



January 6, 2010

California Employment Law Changes for 2010

With the beginning of the New Year, please keep in mind the following changes to California employment laws.

Please contact one of our consultants with questions regarding how any of these new laws may impact your business.

RECENT CHANGE: ALTERNATIVE WORKWEEK SCHEDULES

New California legislation allows non-exempt employees subject to a properly implemented alternative workweek schedule to work more than eight hours per day without incurring daily overtime. Alternative workweek schedules are arrangements made for employees who prefer working fewer days per week without sacrificing the number of hours worked.

Effective May 21, 2009, Assembly Bill amends California Law Code §511 to give employers increased flexibility in implementing alternative workweek schedules. The amendment lets employers include a regular schedule of five eight-hour days in a workweek with daily overtime available after eight hours as one of the menu options offered to employees. Employees may now, with their employer's consent, move from one schedule option to another on a weekly basis. The Division of Labor Standards Enforcement has additionally expressed in a recent opinion that under some circumstances, an alternative workweek schedule may be effective for less than a full year, such as during the summer months only.

In order to implement an alternative workweek schedule, an employer must follow proper statutory and regulatory procedures. These procedures include holding a meeting and making required disclosures regarding the proposed schedule and holding a two-thirds vote of all affected employees in a work unit. The revised California Labor Code §511 includes a provision stating that a single employee may qualify as a "work unit" and defines a "work unit" as a "division, a department, a job classification, a shift, a separate physical locations, or a recognized subdivision thereof," which is consistent with interpretations by the courts and regulations.

California employers should consult legal counsel to ensure that the election process correctly follows all statutory and regulatory procedures and that correct wage orders are utilized.

NEW OPINION LETTER PERMITS FURLOUGH OF EXEMPT EMPLOYEES

In an attempt to clarify its stance on the furlough of exempt employees, the Division of Labor Standards Enforcement (“DLSE”) released an opinion on August 19, 2009, stating that employers may furlough employees un Wage Order 4 and reduce their work week from five to four days in an attempt to cope with significant but temporary economic difficulties, without losing the employees’ exempt status. Wage Order 4 includes employees in professional, technical, clerical, mechanical, and similar occupations. In addition, employers may reduce the salary of their furloughed employees proportionately while maintaining exempt status, as long as the reduced salary does not fall below the minimum salary rate required by California Labor Code §511(a) for exempt employees, which is two times the state minimum wage for full-time employment (40 hours per week).

California employers should be aware that the opinion does not give a green light to all partial-week unpaid furloughs and that the courts may consider, but are not bound, by the terms of opinions issued by the DLSE. In addition, although a furlough under the circumstances described in the opinion letter may not destroy an employee’s exempt status under California law, the same may not be true under the Fair Labor Standards Act. Employers may want to seek counsel regarding decisions related to deductions from exempt employees’ salary rate the length of time those deductions may last, and the frequency of the salary adjustments.

2010 NEW LAW: CIVIL AIR PATROL LEAVE

California employers, both private and public, who employ more than 15 employees, will be required to provide no less than ten days of leave per year for volunteer members of the Civil Air Patrol. This is to ensure that volunteers are able to respond to an emergency operational mission under a new law that will be effective starting January 1, 2010. Employee volunteer members are required to give the employer as much notice as possible of the intended leave dates and must be employed by their current employer for no less than 90 days immediately before the start date of the leave period. After the leave period has ended, an employer must restore the employee to his or her position or to a position with equivalent seniority, pay benefits and other terms and conditions of employment.

California employers should update existing policies to ensure compliance. The new law will not override other employee benefit plans or rights provided for in collective bargaining agreements which provide employees with greater leave rights.

2010 NEW LAW: EMPLOYERS MUST RECOGNIZE OUT-OF-STATE MARRIAGES

Senate Bill 54, which will be effective on January 1, 2010, requires California to recognize and validate same-sex marriages performed out of state before

November 5, 2008., will receive all the rights, benefits, and responsibilities of marriages performed in California between Jun 16 and November 5, 2008. This period of time represents when the state Supreme Court legalized same-sex marriage in California and before Proposition 8 was passed by majority vote defining marriage as between only a man and a woman.

The law carries many implications for employers regarding employee's healthcare plans and other employment benefits. California employers should also refer to this law in connection with handling family leave requests.

