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January 6, 2012

**VIA FAX (415)703-4807
AND FIRST CLASS MAIL**

Julie Su
State Labor Commissioner
Division of Labor Standards Enforcement
455 Golden Gate Avenue
9th Floor
San Francisco, California 94102

*Re: DLSE Notice to Employee (Labor Code section 2810.5)
Wage Theft Protection Act of 2011*

Dear Labor Commissioner Su:

On behalf of the Employers Group, we write to respectfully request the Division of Labor Standards Enforcement (Division) to withdraw immediately its Notice to Employee (DLSE Notice) and the accompanying Frequently Asked Questions (FAQs) first posted on the Division's website on Thursday, December 29, 2011.

As described more fully below, the DLSE Notice and the FAQs issued by the Division, *a mere two (2) business days before the new law took effect*, impose several new, impractical and ambiguous obligations upon California employers. These disclosure obligations are neither authorized nor contemplated under new Labor Code section 2810.5. Indeed, they go far beyond the basic employer, wage and Workers Compensation information that the statute was intended to cover.

More directly, the Division's additional disclosure requirements are unclear and will lead to unintended consequences, use terms that are neither defined nor readily understandable to employers and workers, and will be difficult, if not impossible, for employers to effectively and efficiently implement. In short, rather than providing California workers with the information required by the new law, the DLSE Notice and FAQs will do little more than create confusion and spawn a new wave of class action litigation, something the Legislature surely did not intend. There is added confusion caused by the issuance and retraction of the first FAQs without any indication as to what was changed or why. Many employers printed the original FAQs and are justifiably relying on them. Neither version was dated or time-stamped. Indeed, those

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employers who obtained the original FAQs had no reason to check for a revised version or evaluate what, if any, changes were made or why.

Also, by mandating these new disclosure obligations upon all California employers, the Division has failed to comply with the rulemaking requirements under the Administrative Procedures Act (APA). While Labor Code section 2810.5 authorizes the Division to identify and require employers to disclose other information that it determines to be “material and necessary,” the Division is not relieved of its obligations under the APA to follow the applicable rule-making process. Indeed, several of the additional disclosure requirements unilaterally imposed by the Division would benefit tremendously from the notice, comment and public hearing procedures required under the APA.

The Employers Group is the nation’s oldest and largest human resources management organization for California employers. It represents nearly 3,800 California employers of all sizes and in every industry, which collectively employ nearly 3 million California workers. The Employers Group has a vital interest in seeking clarification and guidance from the California courts and the enforcing agencies, including the Division, for the benefit of its employer members and the millions of California workers they employ. As part of its mission, the Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. It is for this reason that the Employers Group sends this letter. In this regard, along with other members of the Legal Committee of the Employers Group, the undersigned has discussed the issues raised below with a number of California’s largest and most prominent employers, many of which are members of the Employers Group, and they all share the concerns expressed herein.

A. The Additional Requirements Unilaterally Mandated by the Division Are Confusing, Impractical, and Unnecessary.

The DLSE Notice requires employers to provide the following *additional* information beyond that which is required under Section 2810.5:

- The hire date;
- Whether the employer is a sole proprietor, corporation, limited liability company, general partnership, other type of entity, or a staffing agency;
- Whether the employer uses any other business or entity to hire employees or administer wages or benefits. If so, the name, type, physical address, mailing address and telephone number of the other business is required;
- Whether the employment agreement is oral or written;
- The workers' compensation policy number;

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- Whether the employer is self-insured (Labor Code 3700) and if so, the Certificate Number for Consent to Self-insure is required;
- A summarization of Labor Code 2810.5 including when the notice forms must be provided (at hiring or within 7 days of any changes) and when the notice forms are not required (employers who are exempt);
- An acknowledgment stating: "The employee's signature on this notice merely constitutes acknowledgment of receipt. In accordance with an employer's general recordkeeping requirements under the law, it is the employer's obligation to ensure that the employment and wage-related information provided on this notice is accurate and complete. Furthermore, the employee's signature acknowledging receipt of this notice does not constitute a voluntary written agreement as required under the law between the employer and employee in order to credit any meals or lodging against the minimum wage. Any such voluntary written agreement must be evidenced by a separate document."

While not an exhaustive list, the comments of the Employers Group members and other employers are set forth below and are broken down by section in the DLSE Notice.

Generally, the additional disclosure provisions required by the Division ensure that it will be nearly impossible to present the written disclosure on a single sheet of paper. Employers, particularly those with hundreds or thousands of non-exempt employees, need to be able to be efficient in making these disclosures. Also, the notice will be more easily read and understood by those it is intended to benefit if it were more streamlined and required only useful information.

Preamble

- The preamble is unnecessary. The term "time of hire" is not defined and is ambiguous. Several employers use the first day an employee begins work as the "hire" date. Others use the date the employee accepts the job, etc. This term needs clarification and we suggest that it be defined as the first day the employee commences work.

Employee

- The term "hire date" is not defined. For the same reasons described above, the term needs clarification.

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Employer

- The term “worksite employer” is not defined anywhere in California law and is ambiguous. It is neither a term of art nor a customary term used in the staffing industry. The term needs clarification.
- The DLSE Notice requires employers to disclose information about “any other business or entity” used “to hire employees or administer wages and benefits.” Employers could read this to mean a requirement to disclose any business, including third party administrators, that administers health care benefits, pension and profit-sharing programs, leave programs, AFLAC, etc. Not only is this far beyond the scope of the statute, it simply does not make any sense and will be unreasonably burdensome for those many, mostly large California employers providing several different types of worker benefits. A list of these types of organizations could be lengthy and would provide no useful information.
- As drafted, the DLSE Notice will lead to duplication and confusion in the temporary services industry. The notice can be read to require multiple entities to complete forms for the same employee, possibly with inconsistent or confusing information. It is acknowledged that the use of professional employer organizations, employee leasing companies, and other temporary service employers presents unique circumstances. These entities deserve a specially designed form tailored to their unique circumstances, not the inclusion of confusing provisions on the general form applicable to all employers.

