

Calif.'s Patchwork of Local Minimum Wages a 'Minefield' for Employers

By Dan M. Forman

California's robust and lucrative market is also an expensive one, and that cost is increasing. California's recent minimum wage increase will, over 18 months, create the highest state minimum wage in U.S. history, by 2023 at \$15 per hour. Further, many of California's employee-friendly cities and local governments have enacted local wage ordinances that exceed or differ from statewide requirements, making the decision of where to do business in California increasingly complex.

Local wage ordinances include a variety of implementation schedules, rates, possible exclusions, covered entities and employees, as well as different posting and notification requirements to create a minefield for employers. These very real costs and complications should be considered as part of every California



Dan Forman of Carothers DiSante & Freudenberger LLP.

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employer's decision of where to do business in California.

Costs of California's Patchwork of Local Minimum Wage Rate Ordinances

Nearly two-dozen California cities and counties have local minimum wage ordinances, including: Berkeley, El Cerrito, Emeryville, Long Beach, Los

Angeles City, Los Angeles County, Mountain View, Oakland, Palo Alto, Pasadena, Richmond, San Diego, San Francisco, San Jose, Santa Clara, Santa Monica and Sunnyvale, many of which require greater or more rapid increases than the statewide minimum wage increase to \$15 per hour by 2023 (estimated to eliminate approximately 900,000 full-time equivalent jobs).

The patchwork of different and potentially overlapping wage ordinances will drive up compliance costs and litigation expenses. While different ordinances frequently use similar terminology, even slight differences become confusing and may create different standards that will be interpreted by different local enforcement agencies. In addition, some local wage ordinances are also a mechanism to implement paid sick leave that exceeds California's state law requirements. Simply put, statewide requirements are no longer a reliable compliance formula for employers with employees in different, even adjacent, cities.

The local wage ordinances recently implemented by the city of Los Angeles are a good example of complexities and overlapping requirements. Effective, July 1, 2016, employers with 26 or more employees, must pay employees who perform at least two hours of work within the geographic boundaries of the city in a week at least \$10.50 for each hour worked compared to the 2016 state minimum of \$10/hour. Incorporated cities in Los Angeles

County, such as Beverly Hills or Culver City, may have (or will have) their own minimum wage requirements. Thus, an employer with locations in Los Angeles and Culver City is required to pay two equivalent employees a different minimum hourly rate.

Enforcement of Local Minimum Wage Ordinances

The disjointed local wage ordinance model will also lead to complicated enforcement and regulation. An employee paid less than the state's minimum wage has the ability to report such violations to the Division of Labor Standards Enforcement (DLSE) and seek remedies under the DLSE's mechanisms. The DLSE confirms "the effect of this multiple coverage by different government sources is that when there are conflicting requirements in the laws, the employer must follow the stricter standard; that is, the one that is the most beneficial to the employee ... if a local entity (city or county) has adopted a higher minimum wage, employees must be paid the local wage where it is higher than the state

or federal minimum wage rates." However, local governments are creating their own enforcement mechanisms. Thus, California employers should expect to face both the DLSE and overlapping local enforcement agencies and additional fines/penalties, as localities seek additional revenue streams.

Possible Conflicts with California's Fair Pay Act

For many years, the California Equal Pay Act prohibited employers from paying employees less than other employees of the opposite sex for equal work. On Oct. 6, 2015, Gov. Edmund Brown signed the California Fair Pay Act, which has the effect of strengthening and broadening the Equal Pay Act. The Fair Pay Act requires equal pay for employees who perform "substantially similar work." Additionally, this comparison has been further broadened by eliminating the requirement that the employees being compared work at the "same establishment." Every employer's burden is heightened, making it more difficult for an employer to defend its payroll practices by asserting pay differences as a

“bona fide factor other than sex” as different geographic locations may be used as comparators.

Because local wage ordinances themselves create geographical distinctions for particular employees, it is foreseeable that two employees of different genders located in different cities that have different minimum wage requirements will be paid different minimum wage amounts to comply with local wage ordinances which will be used to support a complaint of discrimination under the Fair Pay Act.

Presumably, paying compliant minimum wages under a local wage ordinance will be considered to be a “bona fide factor other than sex” for an employer to attribute different pay rates among employees of the opposite sex. However, until there is case law on point, no clear direction for employers exists.

While the California Fair Pay Act and local wage ordinances are not necessarily in conflict, employers interested in entering different cities with different local wage ordinances may be effectively required to adhere to the highest of such minimum wage rates in order to avoid running afoul of the California Fair Pay Act.

Conclusion

California employers must scrutinize the decision to do business in California and where in California to do business to ensure compliance with the patchwork of local ordinances. The ordinances will compound direct and indirect costs, potential expenses and, thus, further increase the rate at which minimum wage positions may be re-located. Furthermore, the costs of implementation and

enforcement among the smaller municipalities may be too taxing for effective regulation. To reduce the uncertainty of differing wage rates, compliance and enforcement, future statewide legislation should be enacted to curb the patchwork wage laws before they cripple California employers.

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