2010 NEW LAW: WORKERS' COMPENSATION UPDATE

A new bill has amended California Labor Code §3600 to make it illegal for employers to deny claims of an employee's injury or death occurring during the course of the employee's work when the perpetrator's motives are based on the employee's sex, race, color, religion, ancestry, national origin, martial status, or sexual orientation. No personal relationship or personal connection can be assumed to exist between the perpetrator and the employee based only on the fact that the perpetrator injured or killed the employee due to the perpetrator's hatred of or beliefs about the victim's characteristics.

IMPLICATIONS OF CALIFORNIA'S NEW E-DISCOVERY LAWS ON EMPLOYERS

Last summer, California enacted the Electronic Discovery Act, which amended the Civil Discovery Act to include electronically-stored information ("ESI"). California's e-discovery system is similar to the federal e-discovery system, but it differs in small ways, such as imposing a cost-shifting scheme that limits discovery on accessible and inaccessible electronically stored information.

For production, the act allows parties to specify the form in which information should be produced, but a party may object to that request if the ESI is not reasonably accessible. In addition, the act provides a safe harbor from sanctions and protects parties and attorneys for lost data following "routine, good faith operation of an electronic information system." Cal. Civ. Proc. Code §2031.060(i).

California employers should be diligent about their electronic data usage and develop, if necessary, specific policies for document retention and deletion. In the even of litigation, employers should be mindful of cost-efficiency when producing ESI for the other party and be familiar with their own systems to ensure they are making appropriate objections to burdensome production requests while producing what should be provided in response to appropriate, reasonable requests.

[Text of California's Electronic Discovery Act.](#)

2010 NEW LAWS ON SAFETY FOR HEALTHCARE FACILITIES AND EDUCATIONAL INSTITUTIONS

Assembly Bill 1083 is an added requirement to the California Health and Safety Code that requires all licensed hospitals to conduct an annual security and safety assessment. Existing law requires facilities to use the assessment to develop a security plan with procedures on how to protect staff, patients, and visitors from violent or aggressive behavior. This new bill requires hospitals to review and update any plans or assessments related to security and safety on a yearly basis.

CALIFORNIA SUPREME COURT DECISION ON STOCK OPTIONS ALLOWS RESTRICTED COMPANY STOCK PLAN WHICH FORFEITS RESTRICTED SHARES ONCE EMPLOYEE RESIGNS OR IS TERMINATED FOR GOOD CAUSE

In *Schachter v. Citigroup, Inc.* 47 Cal.4th 610 (2009), the California Supreme Court held that a voluntary bonus plan provision that effects a forfeiture if the employee was terminated for cause or voluntarily resigned within two years of purchasing company shares did not equate to an unlawful conversion of wages under California Labor Code §201, §202, and § 219.

The court reasoned that unvested shares of company stock did not amount to unpaid or deferred wages. The controlling factor in the decision was that the employer and employees had entered into an agreement after the employees had been hired and the employees were fully aware of the risks involved with entering into the voluntary bonus plan. Because no unpaid wages remained outstanding when the employees were terminated according to the terms of the incentive plan, the forfeiture provision enforced by the employer was permissible.

INCREASED PENALTIES FOR EMPLOYERS WHO FAIL TO OBTAIN WORKERS' COMPENSATION

Senate Bill 313 increases penalties against employers who fail to secure worker's compensation for their employees. The bill modifies existing law that requires every employer other than the state to secure the payment of worker's compensation benefits through insurance or self-insurance. The amendment changes the method for calculating the monetary penalty to the greater of twice what the employer would have paid in insurance premiums over as much as the past three years of \$1500 per employee.

CALIFORNIA SUPREME COURT TO DECIDE WHETHER DAILY OVERTIME IS DUE TO NONRESIDENTS FOR WORK PERFORMED FOR CALIFORNIA COMPANY

The U.S. Court of Appeals for the Ninth Circuit in *Sullivan v. Oracle Corporation*, 547 F.3d 1177 (9th Cir. 2008) applied California's labor code to out-of-state employees working temporarily in California for employers based in the state. The Ninth Circuit later withdrew its opinion and asked the California Supreme Court for guidance. Consequently, the Ninth Circuit decision in *Sullivan* cannot be relied upon.

In light of the uncertainty surrounding this issue, employers should act cautiously and comply with California law regarding nonresident employees who work within the state.

CALIFORNIA SUPREME COURT TO DECIDE WHETHER EMPLOYERS MUST ENSURE THAT MEAL BREAKS ARE TAKEN

Giving clarity to the rules governing meal breaks, the California Court of Appeal, in *Brinker v. Superior Court*, 165 Cal. App. 4th 25 (2008), held that while California employers cannot impede, discourage or dissuade employees from taking meal breaks, they need only provide, not ensure, that such breaks are taken. The California Supreme Court subsequently granted the plaintiffs' petition to review this decision. Consequently, the Court of Appeal's decision in *Brinker* cannot be relied upon and uncertainty concerning employer obligations with respect to meal breaks will remain until the California Supreme Court issues its final ruling.

