

2008 Employment Law Update

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▶▶ NEW DEVELOPMENTS

Minimum Wage Increases in California.

Governor Schwarzenegger signed Senate Bill 1835 in late 2006, raising California's hourly minimum wage in a two-step process, to one of the highest minimum wages in the country. The first increase took effect on January 1, 2007, raising the minimum hourly wage from \$6.75 per hour to \$7.50 per hour. On January 1, 2008, the minimum wage increases again, to \$8.00 per hour. Bear in mind that the increases in the minimum wage also impact the minimum salary that must be earned by exempt employees, in that the exempt employee's salary must be no less than twice the minimum hourly rate of pay based on full time employment. This means that effective January 1, 2008, exempt employees must earn at least \$33,280 effective January 1, 2008 ($\$8.00 \times 2 \times 2080$).

These changes also require California employers to post a new state minimum wage poster and wage order as of January 1, 2008, which will be available on the Department of Industrial Relations and Industrial Welfare Commission website (www.dir.ca.gov).

Leave Law for Spouses of Military Members on Leave During Deployment. Military and Veterans Code section 395.10 requires employers with more than 25 employees to provide up to 10 days of unpaid leave to employees while their spouse is on leave from a military deployment. The deployment must be in a combat zone and the spouse must be on active duty, serving in the reserve military or serving in the National Guard during a period of military conflict. Employees are eligible for the leave if they work at least 20 hours per week. There is no amount of time that employees must have worked before they are eligible for the leave. Technically, the term spouse includes same sex registered domestic partners. An employee must submit a written certification of the leave during deployment, and employees must provide notice of the intent to take leave within two business days of receiving official notice of the leave. Employers may not retaliate against an employee for taking military spouse leave.

FMLA Military Family Amendment. On January 28, 2008, President Bush signed a bill that amends the Family and Medical Leave Act (FMLA) to provide up to as much as 6 months of unpaid leave to care for family members for veterans injured while on active duty in the U.S. Armed Forces.

Computer Professionals Exemption. Effective January 1, 2008, the California Division of Labor Statistics and Research adjusted the computer software employee's minimum hourly rate of pay from \$49.77 down to \$36.00 for exemption from payment of



overtime compensation. This adjustment reflects a growing concern about the outflow of computer related jobs to overseas locations.

Drivers Will Be Fined For Talking on the Phone. Effective mid-2008, most California employers will need to ensure that employees who use their phones while driving do so with a hands-free device, or not at all. California's Wireless Telephone Automobile Safety Act of 2006, along with Senate Bill 1613, make it illegal to use a cell phone while driving without the use of a hands-free device. The bill becomes effective January 1, 2008; enforcement is not anticipated until July 1, 2008. Drivers caught using a cell phone without a hands-free device may be cited and fined \$20 for the first violation, and \$50 for subsequent violations. Certain exceptions exist for contacting a law enforcement or public safety agency for emergency purposes. The law does not apply when driving on private property.

Keep Sexual Harassment Training Deadlines In Mind. If your organization has at least 50 employees, you must make sure that all supervisors go through sexual harassment training every two years to be in compliance with state law. The law requires all employees who have supervisory authority to participate in an interactive training course. Those initially trained in 2005 must have been retrained by December 31, 2007. Employers that don't comply with the training requirement are subject to a corrective order from the Department of Fair Employment and Housing, and have an increased exposure to harassment claims.

Adding SSNs to Wage Statements. Senate Bill 1618 requires that by no later than January 1, 2008, employers be required to show no more than the last four digits of an employee's social security number (or existing employee identification number other than an SSN), on the employee's wage statement and paychecks.

2007 Standard IRS Mileage Rates Increase. The Internal Revenue Service released the standard mileage rates for business miles driven, from 48.5 cents per mile to 50.5 cents per mile. This new rate is effective January 1, 2008.

Earned Income Tax Credit. California employers that provide unemployment insurance must notify all employees that they may be eligible for the federal Earned Income Tax Credit (EITC).

