June 25, 2014

Julie Su
Labor Commissioner
California Department of Labor Standards and Enforcement
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102
Also via email: jsu@dir.ca.gov

Dear Commissioner Su,

The Sustainable Economies Law Center (SELC) recently assisted in the representation of three employers, all small farmers, who had been fined by the DLSE for violations of California Labor Code Section 226(a). During this process, we identified two things that we’d like to bring to the DLSE’s attention, and we have created resources to help address the problems we identified:

1. **Low-income employers who cannot afford to hire payroll services are highly unlikely to find information on how to comply with Section 226.** Sadly, in their attempts to comply with the law, each farmer was using a different store-bought wage statement form, and all three forms were deficient for the purposes of complying with Section 226. The farmers reasonably believed that the forms complied with the law, and the fact that deficient forms are being sold throughout California means that many employers are inadvertently violating Section 226. SELC volunteers searched office stores for compliant forms and searched the internet for guides explaining to employers about how to comply with the law. Ultimately, we realized that, short of reading the actual code section, it is very hard for employers to find information necessary to comply with 226. This is a problem that disproportionately affects low-income employers, since employers of greater means generally hire payroll services to ensure compliance.

To address this, **SELC has developed the attached Wage Statement and Time Record Guide**, along with sample wage statements and time records that we believe are in compliance with California Labor Code Section 226. We have two requests of the DLSE:

First, **we would appreciate your input** on the Guide and the sample forms, especially if you find that they are deficient in any way.

Second, **we request that you put these materials or a similar guide on the DLSE website**, as indicated in our recommendations, and that you provide a printed guide to employers when you offer trainings to employers.
2. **We believe that Labor Code Section 226.3 should be amended to prevent unconstitutionally excessive fines.** We believe that Labor Code Section 226.3 is, in the words of the California Supreme Court, “manifestly suspect” under the California Constitution and U.S. Constitution, because it is accumulative, mandatory, and does not afford discretion to mitigate the penalty based on the good faith efforts of an employer or characteristics of the employer that would make the fine excessive. *(Hale v. Morgan, 22 Cal. 3d 388, 399-400 (1978))*. The statute currently allows the Commissioner to exercise discretion when there is a “clerical error or inadvertent mistake,” but courts have come to define these concepts so narrowly that we are left with a statute that forces the DLSE to impose unconstitutionally excessive fines. To illustrate, the three farmers we worked with were fined $3,000, $6,000, and $9,000, respectively, for the unintentional omission of one or two required items of information on their wage statements, such as employer address, pay period ending date, and employee social security number. The U.S. and California Constitutions were drafted with the specific intention of preventing such unfair and harmful results.

To address this issue, SELC has drafted a **legal memorandum that explains this issue and offers suggested amendments to Section 226.3**. We expect that other provisions of the Labor Code may need to be amended in a similar fashion, but we are less familiar with the way in which such fines are imposed.

**We request that the DLSE work with the California legislature to change Section 226.3** and/or support any legislation that is introduced for the purpose of correcting this problem.

SELC recognizes that resource limitations affect DLSE’s ability to achieve its enforcement goals, and we think that taking the actions proposed in this packet will reduce the occurrence of minor, unintentional violations, thereby allowing DLSE to allocate its resources to those violations that are most egregious. In addition, changes to the statute will prevent future litigation arising from imposition of unconstitutionally excessive fines.

The farmers we worked with were pushed to the brink of closing their businesses as a result of the fines, and the Sustainable Economies Law Center is committed to ensuring that this does not happen to other low-income employers.

We would appreciate receiving a response from you to hear what action the DLSE may take in response to these requests and recommendations. We look forward to your response, and we welcome any opportunity to discuss these matters further.

Sincerely,

Neil Thapar,
Staff Attorney
neil@theselc.org

Sincerely,

Janelle Orsi
Executive Director
janelle@theselc.org
510-649-9956
CC: Benny Cheng, Regional Manager, DLSE Bureau of Field Enforcement
Via email: BCheng@dir.ca.gov