CALIFORNIA INCREASES STATE WITHHOLDING TAX

In response to the state's emergency budget crisis, Sacramento lawmakers have authorized a 10% increase in the amount of taxes withheld from worker paychecks starting November 1, 2009, and through 2010. In addition, the state imposed a 0.6% increase in supplemental wage withholding and a 1.20% increase on wage stock options and bonus payments. The withholding rates have been increased in order to accelerate tax collections by the State and to prevent under withholding by employees.

California employers may wish to provide DE-4 forms to employees to allow them to adjust their state withholding.

2010 NEW LAW: FAMILY AND MEDICAL LEAVE ACT ("FMLA") AMENDMENTS

The 2010 National Defense Authorization Act ("NDAA") expanded coverage for military exigency leave and military caregiver leave under FMLA. The 2010 changes provide exigency leave coverage to the family members of a service member in the Regular Armed Forces who is deployed to a foreign country, including reservists who are on duty during deployment with the Armed Forces to

a foreign country or a notified of an imminent call to active duty. The provisions also expand caregiver leave to family members assisting veterans undergoing therapy, treatment, or recuperation for a serious injury or illness incurred within a five year window before leaving military service.

California employers should review and, if necessary, revise and redistribute their FMLA policy to employees.

See related Alert: [New FMLA Regulations; Key Changes and Clarifications for Administering Your FMLA Policies and Procedures](#)

NEW I-9 FORM

California employers should be aware that the U.S. Citizenship and Immigration Services revised its Form I-9 on August 7, 2009. It contains an updated list of acceptable documents that employees must present during the hiring process. The main addition to the revised form I-9 is that all documents presented must now be unexpired documents.

Employers should use only the newly revised forms in 2010.

You can download the update [I-9 here](#).

FEDERAL CONTRACTORS REQUIRED TO USE ELECTRONIC VERIFICATION.

As of September 8, 2009, federal contractors and subcontractors are required to use the Electronic Verification ("E-Verify") system when hiring employees to confirm their employment eligibility to legally work in the United States.

Employers with federal contracts or subcontractors should register for E-Verify, an Internet-based system which compares Form I-9 document information against federal government database to verify employment eligibility.

See Related Alert: [Final Rule Mandating Use of E-Verify Employment Eligibility Verification System by Federal Contractors Effective September 8, 2009.](#)

FEDERAL CASE DECIDES REHABILITATION ACT COVERS CONTRACTOR DISCRIMINATION CLAIMS

The Ninth Circuit ruled in *Fleming v. Yuma Regional Medical Center*, 07-16427, that the federal Rehabilitation Act applies to discrimination claims brought by an independent contractor.

Plaintiff, an anesthesiologist suffering from Sickle Cell anemia, was denied a contract by Yuma Regional Medical Center due to the fact that they could not accommodate his operating room and call schedules. The doctor sued for discrimination under the Rehabilitation Act and the hospital argued that the doctor had no standing to sue for discrimination because he was an independent

contractor. The court reasoned that the scope of the Rehabilitation Act is broader than the ADA, and that there is no language in the Act that limits its scope to employees.

In light of this decision, California employers should take note that an independent contractor may sue their hiring companies for discrimination under the Rehabilitation Act even if they are not actual employees.

CONSOLIDATED OMIBUS BUDGET RECONCILIATION ACT (“COBRA”) SUBSIDY EXTENDED

Congress has passed a bill extending the COBRA subsidy which helps unemployed individuals continue their health insurance coverage. With the enactment of the economic stimulus package, many laid-off workers qualified to receive healthcare coverage assistance through federal COBRA subsidies. The bill extended the number of months covered by the subsidy from nine to fifteen months. Before the extension, the employee or family member qualified if involuntarily terminated from employment between September 1, 2008 and December 31, 2009. That period of eligibility has been extended to February 28, 2010. The subsidy will apply to COBRA payments made on or after February 17, 2009. Employees who are eligible will be required to pay only 35% of their COBRA premium while employers will subsidize the remaining 65%. The annual income of the individual must be less than \$125,000 if single or \$250,000 if married. Once the employee qualifies for coverage under another group health plan or Medicare, his or her eligibility for this coverage will end.

See Related Alert: [Department of Labor Issues Model COBRA Notices](#)

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