



# STOKES WAGNER

ATTORNEYS AT LAW

## Quarterly Legal Update

January 2017

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### Federal

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New overtime regulations for exempt employees are on hold. **(See Page 2)**

#### [Post-Accident Drug Testing](#)

OSHA regulations make employers think twice about mandatory post-accident drug testing. **(See Page 2)**

#### [Arbitration Agreements in the 9<sup>th</sup> Circuit](#)

Employers need to review their arbitration agreements. **(See Page 2)**

#### [EEO-1 Compliance](#)

New EEO-1 Form requirements start on 3/1/17. **(See Page 2)**

#### [New I-9 Form](#)

Starting 1/22/17 employers must use the newly published I-9 form. **(See Page 3)**

#### [Your Investigation Matters](#)

An impartial investigation can be tainted by inaccurate information received from a biased employee. **(See Page 3)**

#### [Police Inquiries into Guest Records](#)

A discussion regarding law enforcement's right to inspect guest records. **(See Page 3)**

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### California/Local

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#### [Minimum Wage](#)

Starting 1/1/17 California minimum wage increased to \$10.50 per hour. **(See Page 4)**

#### [Fair Pay](#)

New law expands fair pay requirements to race and ethnicity. **(See Page 4)**

#### [All Gender Restrooms](#)

Beginning March 1, 2017, any single-user toilet facility in California must have signage identifying it as an all-gender facility. **(See Page 4)**

#### [Marijuana at Work](#)

Employers are still allowed to have a zero tolerance drug policy despite the recreational legalization of marijuana. **(See Page 4)**

#### [L.A. Bans the Box](#)

Employers in the City of Los Angeles cannot ask for an applicant's criminal history until a conditional offer of employment has been made. **(See Page 4)**

## DOL's Exempt Employee Salary Requirements on Hold

Employers nationwide were bracing for the increase in the federal threshold for exempt employees. At the 11<sup>th</sup> hour a Texas judge issued a nationwide preliminary injunction and thereafter the U.S. House of Representatives passed a bill that would delay the implementation of the \$47,476 threshold to June 1, 2017. The bill still requires Senate and Presidential approval.

## If You Have a Mandatory Drug Testing Policy After an On-the-Job Injury, You Need to Read This

Although we mentioned the new OSHA Final Rule in our last Quarterly Report, it is worth mentioning again. Employers should re-visit their drug-testing policy, specifically their policy regarding drug testing after an on-the-job injury. Post-accident drug testing has been a staple due to most workers' compensation insurance policies, however OSHA's Final Rule effective January 1, 2017, is a game changer. The Final Rule requires that an employer's reporting procedure not deter or discourage employees from reporting on-the-job injuries. The Rule explicitly states that employers conducting post mandatory accident drug testing will face penalties unless substance abuse **LIKELY** contributed to the accident and the test identified impairment.

## Arbitration Agreements in the Ninth Circuit

Arbitration agreements with mandatory class action waivers have long been under attack by the National Labor Relations Board ("NLRB"). The NLRB claims that mandatory class action waiver provisions in employee arbitration agreements violate the National Labor Relations

Act ("NLRA"). If you have an arbitration agreement with a class action waiver and operate within the jurisdiction of the 9<sup>th</sup> Circuit (CA, AZ, NV, OR, WA, ID, MT, AK), it is arguable the arbitration agreement is invalid. Employers within those jurisdictions should reach out to their employment counsel to determine whether an arbitration "opt-out" will save the arbitration agreement.

## EEO-1 Filings To Include Salary Information Starting March 2018

As anticipated, the EEOC issued its final revisions to the EEO-1 reporting requirements on September 29, 2016, in an effort to promote equal pay in the workforce. Beginning March of 2018, private employers with more than 100 employees will be required to disclose data on the wages and hours of its workforce in addition to the existing EEO-1 reporting requirements. Currently, covered employers are only required to report data on the race, gender, and ethnicity of its workforce. As noted above, the new requirements contain two major additions to the reporting requirements:

**Summary Pay Data** – Employers will be required to report the total number of full and part-time employees by demographics in 12 pay bands for each EEO-1 job category according to W-2 wages;

**Data on Hours Worked** – Employers will be required to report the aggregate number of hours worked by the workers accounted for in each pay-band. For non-exempt employees, employers should consult records already kept to remain compliant with the Fair Labor Standards Act. For exempt employees, employers have the option to report 20-hours per week for part-time employees and 40-hours per week for full-time employees or track report the actual number of hours worked.

