

EMPLOYMENT QUARTERLY

New employment laws for '09

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BY DAWN ROSS

Each year brings a new set of laws for employers to comply with, and this year is no exception. Below is a summary to assist employers in negotiating the maze of new laws, and to give you a preview of what else to expect in 2009.

New Statutes

No Texting While Driving. As you will recall, in July 2008, a new law went into effect prohibiting drivers from using cell phones without a hands free device. S.B. 28 expands the prohibition to include use of electronic wireless communications to write, send or read a text message, instant message or email while driving.

To Do: Update your employee handbook policy to include this new law.

ADA Amendments. Extensive changes have been made to the Americans with Disabilities Act. The new law, called the ADA Amendments Act of 2008 (ADAAA) is now much more in line with the more protective California law under the Fair Employment and Housing Act. The ADAAA broadens the scope of those who qualify for protection under the ADA in three ways: 1) it expands the definition of "major life activities;" 2) whether an impairment substantially limits a major life activity is examined without consideration of mitigating measures such as hearing aids and medication; and 3) it also extends protection to those who are regarded as disabled because of an actual or perceived impairment, even if it does not limit a major life activity.

To Do: With these expanded definitions, ADA litigation will now center on whether an employer properly engaged in the good faith interactive process with a disabled employee to find a reasonable accommodation. Institute step-by-step procedures for engaging in this process.

Military FMLA Leave. The Family Medical Leave Act (FMLA) has been expanded to permit two new types of workplace leave for family members of military personnel: 1) active duty leave for those with an immediate family member called to active duty; and 2) service member caregiver leave for immediate family to care for an injured member of the armed forces.

To Do: Update your FMLA policy, and order the 2009 posters.

Overtime Exemption for Computer Software Professionals. A.B. 10 expands California's overtime exemption for certain computer software professionals to employees who are paid a salary of at least \$75,000 annually for full-time employment.

Timesheet Fraud. A.B. 2075 makes it illegal to require an employee to sign a timesheet or similar document, as a condition of being paid, when the employer knows the statement is false.

Temporary Service Employees. S.B. 940 provides for a series of rules pertaining to when wages must be paid to temporary service employees.

To Do: If you employ temporary service employees, you should download a copy of this bill as it contains a number of specific pay provisions.

Workers' Compensation Reporting. A.B. 2181 changes the method of reporting workplace injuries. The Division of Workers' Compensation (DWC) will be publishing a new form for use by employers to send to their insurers, who will then forward the information electronically to the DWC.

Whistleblower Hotline. A.B. 2001 authorizes cities and counties to maintain a confidential whistleblower hotline to receive calls from people who have information regarding possible violations by local government employees of state, federal, or local laws.

New Case Laws

There were several important California Supreme Court cases in 2008 that will affect employers. Here is a summary of the cases that may affect your workplace.

Edwards v. Arthur Anderson – Non-Compete Agreements. The Court ruled that the California Unfair Competition law prohibits employers from enforcing non-compete agreements unless the agreement falls within one of the statute's limited exceptions (sales or dissolution of corporations, partnerships, and LLCs).

Jones v. The Lodge at Torrey Pines – Individual Liability under FEHA. The Court ruled that individual managers and supervisors cannot be held personally liable for discrimination or retaliation under the Fair Employment and Housing Act (FEHA).

Lonicki v. Sutter Health – CFRA Leave. The Court held that an employee who is on leave because he/she is unable to perform an assigned task due to a serious health condition is not automatically precluded from performing a similar job for another employer while on CFRA leave. The Court also ruled that employers can obtain a third medical opinion if the first two are in conflict.

McDonald v. Antelope Valley Community College District – FEHA Statute of Limitations. The Court ruled that the one-year statute of limitations for filing a discrimination charge under the FEHA is tolled while the employee pursues internal administrative remedies offered by the employer.

Ross v. Ragingwire Telecommunications Inc. – Medical Marijuana. The Court ruled that employers are not required to accommodate medical marijuana use on or off the job.

On the Horizon for 2009

In response to the state's financial crisis, Gov. Arnold Schwarzenegger called for a special session of the Legislature to pass a plan to invigorate California's economy. Gov. Schwarzenegger's action plan includes a number of proposals designed to generate and retain jobs in California. The workplace reforms designed to assist California employers consist of the following:

Overtime Exemptions. Gov. Schwarzenegger is proposing to classify as exempt from overtime pay all executive, sales, administrative and professional employees who earn over \$100,000 annually.

More Flexible Work Schedules. Gov. Schwarzenegger is proposing to allow employees to work more flexible hours upon request, such as four 10-hour work days in a 40-hour work week, without being paid overtime. Such legislation would put California in line with nearly every other state in the country.

Clarification to Meal and Rest Break Rules. The Governor is also proposing that the Legislature clarify existing law regarding meal and rest periods to provide employers and employees with a clear understanding of the break rules and by offering flexibility to both businesses and workers. This is partly in response to the Brinker case.

No Match & I-9's. In early 2009, we expect the Federal Court to issue a decision involving whether a controversial rule setting forth the steps employers should take when they receive a No Match letter is constitutional. This case could have a dramatic affect on California employers who have a large immigrant workforce.

Hernandez v. Hillsides – Surveillance. The Supreme Court will be deciding whether employees can sustain a claim for invasion of privacy because their employer installed a hidden surveillance camera in the office to investigate improper use of a company computer, when the surveillance was only after hours and did not capture video of any of the employees who worked in the office. With the advent of spyware and other methods of surveillance, this could be an important decision.

McCarthy v. Pacific Telesis Group – Kin care. For the first time, the Court will be examining the kin care laws, and deciding whether employees who do not accrue sick days, but are paid when they are sick, must be paid for kin care time as well. The Court will also decide the scope of the anti-retaliation provisions.

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