



## No shortage of new laws for 2010



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Published in The North Bay Business Journal January 4th, 2010

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 2010.

### New statutes and regulations

- **Alternative workweek schedules.** Labor Code §511 has been amended to make it easier for employers to create alternative workweek schedules, such as four-day/10-hour schedule without having to pay overtime. The amendments provide better definitions of work units, allow a work unit with only one employee where appropriate, allow a traditional 5/40 workweek to be one of the menu options and allow employees to move from one schedule to another on a weekly basis.

**To do:** If your employees regularly work overtime, consider an alternative workweek to cut your payroll costs.

- **Genetic Information Nondiscrimination Act.** Effective Nov. 21, 2009, employers must begin to comply with the Genetic Information Nondiscrimination Act (GINA). Under GINA, it is illegal to discriminate against employees or applicants because of

genetic information. GINA prohibits the use of genetic information in making employment decisions, restricts acquisition of genetic information by employers and other entities covered by Title II and strictly limits the disclosure of genetic information.

**To do:** Update your employee handbook policy to include this new law, and replace the posters in your break room. The new poster is available at [www1.eeoc.gov/employers/poster.cfm](http://www1.eeoc.gov/employers/poster.cfm)

- **Lily Ledbetter Fair Pay Act.** The Fair Pay Act extends the time for filing an unfair pay claim. Under the new law, the time begins to run each time an employee receives a paycheck that violates the act, instead of running from the time the initial discriminatory pay decision was made.

- **Workers' compensation.** The law allowing employees to pre-designate their personal physician of choice as the first medical provider in case of a workplace injury has been extended permanently. If a worker does not pre-designate in writing, the employer may direct the worker to its designated medical provider network. In addition, the penalty for failing to carry workers' compensation insurance has increased by at least 50 percent.

**To do:** Be sure you have workers' compensation insurance and a designated medical provider network so you know where to send your employees in the event of a workplace injury.

- **Increased tax withholding.** As of Nov. 1, 2009, employers were required to start using a new state income tax withholding table, increasing by 10 percent the amount of income taxes withheld based on existing claimed exemptions. In addition, as of Jan. 1, 2010, there is a 7 percent backup withholding for certain payments to independent contractors, where back-up withholding is otherwise generally required under the Internal Revenue Code.

**To do:** Work with your payroll service or internal payroll department to make sure it is aware of and complying with the new withholding tables. Work with employees to submit revised W-4 and DE-4 forms if the new tables would result in excessive tax withholding.

- **COBRA subsidy.** In early 2009, as part of the stimulus package, employees who were involuntarily terminated between Sept. 1, 2008, and Dec. 31, 2009, could continue health care coverage through COBRA by paying only 35 percent of their premiums for up to nine months. The remaining 65 percent is paid by employers, who may deduct the cost from federal payroll taxes. Congress is currently considering legislation that would extend the end-of-year cut off, increase the subsidy from 65 percent to 75 percent, and extend benefits from nine to 15 months.

**To do:** Work with your benefits provider to supply your terminated employees with the correct information on this COBRA subsidy.

- **Federal no-match rules rescinded.** After much controversy and litigation, the Department of Homeland Security rescinded its proposed “no-match” rules effective Nov. 6, 2009.

**To do:** Employers should still follow up when receiving a “no-match” letter by checking their records for errors, informing the employee (preferably in writing) of the SSN “match” problem and asking the employee to review the information for accuracy and resolve the issue with SSA within 60 days. No-match problems will likely increase the likelihood that an employer will be targeted by ICE for an I-9 audit. Also, employers should be using the most recent Form I-9, revised as of August.

### **New case law, opinion letters**

There were several important U.S. and California Supreme Court cases in 2009 that will affect employers, along with an important DLSE Opinion Letter. Below is a summary of the cases that may affect your workplace.

- **DLSE opinion letter.** Allows pay reductions for salaried employees on reduced workweek. In a recent opinion letter, the Department of Labor Standards Enforcement stated that employers can reduce a salaried employee’s pay commensurate with a reduction in the workweek. Prior to this opinion, a salaried employee had to be paid full pay, regardless of how many hours they worked in a workweek.

