2017 California Labor Law Update

BUSINESS & PEOPLE STRATEGY CONSULTING GROUP

4TH ANNUAL CALIFORNIA LABOR LAW UPDATE
Welcome


Our way of providing California employers with the ability to educate employers with California employees to avoid costly litigation, maintain compliance, and stay in business.

We have provided guidance, support, outsourcing, strategy, and solutions related to labor & employment laws, compliance, human resources, payroll & HR technology for over 18 years.

Our experience spans start-ups to some of the top 50 largest employers in the world with clients across the U.S., Mexico, Canada, Australia, Europe, and Asia.
Before We Get Started

For those joining us for the first time…

◦ Don’t be shy. If you have a question…ask (chances are others have the same question).
◦ You don’t have to wait until the end to ask questions.
◦ You can use the text or microphone (if using the microphone, please be sure to place it on mute when not asking questions).
◦ We will load a copy of the presentation as well as the recorded session on our website within 2 to 3 days, thus you can access them at any time.

…most important, please enjoy!
Agenda

- Review of Key 2016 Laws
- December 1, 2016 FLSA Requirements
- California & Local Minimum Wage Requirements for 2017
- New & Revised Laws for 2017
- Laws Signed with Post-2017 Effective Dates
- Impact of Prop 64 (Legalized Marijuana)
- Summary
Presenter

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President & CEO of Business & People Strategy Consulting Group

Over 25 years of labor & employment law, compliance, and human resources experience

Doctorates in Jurisprudence (JD) and Psychology (PsyD)

Certified Interrogator

Author of ‘Dirty Little Secrets: Declassifying the Employment Game’
Review of 2016
Key 2016 Laws (Labor Commissioner)

Labor Commissioner’s enforcement powers expanded to enforce local laws regarding overtime hours or minimum wage provisions and to issue citations and penalties for violations, except when the local entity has already issued a citation for the same violation.

Labor Commissioner allowed to use any of the existing remedies to enforce a judgement against the employer when collecting unpaid wages.
Key 2016 Laws (CA Equal Pay Act)

California Equal Pay Act amended to make it unlawful for employers to prohibit and prevent employees from disclosing their own wages, communicating about the wages of other employees, or inquiring about wages of other employees for the purpose of determining whether there is a factual basis for an equal pay claim.

Eliminated the requirement that the wage differential be within the same establishment and, instead, prohibits an employer from paying any of its employees at wage rates less than those paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort and responsibility, as specified by the new law.
Key 2016 Laws (E-Verify)

Employers that use the E-verify system must notify the affected employee of any notification from the Social Security Administration or the U.S. Department of Homeland Security with information about the applicant’s E-verify case or any tentative non-confirmation notice ($10,000 for each employer violation of the law’s provisions).

Definition of an unlawful employment practice expanded to prohibit an employer or other person or entity from using the E-verify system at a time or in a manner not required by federal law or by a federal agency memorandum of understanding to check employment authorization of an applicant who has not received an offer of employment, except as required by federal law or as a condition of receiving federal funds.
Key 2016 Laws (CFRA)

Clarified that eligible employees are those who have been employed for 12 months or more and have been employed for at least 1,250 hours during the 12-month period.

When a business is considered a joint employer (which is determined by looking at the economic circumstances of the situation), employees should be counted by both employers for determining CFRA eligibility.

Employer must have a “good faith, objective reason” to doubt the legitimacy of an employee’s medical certification.

Defined a serious health condition to be one that involves either inpatient care or continuous treatment.
Key 2016 Laws (Family School Partnership)

Applies to employers with 25+ employees.

Expanded to encompass more circumstances for when an employee can take time off work without fear of being terminated.

Prohibits discriminating against an employee who is a parent, guardian, or grandparent who has custody of a child and subsequently uses unpaid time off for the purpose of participating in school activities.

Includes taking job-protected time off to:

(1) find, enroll, or re-enroll his or her child in a school or with a license care provider, and
(2) to address a child care provider or a school emergency.
Key 2016 Laws

Unlawful for an employer to retaliate or discriminate against an employee for requesting an accommodation for a disability or religious observance, regardless of whether the request was granted.