Employees must be notified within one week of the time the employer provides an annual wages summary (i.e. W-2). The notification must be handed directly to the employee or mailed to the employee's last known address.

▶▶ WAGE AND HOUR LAW

Former Employees Receive Break Pay. Former employees of a hospital who hadn't been paid for second meal breaks during their work shifts have been paid as part of a \$2.7 million settlement agreement with the hospital. More than \$750,000 is to be distributed to approximately 700 past employees. A DLSE investigation of the hospital records in 2006 found the hospital had failed over the last 3 years to pay many employees who worked 10 hours or more per day a second meal period as required by state law. After the state started its investigation, the hospital conducted a self audit and revealed the hospital owed employees approximately \$2.5 million. More than \$2 million was paid to current employees, and checks ranging from a few dollars to as much as \$25,000 after taxes were distributed to 150 former employees.

Reminder: Be sure to comply with all meal period and rest break rules applicable to non-exempt employees.

FedEx Drivers Are Employees, Not Independent Contractors. The California Court of Appeal found that FedEx Ground Package System, Inc. ground drivers that performed pickup and delivery services on a full time basis in a single work area/route were employees, not independent contractors, within the meaning of California Labor Code section 2802. The employees were seeking reimbursement from FedEx for expenses under the CA code section, which requires employers to indemnify employees for all necessary expenditures they incur as a result of performing their job duties. To determine that the drivers were "employees", the court assessed the "control of details" test, which included whether FedEx had the right to control the manner and means by which the drivers accomplished the work. The factors the court looked at were 1) whether the drivers were engaged in a distinct operation or business; 2) whether the work was usually done under FedEx's direction; 3) the skill required to perform the work; 4) whether FedEx or the worker supplied the tools and place of work; 5) the length of time in which the services were to be performed; 6) whether the compensation for work performed was by time or by job; 7) whether the work was part of

FedEx's regular business; and 8) whether the parties believed they were creating an employee-employer relationship.

REMINDER: You can't make "employees" into "independent contractors" solely through a nonnegotiable contract or operating agreement. A worker will be considered an employee if you assert control over the working conditions. If you wish to have independent contractors, you should assert very little control over the workers and allow them to work with little direction or supervision.

Three Year Statute of Limitations Applies to Meal/Rest Break Violations. The California Supreme Court has ruled that a three year statute of limitations period, not one year, applies to the "one additional hour of pay" employers are required to pay employees when meal and/or rest breaks are not provided. California law entitles non exempt employees to an unpaid 30 minute, duty free meal period upon their fifth hour of work, if their shift is longer than six hours, and a paid 10 minute rest break for each four hours of work. Employees who must forego the meal and rest breaks are giving the employer "free" work and suffer a loss of a benefit to which they are entitled. In other words, they suffer a loss of "wages". The hour of additional pay is not only an incentive for employers to comply with the law, but a premium wage that compensates employees.

▶▶ ADA

Employer Pays \$2.2 Million For Failing to Engage in "Interactive Process." The Second Appellate District of the California Court of Appeal recently affirmed a verdict of \$2.2 million (including \$1 million in punitive damages) against a large automobile insurance company. According to the court, the company failed to engage in an "interactive process" to determine reasonable accommodations for an employee's disability and retaliated against the employee for his age discrimination complaint.

REMINDER: Failing to engage in the interactive process and failing to provide a reasonable accommodation are two separate bases for liability under the Fair Employment and Housing Act (FEHA). The FEHA requires employers to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or a known medical condition.

▶▶ AT-WILL EMPLOYMENT

At-Will Employment In California. The California Supreme Court recently reiterated that employers continue to have the basic right to terminate at-will, upholding the plain meaning of an at-will clause in an offer letter. In furtherance of this good news, employers should:

- 1) Review employment documents to be sure that they include employment at-will language (applications, offer letters, employment contracts, handbooks, etc);
- 2) Be sure that supervisors and managers are trained on how NOT to make references to or promise continuing employment or employment for an unspecified duration with no right to terminate at-will;
- 3) Do not use progressive disciplinary policies ---these types of policies serve to destroy an employer's right to terminate employees at will;
- 4) Have all employees sign an at-will employment agreement that is separate and apart from other employment documentation;
- 5) Ensure that employment termination decisions do not violate state or federal law.