**To do:** If you are looking for ways to reduce payroll, you can now do a reduced workweek with a corresponding cut in pay for both hourly and salaried employees.

- **Hernandez v. Hillsides Inc. Workplace privacy.** The California Supreme Court ruled that an employer did not violate workplace privacy rules by secretly installing video equipment in employee offices because the employer was legitimately trying to find out who was accessing Internet pornography after hours and took steps to minimize the intrusion.

**To do:** If you are considering any type of surveillance equipment (including computer/e-mail/texting surveillance), be sure you have a written policy that explains the monitoring to limit the expectations of privacy. Surveillance is not allowed in bathrooms, locker rooms or similar places that have a high expectation of privacy.

- **Amalgamated Transit Union v. Superior Court & Arias v. Superior Court. Class action lawsuits.** In addressing issues of class action requirements, the California Supreme Court made three important rulings: 1) unions cannot bring class action claims on behalf of union members; 2) employees must follow class action rules to bring an unfair competition lawsuit for labor violations on behalf of a group of employees; and 3) Labor Code Private Attorney General claims do not have to be filed as a class action, thereby allowing one employee to sue his employer to recover labor code penalties on behalf of a group of employees.

**To do:** Be sure you are complying with all wage and hours laws, especially overtime, rest and meal period rules.

- **Schachter v. Citigroup.** The California Supreme Court ruled that an employer plan that allowed employees to divert up to 5 percent of earnings to purchase company stock below market price but required a two-year vesting period, was not an illegal forfeiture.

**To do:** Ensure that stock vesting/forfeiture clauses are written clearly and distributed to all employees.

- **Ricci v. DeStefan. Reverse discrimination.** The U.S. Supreme Court ruled that an employer violated Title VII by throwing out the rankings from its promotional exam after none of the black firefighters achieved a high enough score to be considered for promotion. The court ruled that the city decision discriminated against the 17 white firefighters and two Latino firefighters who passed the test.

**To do:** If you are using standardized tests for hiring or promotion, make sure the questions are job related.

- **Gross v. FBL. Age discrimination.** The U.S. Supreme Court was sharply divided in deciding that employees who sue for age discrimination under the ADEA have a higher burden of proof. Rather than showing that age was one motivating factor in the employer's decision, the employee must prove the adverse decision would not have happened but for the employee's age.

- **14 Penn Plaza LLC v. Pyett. Binding arbitration.** The U.S. Supreme Court ruled that a provision in a collective bargaining agreement requiring union members to arbitrate age discrimination claims under the ADEA is enforceable.

**To do:** If you have a collective bargaining agreement, consider including binding arbitration of discrimination claims.

## Reminders

- **Sexual harassment training.** If your company has 50 or more employees, you are likely facing a statutory deadline for renewing your supervisor sexual harassment training. The original deadline went into effect in 2005, and training is required every four years.

- **Mileage reimbursement.** If your company uses the IRS mileage rate for reimbursing employees, update your forms to reflect the new, reduced rate of 50 cents per mile.

## On the horizon in 2010

- **ICE getting aggressive.** In 2010, we expect Immigration and Customs Enforcement to steadily increase its audits of employers who are believed to be employing illegal

workers. Be sure your I-9s and payroll records are up to date.

- **U.S. Supreme Court to decide key text message case.** The United States Supreme Court has agreed to decide an important employee privacy case — *City of Ontario v. Quon* — that is likely to have far-reaching implications for public and private employers alike. The court will determine: (1) whether text messages sent by an employee using employer-owned equipment are private and therefore entitled to legal protection, and (2) whether messages sent to an employee using that same equipment are private.

- **California Supreme Court to decide important meal and rest period case.** Last year, the California Supreme Court granted review of *Brinker Restaurant Corp. v. Superior Court*, which involves several interesting issues including: 1) whether an employer must simply “provide” meal periods, as opposed to ensuring they are taken; 2) whether meal and rest periods must be taken near the middle of each shift; and 3) whether employees can bring class action lawsuits for violation of meal and rest period claims of this nature. We are expecting a decision in this case shortly.

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