Employers with 5+ employees subject to new and expanded anti-discrimination and anti-harassment regulations, including new required policy language in writing and disseminated, new training requirements, new definitions, and 10% rule for other languages spoken in the workplace.

Amended Labor Code Section 6404.5 and expanded the prohibition on smoking of tobacco products in all enclosed places of employment to all employers of any size, including a place of employment where the owner-operator is the only employee (i.e., owner-operated business).
FLSA
December 1, 2016
The Final Rule

Previously set to be effective December 1, 2016

Applies to employees classified and paid as exempt (not entitled to overtime pay).

Would have set minimum at $913 per week/$47,476 annually.

2 lawsuits filed challenging the law.

Injunction granted to halt the new law November 22, 2016.
Options

The DOL can appeal the injunction to the Fifth Circuit, which will not likely issue an opinion until 2017.

◦ If the Fifth Circuit reverses, the injunction would be lifted, and the case would return to the judge that granted the preliminary injunction to be fully litigated.

The DOL can choose not to appeal, and the case would be litigated before the judge who granted the preliminary injunction.

◦ Given that the judge already granted a preliminary injunction and determined that there was substantial likelihood that the plaintiffs who challenged the Final Rule would succeed on the merits, it is likely that the judge would grant a permanent injunction.
Options

A lame-duck Congress could come up with a compromise bill for President Obama’s signature.

- While the Final Rule had support from both sides of the aisle, it is unclear whether the two sides would be able to get a compromised bill to President Obama before the expiration of his term.

The issue remains and President Elect Trump addresses it after his confirmation.

- Given President Elect Trump’s pro-business background, it is unlikely that he, or the Republican House or Senate would allow this initiative, which has been seen as bad for business.
What Now?

California employers will still need to adjust for the January 1, 2017 minimum wage increase, thus increasing the annual minimum to $43,680 per year/$840 per week. (Note: Employees exempt under Computer Professional must be paid no less than $88,231.36 starting January 1, 2017)

If no changes made…nothing to do.

If changes already made:
- Reverse back to previous structure (may result in employee issues)
- Retain new structure (will result in the anticipated labor costs)
Considerations

During this process, many employers discovered issues such as:

- Misclassification of their exempt employees;
- Travel time errors;
- Time recordkeeping errors;
- Time worked off the clock errors;
- Clock in and out errors.

If you haven’t evaluated these serious litigation areas, now is the time to do so.
2017 California and Local Minimum Wage Requirements
California Minimum Wage

Employers with 26 or more employees
January 1, 2017 increases to $10.50 per hour

Employers with 25 or fewer employees have one extra year to comply.
January 1, 2018 increases to $11.00 per hour
January 1, 2019 increases to $12.00 per hour
January 1, 2020 increases to $13.00 per hour

Note: This subsequently increases the California minimum for exempt employees each year.
Based upon the current projection for the next federal exempt minimum increase, California may preempt in 2020 ($54,080 per year).
# California Minimum Wage (2017-2022)

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<thead>
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<th>Date</th>
<th>26+ employees</th>
<th>&lt; 26 employees</th>
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<tr>
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<td>$10.00</td>
<td>$10.00</td>
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<tr>
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<tr>
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<tr>
<td>January 1, 2022</td>
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</tr>
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</table>
Los Angeles Minimum Wage

Includes LA city districts AND unincorporated LA County.

Employee is defined as an individual who works at least 2 hours of work within the geographic boundaries of the City of Los Angeles for any employer.

Employers with 26+ employees:
- July 1, 2017 increases to $12.00 per hour ($10.50 for 25 or fewer employees)
- July 1, 2018 increases to $13.25 per hour ($12.00 for 25 or fewer employees)
- July 1, 2019 increases to $14.25 per hour ($13.25 for 25 or fewer employees)
Los Angeles Minimum Wage

Paid Sick Leave Requirements for 26+ Employees
- Grant or accrue no less than 48 hours per year (as opposed to the state 24 hours).
- Accrual cap of no less than 72 hours (as opposed to the state 48 hours).
- No less than 48 hours per year available to be used.