**What should you do now?** – In preparation for the March 31, 2018 filing deadline, Stokes Wagner recommends the following:

- ✓ Assess your company's current data system and determine if adjustments need to be made for recording required data;
- ✓ Analyze and assess risk address pay issues that could lead to an EEOC investigation;
- ✓ Consult the EEOC's [Q&A](#) page on the new EEO-1 Revisions; and
- ✓ Contact Stokes Wagner with additional questions

## New I-9 Compliance

On November 14, 2016, USCIS released a revised version of [Form I-9](#), Employment Eligibility Verification (for new hires and employees requiring re-verification) so that it would reduce error rates and to make it more user friendly. Employers must use the revised form by [January 22, 2017](#).

## Your Investigation is Only as Credible as Your Employees

On August 29, 2016, the U.S. Court of Appeals for the Second Circuit joined several other federal courts<sup>1</sup>, and for the first time, adopted the "cat's paw" theory of liability in Title VII discrimination claims. The term "cat's paw" refers to a situation in which an employee is subjected to an adverse employment action by a decision maker who has no discriminatory motive but who has been manipulated by an employee who does have such intent to bring about an adverse employment action through his or her own bad acts.

In these jurisdictions an employer can be liable for acting on bad information from **any** employee when firing another worker – even a low-level, non-managerial employee.

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<sup>1</sup> The following five federal circuit courts of appeals have previously adopted and applied this cat's paw theory of liability to Title VII retaliation claims: the 3<sup>rd</sup> Circuit, the 5<sup>th</sup> Circuit, the 6<sup>th</sup> Circuit, the 7<sup>th</sup> Circuit, and the 8<sup>th</sup> Circuit.

## Law Enforcement's Right to Inspect Hotel Guest Records

Until recently, hotels in many jurisdictions routinely provided the police with access to their guest registers without much concern about the privacy issues that might be involved. After all, numerous cities and towns possessed ordinances that required hotels to collect specific guest information and allowed the police inspect the information upon request.

In 2015, however, the U.S. Supreme Court decided the landmark case of *City of Los Angeles v. Patel*, 135 S.Ct. 2443 (2015), which recognized that a hotel has a privacy interest in the information it collects from its guests. Moreover, the court held that a hotel which objects to providing the police with access to this information must be able to obtain an impartial review of whether the request by the police is proper.

In view of these developments, hotels should take several steps, including determining applicable local ordinances and developing a policy tailored to comply. Stokes Wagner has published a thorough article on this subject that can be found [here](#).



## California/Local Update

### Minimum Wage & Exempt Employees

As of January 1, 2017, the minimum wage in California is \$10.50. The new minimum wage also affects any California employer's analysis of an exempt employee. Generally, exempt employees must be paid 1.5 times the minimum wage. Thus, generally, an exempt employee in California must make at least \$43,680 per year to qualify as exempt. This necessarily makes the Department of Labor's proposed increase to \$47,476, seem less extreme.

### Fair Pay Applies to Gender and Race

A year ago California enacted the Fair Pay Act requiring employers to provide equal pay for male and female employees who perform substantially similar work. The Fair Pay Act has been amended to extend its application to prohibit pay disabilities based on not only gender, but also race and ethnicity. Stokes Wagner recommends reviewing all pay policies and using the new EEO-1 form (which requires a break down of pay based on race and gender) as a tool in the analysis.

### All Gender Restrooms

Starting March 1, 2017, any single-user toilet facility in California must have signage identifying it as an all-gender facility.

### Weed While You Work?

The State of California recently legalized the recreational use of Marijuana through Proposition 64. Nonetheless, the Proposition does not impact an employer's right to prohibit marijuana use, nor does it require employers to accommodate use of the substance. Stokes Wagner recommends issuing a reminder to all employees explaining that the recent Proposition does not change existing anti-marijuana work policies.

### The City of LA Bans the Box

Los Angeles passed the Fair Chance Initiative for Hiring - colloquially referred to as the "Ban the Box Ordinance." The Ordinance makes *pre-offer* criminal background checks by private employers illegal. As a result, City of Los Angeles employers cannot include questions on any application for employment that seeks the disclosure of an applicant's criminal history. Such inquiries are only permitted once a conditional offer of employment has been extended. Additionally, the Ordinance sets forth rigid procedures (coined, the "fair chance process") for employers who wish to take an adverse action against an applicant after discovering the existence of the applicant's criminal history after a conditional offer has been extended. The Ordinance is slated to become effective January 22, 2017, with monetary fines effective July 1, 2017.





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