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Labor laws driving businesses to leave state

By Jonathan Fraser Light

The hidden and not-so-hidden inequities in California labor laws are staggering. I recently settled a class action for mid-six figures in which the average loss per employee was 11 cents per week. Employees earned small bonuses for properly completing certain tasks, but the employer did not know that it had to gross up those bonuses based on the small amount of overtime often worked during the pay period. One year's worth of actual loss to the employee, including interest, was about \$6. Because of that mistake, however, the employer owed, per employee, \$4,000 for incorrect paystubs, approximately \$5,000 to any employee who had left the company (30 days of "waiting time" penalties) and an additional amount in excess of \$10,000 for violation of the California Private Attorney General Act (PAGA) — punishment for missing 11 cents a week.

Employees of a client's meat processor often took their meals five hours and 10 minutes into their shift because they wanted to eat with their friends or the food trucks arrived then. That's 10 minutes over the allowed length of time before lunch must start. The same penalties as above were applied to an ensuing class action. This time, the settlement was \$1.1 million; a discount on the \$5 million damages analysis offered up by the employees' attorneys.

The first company can't leave the area because of the nature of its business. The second packed up its machines and trucked them to Texas, along with many of its employees. Another client, a computer component manufacturer largely moved to Mexico. A hydroponic agricultural client moved much of its operations to Nevada.

California has easily the most burdensome employment laws in the country and no employer can keep up. I have a 75-point human resources audit checklist that no client has ever passed successfully. They're often shocked at the small things they are missing. In one case the perforation between the paycheck and the paystub inadvertently cut off the name of the company from the paystub (and put it on the check). It had been printed incorrectly. A multiple six-figure payment resolved the class action lawsuit.

One of my clients embroiled in a class action with frivolous (but legally legitimate) claims said, aptly, "I didn't know that doing nothing wrong isn't the same as doing everything right."

One equitable fix would be for the California legislature to put a cap on the amount of penalties an employee can recover as a ratio of their actual damages. The penalties are currently wildly disproportionate to the damages suffered. A one-day employee who had a late meal break by 10 minutes could be eligible to recover in excess of \$10,000 based on multiple California labor laws. I understand that our laws are designed to protect the little guy, but this is ridiculous.

Our legislature needs to do something, and do something fast, because our California system is broken. We are driving core businesses away, which is not helping the middle class.

Of course, there are other factors that are hurting the middle class in other states, primarily cheap foreign labor, but California is making matters worse. California will have more and more haves and have-nots, and a weaker middle class as core businesses continue to pack up and leave. It's painful to see clients literally crying in front of me at a mediation because the family business, built by their grandparents and parents, may go under as a result of their inadvertent mistakes and nitpicking laws that employee attorneys legitimately exploit.

Another fix: Give judges discretion to award all penalties in the same way that they have discretion under PAGA. This single change could have a positive step in the negotiation of settlements in class actions. The absolute black and white nature of these penalties cripples employers because equity has no place in the analysis or negotiation. In some situations, the only viable defense is to plead poverty; and if the employer is doing so badly that poverty is relevant, employment at that company won't last long anyway. How does that strengthen California's economy? Unless all we want primarily are service and hospitality industries in California (industries that have been beaten up as well), our legislature needs to act.

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Perspective