The following remain consistent with the state law:
- Not required to pay out at termination (unless combined in PTO).
- Accrued time must be reinstated if the employee returns to work within 1 year of separation.
- Can be limited in use until completing 90 days of employment.
- Accrual based upon 1 hour per 30 hours worked.
<table>
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<td>El Cerrito</td>
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<td>Emeryville</td>
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<td>$14.82 (56+)</td>
<td>$14.00 (&lt;56)</td>
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<tr>
<td>San Diego</td>
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<td>$11.50</td>
<td></td>
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<td>San Francisco</td>
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<tr>
<td>San Mateo</td>
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<td>$11.10</td>
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<tr>
<td>Santa Monica</td>
<td>July 1, 2017</td>
<td>$12.00 (26+) $10.50 (&lt;26)</td>
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<tr>
<td>Sunnyvale</td>
<td>January 1, 2017</td>
<td>$13.00</td>
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</table>
New & Revised for California in 2017
Wage Discrimination and Application to Race and Ethnicity

AB 1676 and SB 1063

Effective January 1, 2017

Under the January 1, 2016 Fair Pay Act, existing law generally prohibits an employer from paying an employee at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.
Wage Discrimination and Application to Race and Ethnicity

The Fair Pay Act provides for exceptions such as, the wage differential is based upon one or more of the following factors:

- a seniority system;
- a merit system;
- a system that measures earnings by quantity or quality of production;
- a bona fide factor other than sex, such as education, training, or experience.
Wage Discrimination and Application to Race and Ethnicity

AB 1676 amends the Fair Pay Act (Labor Code Section 1197.5) to provide that an employee’s prior salary cannot, by itself, justify any disparity in compensation under the bona fide factors above.

SB 1063 amends Labor Code Sections 1197.5 and 1199.5 and expands the requirements of the Fair Pay Act to include employees’ race or ethnicity, and not just gender.
Itemized Wage Statements

AB 2535

Effective January 1, 2017

The existing law requires that employers provide their employees an accurate itemized statement (pay stub) in writing containing specified information as listed in Labor Code Section 226.

This Bill clarifies that Section 226 does not require employers to include in itemized wage statements the total number of work hours by an exempt employee.
Itemized Wage Statements

An exempt employee is an employee who is exempt from minimum wage and overtime premiums under the California Labor Code or other applicable Wage Orders by the Industrial Welfare Commission.

Employers must continue to include the total hours worked by non-exempt employees in the itemized wage statements for each pay period.
Itemized Wage Statements

Labor Code Section 226 required information for itemized wage statements includes:

◦ Gross wages earned;
◦ Total hours worked (except salaried exempt employees);
◦ Piece rate units and rate, if applicable;
◦ All deductions, including taxes, disability insurance, and health and welfare payments (deductions ordered by the employee may be aggregated and shown as one item);
◦ Net wages earned;
◦ The inclusive dates of the pay period;
◦ The name of the employee along with his or her social security number (last four digits only) or an employee identification number;
◦ The name and address of the legal employing entity; and
◦ All applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.
Itemized Wage Statements

Quick Note About Itemized Wage Statements

- Meal and rest period premiums have been the token “add-on” claim in employee lawsuits (especially in PAGA/class-action).
- These premiums must be distinguished on the IWS, thus cannot be included in their regular wages.
- All that is needed are meal and/or rest period violations to trigger this claim.
AB 2899

Effective January 1, 2017

Requires that any employer, before appealing a decision by the Labor Commissioner (LC) relating to a violation of wage laws, must file a bond—in favor of the unpaid employee—with the LC that covers the total amount of any minimum wages, liquidated damages, and overtime compensation owed.

The bill also provides that the total amount of the bond is to be forfeited to the employee if the employer fails to pay the amounts owed within 10 days from the conclusion of the proceedings.
Immigration Related Unfair Practices

SB 1001

Effective January 1, 2017

Employers who are in the process of verifying that workers have the necessary documentation to work in the United States are prohibited from:

1. Requesting more documents or different documents than are required under federal law,
2. Refusing to honor documents tendered that on their face reasonably appear to be genuine,
3. Refusing to honor documents or work authorization based upon the specific status or term of status that accompanies the authorization to work, and
4. Reinvestigating or re-verifying an incumbent employee’s authorization to work.
Immigration Related Unfair Practices

Under this Bill (which adds Labor Code Section 1019.1), applicants and employees may file a complaint with the Division of Labor Standards Enforcement.

