar with the law, you may find an in-depth discussion of the law's historical background and provisions here. For example, it is worth noting that certain employers are excluded from availing themselves of this provision, such as new automobile dealerships.

The Nisei Farmers League Litigation

Nisei Farmers League (Nisei) is an agricultural employer interest group. Early last week, Nisei filed a lawsuit in Fresno County Superior Court to challenge the constitutionality of Section 226.2. In particular, the lawsuit asserts that the law is unconstitutionally vague, fails to fairly give notice to employers of its requirements, and is impermissibly retroactive. Nisei seeks to invalidate the law by permanently enjoining the state from enforcing it.

Procrastinators Unite . . . Tomorrow: The Temporary Restraining Order

On June 30, just three days after the lawsuit was filed, the court granted a temporary restraining order blocking the DIR from enforcing the July 1 deadline pending the outcome of the hearing on the preliminary injunction. That hearing will take place on July 18, 2016.

The new deadline to notify the DIR can turn out one of two ways. If the court declines to grant the preliminary injunction, the new deadline will be July 28, 2016. If, however, the court decides to grant the preliminary injunction, the deadline to sign up for the safe harbor provision will be tolled until 30 days after the preliminary injunction expires. Additionally, the deadline to make payments will be tolled until 197 days after the preliminary injunction expires. Because a preliminary injunction will remain in place through trial, a determination as to the preliminary injunction in employers' favor could push out the deadlines to comply for a year or more.

Do It Later, Or Just Never Do It? The Affirmative Defense Cuts Both Ways

The affirmative defense seems appealing at first glance, and taking proactive steps to try and deflect a known liability may provide some employers with a sense of comfort. Nonetheless, the affirmative defense may not be worth the hype.

In particular, employers must satisfy multiple conditions to qualify, including notifying the DIR of the election. The DIR then publishes the name of the employer who makes the election on its website for public viewing. It does not take much imagination to think of reasons why public disclosure of the employer's election is undesirable.

Moreover, the payments need to be made within a relatively short time span, and the cost of paying all current and former employees who were paid on a piece rate basis over the past four years is extremely costly for many employers. Finally, the basis for the payment has been attacked as retroactively applying a wage standard that was not in effect, or unsettled, during the period in question.

Employers who have already provided notice to the DIR of their election to participate should proceed as usual notwithstanding the *Nisei* litigation. Others who have not yet provided notice pursuant to the July 1 deadline may wish to reconsider whether they intend to elect to participate in the safe harbor.

Some employers have already determined, for good reason, that they will bypass the affirmative defense given that the law is believed to unfairly impose retroactive liability. Additionally, employers may be adverse to the negative publicity that may be generated by the inclusion of their company's name on the DIR website.

We will be monitoring the developments in the *Nisei* case closely. In the interim, employers should contact their labor and employment counsel to discuss whether they are eligible to invoke the provision, and if so, the benefits and disadvantages of the safe harbor provision as applied to their company.

If you have any questions about this situation, or how it may affect your organization, please contact your Fisher Phillips attorney or one of the attorneys in any of our California offices:

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