Wage Information

- Both the DLSE Notice and FAQs are devoid of any guidance as to whether “Rate(s) of pay” is meant to include bonus payments, differentials, SPIFs, and other means of compensation commonly used by California employers. As these forms of compensation often are contained in lengthy policies or free-standing documents, the need to include this information in the notice would substantially lengthen and complicate it.
- Also, the DLSE should clarify that any requirement to specify overtime rates should be limited to stating the percentage (time and one-half or double time) and that the regular rate of pay, which can change from pay period to pay period as the number of hours or the amount of includable compensation changes, need not be stated.
- The term “employment agreement” is not defined and is ambiguous. Such a term unwisely creates inferences about employment contracts and may implicate or affect the general presumption under California law that employment is “at will.”

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Labor Code 2922. If the intention of the disclosure requirement is to address the agreement *as to which wage rates are paid*, it should be stated so directly.

Workers Compensation

- Although employers may not regularly change Workers' Compensation insurance carriers, the policy number often changes each year as a policy is renewed. The Division's requirement that this policy number be included, and the requirement that employees be informed of any changes in writing, means that, collectively, California employers must issue *millions* of new disclosure notices simply due to policy number changes. This presents considerable administrative and environmental costs. This additional burden is on top of the other several new disclosure notices already expected to be issued due to wage rate changes and other changes to the information already required under the statute. And, of equal importance is the fact that it provides California workers with no useful information.
- It should be noted that this disclosure requirement will likely have the unintended consequence of confusing and misleading employees. Employers often have designated procedures or telephone numbers for employees to use to contact the Workers' Compensation carrier for benefit or claim information, and these procedures may be different than the information required to be disclosed on the form, which employees may unwittingly be inclined to use.

Acknowledgment of Receipt

- The requirement to have every employee and an employer representative sign each disclosure and change in information is unnecessary and administratively burdensome. There is also no guidance provided defining who may be an appropriate "employer representative." Employers may want to obtain signatures but they should not be mandated to do so.
- Although the Division states in the FAQs that employers may provide the notice electronically, the issuance of the DLSE Notice and FAQs just two business days before the new law became effective plainly prevented any employer from timely implementing a system to provide the disclosure and enable a worker to acknowledge receipt of the notice.
- No guidance is provided as well as to whether or how employers using electronic notice systems may meet both the Division's mandate that a "worker can acknowledge the receipt of the notice" and comply with applicable state and federal electronic signature laws. This is an area that is out of the Division's expertise and clearly calls for public input provided under the rulemaking process.

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- The language included to qualify or limit the significance of the employee's signature is overbearing and unnecessary. The first sentence is sufficient.

B. The Division Violates The Rulemaking Requirements Under The Administrative Procedures Act When It Imposes The New Disclosure Requirements Identified In The DLSE Notice On All California Employers.

Every regulation is subject to the rulemaking procedures of the APA *unless expressly exempted by statute*. See *Government Code Section 11346*, et seq.. "Regulation" means "every rule, regulation, order, or standard of general application ... adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." *Government Code Section 11342.600*.

In this case, the Division mandates in its notice and FAQs that all employers disclose additional information beyond that specified in Labor Code 2810.5(a)(1). For example, the notice and the FAQs mandate (1) that employers must use the DLSE Notice or their own notice so long as they contain "all the information requested on DLSE's template," and that the "template includes all required information, including that which the Labor Commissioner deems material and necessary for purposes of the notice," (2) that the notice "must be on its own form," and (3) that that electronic delivery programs must contain "a system where the employee can acknowledge the receipt of the notice and print out a copy of the notice."

These and other mandates are clear directives indicating the DLSE's intent to impose a rule of general application to make specific the law administered by the Division. In so doing, the Division is implementing a rule or standard of general application to all employers, which is impermissible under the APA. See *Engelmann v. State Board of Education* (1991) 2 Cal.App. 4th 47 (To the extent any of the agency rules depart from, or embellish upon, express statutory authorization and language, the agency will need to promulgate regulations.) Furthermore, no exemption applies in this case. See *United Systems of Arkansas v. Stamhon* (1998) 63 Cal.App.4th 1001, 1010 ("When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language").

Based upon the well established law in this area, it is nearly certain that the Office of Administrative Law and the courts would find the Division's mandates as described in the DLSE Notice and FAQs to be unenforceable and in violation of the APA. Moreover, this additional information and the Division's directives as to how they should be disclosed affect hundreds of thousands of employers and their workers in a variety of industries. The public input from employers, worker advocacy groups, and others under the rulemaking process is necessary in this case.

For the reasons described above, we respectfully request that the Division immediately withdraw its DLSE Notice and accompanying FAQs and reissue at this time a new template form, on a single page, that is limited to the plain language of the statute. We also request that

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the Division should address the ambiguous terms and items described above in a revised FAQs. Should the Division believe that employers should disclose additional information that it finds to be "material and necessary," those items should be mandated only after the Division has complied fully with the rulemaking procedures under the APA.

The Employers Group remains willing to assist the Division in providing input and recommendations to ensure the adoption of disclosure requirements that are clear, relevant, and practical to the needs of the Division, California workers, and their employers.

Best regards,

ATKINSON, ANDELSON, LOYA,
RUUD & ROMO

By 

Robert R. Roginson

RRR/

cc: Employers Group Legal Committee