Any person who is deemed in violation of this new law is subject to a penalty imposed by the Labor Commissioner of up to $10,000 and potential other relief available.
Employment Discrimination

AB 488

Effective January 1, 2017

This is an expansion of AB 1443, enacted in 2014, which extended FEHA’s protections to unpaid interns and volunteers.

 Allows individuals employed under a special license in a nonprofit sheltered workshop or rehabilitation facility to bring an action under the Fair Employment and Housing Act (FEHA) for prohibited harassment or discrimination.

Also now extends FEHA’s protections to workers with disabilities.
Employment Protections for Victims of Domestic Violence, Sexual Assault, or Stalking

AB 2337

July 1, 2017 (required compliance by)

Requires that by July 1, 2017, employers with 25 or more employees must provide specific information in writing to new employees upon hire and to other employees upon request of their rights to take leave under Labor Code Section 230.1

Labor Code Section 230.1 relates to victims of domestic violence, sexual assault, or stalking.
Employment Protections for Victims of Domestic Violence, Sexual Assault, or Stalking

It also requires that, on or before July 1, 2017, the Labor Commissioner develops a form that employers may elect to use to comply with these provisions and to post it on the Labor Commissioner’s website.

Employers are not required to comply with the notice of rights requirement until the Labor Commissioner posts such form.
Criminal History in Applications for Employment

AB 1843

Effective January 1, 2017

Prohibits employers from asking an applicant for employment to disclose any information regarding juvenile convictions and seeking or utilizing any information related to juvenile arrests, detentions, or court dispositions as a factor in employment determination.
Criminal History in Applications for Employment

The bill does specify that an employer at a health facility can inquire into an applicant’s juvenile criminal background if:

(a) a juvenile court made a final ruling or adjudication,

(b) that the applicant had committed a felony, or

(c) misdemeanor relating to sex crimes or certain controlled substances crimes within five years prior to applying for employment.

Still, these employers cannot inquire into an applicant’s sealed juvenile criminal records.
Background Checks

AB 1289

Effective January 1, 2017

Requires a transportation network company ("TNC"; e.g., Uber, Lyft) to conduct, or have a third party conduct, criminal background checks on each participating driver.

Also prohibits a TNC from contracting with a driver:
(a) who is currently registered on the DOJ’s National Sex Offender Public Website;
(b) has been convicted of specified felonies within the past seven years; and/or
(c) has been convicted, within the past seven years, of misdemeanor assault or battery, domestic violence, or driving under the influence of drugs or alcohol.
Background Checks

AB 2763

Effective January 1, 2017

Defines a personal vehicle, used by a participating driver in a transportation network company, as one that has a passenger capacity of eight persons or less, (including the driver) and is owned, leased, or rented for a term that does not exceed 30 days, or otherwise authorized for use by the participating driver.
Employee Contact Information

AB 2843

Effective January 1, 2017

Expands an existing provision of the California Public Records Act (CPRA) that exempts the homes addresses and home telephone numbers of certain public employees from public disclosure to now cover all public employees, including persons paid by the state to provide in-home support services.

Also extends the CPRA exemption to include the employee’s personal cell phone number and birth date.

However, telephone numbers will be made available to bargaining agents for those employees.
Choice of Law and Forum in Employment Contracts

SB 1241

Effective January 1, 2017

This Bill adds Labor Code Section 925 and prohibits employers from requiring California-based employees to enter into agreements (including arbitration agreements) requiring them to:

1. Adjudicate claims arising in California in a non-California forum; or
2. Litigate their claims under the law of another jurisdiction, unless the employee was represented by counsel.