▶▶ LABOR LAW

Employers Can Prohibit Use of Email for Union Organizing. In a long awaited decision, the NLRB has ruled 3-2 to permit employers to restrict the use of the company's email system for union organizing purposes. In the particular case, the employer had a policy that prohibited the use of its communications systems for solicitation on behalf of any outside organization, or when the solicitation was not job related. An employee (who was also a union official) allegedly violated this rule and was disciplined. The NLRB held that an employer has the basic property right to regulate and restrict employee use of company property, holding that email systems are a company's property.

REMINDER: Be sure to have a valid no-solicitation policy incorporating a rule regulating the use of company communications systems and limited use to business related purposes.

▶▶ I-9 FORMS

New I-9 Form Now Available. As a reminder, all employers should be using the NEW I-9 form issued by the Department of Homeland Security (revision date June 5, 2007). The main changes to the form relate to documents employees must provide, there is no change in how Form I-9 is filled out. New employees must still give their identity, state that they are eligible to work in the U.S., and present supporting documentation. They may either present one document from List A (establishing both identity and employment), or one document from each of List B (identity) and List C (eligibility). The employer then reviews the documents and certifies that they appear to be genuine and relate to the named employee, and that to the best of its knowledge, the employee is eligible for employment. The form is also used to recertify rehired workers and those whose initial eligibility documents may have expired and then been reissued. In another change, an employee does not have to furnish their social security number on the I-9 form if they don't want to, unless their employer participates in the USCIS' Electronic Employment Eligibility Verification Program (E-Verify). The form is available online at www.uscis.gov/files/form/I-9.pdf. The new form is available in English and in Spanish; however, employers outside of Puerto Rico may only use the Spanish version as a translation guide and must use the English version only for recordkeeping purposes.

▶▶ SOCIAL SECURITY NUMBER MISMATCHES

Proceed With Caution When Terminating For Mismatched SSNs. The Department of Homeland Security has issued proposed final regulations on what employers should do when they receive a Social Security mismatch letter. The proposed regulations state that an employer should attempt to resolve the discrepancy by the following two methods:

1) Check to determine whether the discrepancy is an internal clerical error. If so, the employer should make the correction, notify the SSA of the correction, verify that the SSA has made the correction, and make a record of the manner, date and time of the verification.

2) If there is not a simple remedy for the mismatch, the employer must promptly ask the employee whether the information in the personnel record is correct. If the employee claims the information is correct, despite the existence of the no-match letter, the employer should direct the employee to resolve the discrepancy with the SSA. If the employee claims that the employer's records are incorrect, then the employer should re-check its own records again.

If the discrepancy is not resolved within 90 days of receipt of the mismatch letter, the proposed regulations require the employer to re-verify the employee's work eligibility and identity by completing a new Form I-9 (however, alternative documents must be used, and the identity document must include a photograph). Both I-9 forms must be retained as an employment record. If the employee cannot provide alternative documentation for a new Form I-9, the guidelines (somewhat unhelpfully) recommend weighing the risk of a termination against the risk of being found to knowingly employ unauthorized workers.

CAVEAT: Until further guidance is given, employers should use caution in implementing terminations for unresolved matches as suggested by the proposed regulations.

▶▶ RETALIATION

USERRA Protects Employees From Discrimination and Retaliation. Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), employees are provided with protection from discrimination and retaliation because of their service in the military. USERRA also provides protection from discharge for a period of time after the employee's return from service. A recent Ninth Circuit Court of Appeals case (which covers California and Nevada) upheld a lower court decision awarding a Navy reservist \$250,000 because it was found that his superiors punished him for his repeated military leave. Employers should carefully review any proposed discipline of employees returning from military service leave to make sure that the discipline is warranted.

NOTE: A recent California Court of Appeal decision went further by holding that a severance agreement CANNOT waive an employee's USERRA's claims.