Any provision of a contract that violates this new law is voidable by the employee, any dispute arising thereunder shall be adjudicated in California under California law and the employee is entitled to recover reasonable attorneys’ fees.
Entertainment Employment Services

AB 1687

Effective January 1, 2017

Addresses age discrimination in the entertainment industry by prohibiting a commercial online entertainment employment service (i.e., IMDb) that enters into a contract, from publishing a subscriber’s age or date of birth in an online profile.

Requires that a service provider—upon request by the subscriber—remove age information from public view in any online profile under its control.
Talent Services

AB 2068

Effective January 1, 2017

Updates the Talent Service Act’s existing communication and contractual protections to include new technologies, such as mobile applications.

Specifically, it strengthens the protection for an artist’s information or image to include information posted on an online service, online application, mobile application, or website.
Talent Services

Updates the communication and advertisement protections between talent agencies and artists by including communication through the use of a telecommunication device, in print, on the Internet, or through the use of a mobile or online application or other electronic communication.

Adds “text message” and other “electronic communication” to the list of methods by which an artist may ask that photographs and other information about the artist be removed from a website, online service, online application, or mobile application owned or serviced by the talent service.
Single User Bathrooms

AB 1732

Effective March 1, 2017

Requires all single-user toilet facilities in any business establishment, place of public accommodation, or government agency to be identified as all-gender toilet facilities.

It will authorize inspectors, building officials, or other local officials responsible for code enforcement to inspect for compliance with these provisions during any inspection.

Note: AB 1732 adds Article 5 (commencing with Section 118600) to Chapter 2 of Part 15 of Division 104 of the Health and Safety Code, relating to restrooms.
Work Experience Education

AB 2063

Effective January 1, 2017

Provides an additional option for a student, at least 14 years old, to participate in work experience education.

Increases the number of hours per week a student may participate in job shadowing from 25 to 40 hours per semester, if the principal of the school where the student is enrolled certifies that it is necessary for the student’s participation in a career technical education program.
New Laws with Future Effective Dates
Paid Family Leave (PFL; not to be mistaken with CFRA or PDL) provides short-term benefits to eligible employees who lose wages when they need to take time off work to care for a seriously ill child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered domestic partner, or to bond with a new child entering the family by birth, adoption, or foster care placement.

It revises the formula for determining benefits available to those eligible employees “for periods of disability commencing after January 1, 2018, but before January 1, 2022.”
Paid Family Leave

It provides “a weekly benefit amount minimum of $50 and increases the wage replacement rate to specified percentages, but not to exceed the maximum workers’ compensation temporary disability indemnity weekly benefit amount established by the Department of Industrial Relations pursuant to existing law.”

It also removes the existing seven-day waiting period for paid family leave benefits.

Note: This Bill impacts Sections 2655, 3303 and 2655.1 of the Unemployment Insurance Code.
Wages, Hours and Working Conditions for Agricultural Workers

AB 1066 (General Effective Date January 1, 2017)

Enacts the “Phase-In Overtime for Agricultural Workers Act of 2016,” which requires employers to pay agricultural workers overtime over a four-year phase-in process.

Beginning January 1, 2019, employers are required to pay overtime for any hours worked over 9.5 hours per day or 55 hours per workweek.

Each year the hours worked triggering overtime pay will reduce, until reaching 8 hours per day, 40 hours per week, beginning January 1, 2022.
Wages, Hours and Working Conditions for Agricultural Workers

Also beginning on January 1, 2022, any employee who works over 12 hours per day must be paid at a rate no less than double the regular rate of pay.

The Governor may temporarily suspend the scheduled overtime requirement but only if the minimum wage increases are suspended as well.

Employers that employ 25 or fewer employees will have an extra three years to comply with the phase-in and must begin paying overtime by January 1, 2022.
Heat Regulations for Indoor Workers

SB 1167

Effective January 1, 2019

The Division of Occupational Safety and Health (“Division”) investigates complaints that a workplace is not safe and may issue orders necessary to ensure employee safety.

Under existing law, certain violations of that act or a standard, order, or special order authorized by the act are a crime and the Division has adopted regulations establishing a heat illness prevention standard for outdoor workers.
Heat Regulations for Indoor Workers

SB 1167 adds Labor Code Section 6720 and requires that, by January 1, 2019, the Division is propose to the Occupational Safety and Health Standards Board ("Board") for the Board’s review and adoption, a heat illness and injury prevention standard applicable to workers working in indoor places of employment.

“The standard shall be based on environmental temperatures, work activity levels, and other factors.”

Additionally, the Division is not precluded from proposing, or the Board from adopting, a standard that limits the application of high heat provisions to certain industry sectors.
Prop 64
What is Prop 64

Voted into law in November 2016

Adults 21 years of age and older

Posses and use marijuana for recreational purposes

Proposition 64’s passage raises questions for California employers concerned about their rights to create and enforce drug policies in the workplace.
What is Prop 64


Despite the changes to the California law, employers are still concerned about how it will impact their practices.

The “Purpose and Intent” section of the proposition explicitly permits “public and private employers to enact and enforce workplace policies pertaining to marijuana.”

Therefore, while the possession and recreational use of marijuana would be legal, employers are not required to permit employees to possess or use it in the workplace.
What is Prop 64

Under current precedent, employers may also continue to conduct pre-employment drug screening.

California courts have determined employers may require prospective employees to pass a drug test as a condition of employment, assuming testing is performed in a uniform, non-discriminatory manner.

This holds true even if an employee tests positive for marijuana legally obtained under the terms of California’s Compassionate Use Act which established the state’s medical marijuana program.
What is Prop 64

The California Supreme Court also held that employers are not required to permit an employee’s medicinal marijuana use as a reasonable accommodation.

Similarly, there is no language in Proposition 64 forbidding employment screening for marijuana use, even if legally obtained and consumed.

NOTE: California’s privacy laws do impose limitations on the timing and manner of drug tests, however, so it is important to consult an employment attorney when developing your drug testing policy and protocol.
What is Prop 64

Given that recreational marijuana possession and use will likely increase dramatically, employers wishing to prevent possession and use at work should ensure they have clear policies in place and ensure that these policies are effectively communicated to employees.

Workplace drug and alcohol policies should clearly specify barred conduct and emphasize that the use, possession, and working under the influence of marijuana is explicitly prohibited.
Summary
Quick Review

Ensure that your employees are being paid no less than the prevailing minimum wage.

Ensure that your exempt employees (under Professional, Administrative, Executive) are being paid no less than $43,680 per year/$840 per week.

Ensure that you have a clearly defined Compensation Program that is compliant with the California Equal Pay Act.
Quick Review

Add (or ensure revised for compliance) your Employment Protections for Victims of Domestic Violence, Sexual Assault, or Stalking Policy.

Ensure that your Drug & Alcohol policies are clearly drafted and compliant.

Review/revise your employment contracts to ensure compliance with the new laws related to choice of law and forum.
Quick Review

Review your I-9 procedures to ensure they are compliant and that anyone completing I-9s is trained to ensure no violations.

Review your itemized wage statements to ensure that all required fields are reflected and compliant.

Review your policies and procedures related to requesting information about criminal history (including your applications) and that anyone involved in requesting, reviewing, etc. the results is properly trained and knowledgeable.
Quick Review

If you have single-user bathrooms, be sure that they are designated as “all-gender”.

Be sure that you have the 2017 labor law posters posted in a conspicuous place.

Be sure that your Employee Handbooks are revised to be consistent and compliant with changes to local, state and federal laws.
QUESTIONS
How We Can Help You With Your 2017 Compliance

2017 New & Revised Employee Handbooks

2017 Combined State & Federal Labor Law Posters

Exempt/Non-Exempt Analysis

Compensation Program Design

Employment Contracts Review & Drafting

Drug & Alcohol Policy

Victims of Domestic Violence, Sexual Assault, Stalking Policy
THANKS FOR ATTENDING

Please feel free to visit our website (www.bpscllc.com) to review the presentation from today or listen to the webinar again. It will be on our site within 3 days. You can also view any of our previous webinars covering labor, employment, & human resources.

For any assistance with labor & employment laws and compliance, human resources outsourcing or assistance, or payroll & HR technology, please contact a member of our team at:

Local: 661-621-3662    Toll Free: 844-322-3300    Email: services@bpscllc.com