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California Employment Law Newsletter

What's New for California Employers?

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The following is a brief summary of the significant employment law developments since our last newsletter.[1]

LEGISLATION

San Francisco Health Care Ordinance: As previously reported, employers doing work for the City of San Francisco must spend a minimum amount on health care for each hour worked by their covered employees. That obligation can be satisfied by paying into the employer's own health insurance plan or making payments on behalf of its employees to a Health Access Program ("HAP"). *S.F. Health Care Security Ordinance*. That ordinance has recently survived a legal attack by the S.F. Restaurant Association, which alleged that the ordinance was pre-empted by federal ERISA laws. *Comment:* Another recent decision clarified that this obligation applies to employers anywhere in the United States whose employees work under the local ordinance.

S.F. Mass Transit Commuter Benefits: Employers with 20 or more employees on average will be required, as of December 20, 2008, to establish a mass transit commuter program for their employees who work 10 or more hours per week in San Francisco. Eligible employees must be offered (1) a pre-tax election program to exclude certain commute costs from payable wages; (2) a transit pass for public transportation requested by the employee; (3) reimbursement for equivalent van pool charges for an amount that is at least equal to the value of a monthly railway fast pass; or (4) transportation in a vanpool, bus, or similar multi-passenger vehicle operated by or for the employer at no cost to the employee.

"Texting" Behind the Wheel: On September 24, 2008, Governor Schwarzenegger signed into law an amendment to the Vehicle Code which states: "A person shall not drive a motor vehicle while using an electronic wireless communications device to write, send or read text-based communication." *Senate Bill 28.* This is an obvious extension of the bill passed earlier requiring hands-free telephone devices while driving. *Comment:* But "a person shall not be deemed to be writing, reading, or sending a text-based communication if the person reads, selects or enters a telephone number or name in an electronic wireless device for the purpose of making or receiving a telephone call."

DISABILITY DISCRIMINATION

Reasonable Accommodation: An alternative position may be a "reasonable accommodation" under the Fair Employment and Housing Act (FEHA). *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* However, the employee has the burden of proving the existence of an available, vacant position to support the claim of failure to accommodate or to engage in the interactive process. *Comment:* The interactive process should include a discussion of alternative positions; however, an employer is *not* required to create a position nor to hold open a position if business needs dictate otherwise.

ADA Amendments: A recent amendment to the ADA expands the protections provided by the ADA, effectively overturning recent Supreme Court cases that narrowly construed what was a "disability" under the ADA. *ADA Amendments Act of 2008 (ADAA).* One amendment clarifies that "disabilities" include impairments that are controlled with medication, assistive devices, etc. *Comment:* The ADAA would also hold an employer liable under a "regarded as" theory if the individual can show discrimination based on the perceived impairment, whether or not the impairment actually limits a major life activity.

IMMIGRATION

E-Verify Program: Employers considering implementing the E-Verify system should consider the following:

[1] This summary is intended to be a brief overview of significant legal developments and is not an in-depth analysis of the cases or statutes discussed. Our clients are advised to contact their employment attorney before making significant decisions related to the legal developments reported herein.

- Does the employer operate in a state that already requires it to use E-Verify (e.g., Arizona)?

- Participation in E-Verify does *not* provide a "safe harbor" from work site enforcement.

- Employers must agree to provide access to its employment records to the DHS and SSA for the purpose of program evaluation; and

The use of the E-Verify system provides the employer with a rebuttable presumption that it did not knowingly hire an unauthorized alien. *Comment:* More information regarding this program can be obtained online at www.uscis.gov/everify.

SSA No Match Letters: The Department of Homeland Security (DHS) has issued a Supplemental Final Rule (SFR) addressing procedures employers may follow when they receive no-match letters from the Social Security Administration (SSA). It makes no substantive changes to the provisions of the final rule published in August of last year, but addresses issues raised by a California federal court which had previously enjoined enforcement. *Comment:* The rule has not gone into effect yet, and will not become effective until the court lifts its injunction. However, employers who receive no-match letters must continue to correct their records and ask employees to address problems within a reasonable time.

WAGE AND HOUR

Non-Residents: Non-residents of California, working primarily in other states, are still entitled to overtime under the California Labor Code for work performed within California. *Sullivan v. Oracle Corporation.* In this case, three Colorado residents were brought to California as teachers to train Oracle customers in the use of its software. *Comment:* All non-exempt workers performing work within the geographical boundaries of California must receive the benefits of the State's labor laws.

Meals/Rest Breaks: The California Supreme Court has granted review of the Appellate Court ruling that employers are required to make meal and rest breaks available – not require them (see prior newsletter). *Brinker Restaurants v. Superior Court.* Thus, while the effect of this case has been suspended, its principles will continue to apply until the Supreme Court has ruled otherwise (discussed below). *Comment:* The Labor Commission still appears to be guided by the principles of the *Brinker* decision (i.e., employers must provide meal periods to employees, but do not have an additional obligation to ensure that such meal periods are actually taken).

Meal/Rest Periods: Employers are required to make available, but are not obligated to ensure that, employees take meal and rest breaks. *Brinkley v. Public Storage, Inc.* This case resurrects the principles of *Brinker Restaurants*, but goes further in holding that meal breaks need not necessarily be taken during the first 5 hours of a shift. *Comment:* Employers should use the *Brinker* and *Brinkley* principles while awaiting further word from the California Supreme Court.

Computers and Software Professional Exemption: The Labor Code has been amended to exempt from overtime pay eligibility only those computer software professionals who earn at least $75,000 annually. *Labor Code § 515.5*. Thus, computer software professionals earning less than $6,250 per month are not subject to the exemption (i.e., must be paid overtime). *Comment:* The previous rule exempted those professionals earning not less than $36.00 per hour, with no annual income restrictions.

OTHER DEVELOPMENTS

Non-Compete Agreements: Even narrow restraints on non-competition agreements are unlawful. *Edwards v. Arthur Anderson LLP*. In this case, an agreement not to solicit or perform work services for defendant's clients for whom plaintiff had performed work during the 18 months preceding his termination was invalid. Further, the Court held that a

settlement releasing "any and all claims" did not (and could not) waive statutory rights under California Labor Code § 2802 (i.e., right to reimbursement for business expenses incurred on behalf of employer). *Comment:* In this case, the Supreme Court rejected even a narrow restraint on competition through these agreements.

Family Leave: An employment handbook may create FMLA obligations for otherwise ineligible employees. *Peters v. Gilead Sciences, Inc.* In this case, the company's employee handbook offered protected family leave for the company's employees, despite the fact that it employed less than 50 employees within 75 miles of the company's workplace. *Comment:* This is a federal court decision from another district, but it is a reminder that employers should be careful not to unintentionally expand employee rights beyond that which is provided by law. An employer can always voluntarily choose to expand those rights on a case-by-case basis.

CFRA: Employees calling in sick and submitting medical excuses may constitute a request for leave under California's Family Rights Act (CFRA). *Avila v. Continental Airlines, Inc.* While this case did not find that the employee necessarily satisfied the notice requirements of CFRA, the employee was entitled to ultimately have a court or jury decide that issue. *Comment:* An employer who is notified that an employee is on leave for a potential "serious health condition" should treat that leave as protected.

Independent Contractor Status: A construction inspector was an independent contractor and not an employee, notwithstanding a letter agreement between the parties stating that either party could terminate the relationship at will. *Varisco v. Gateway Science and Engineering, Inc.* The Appellate Court found that the undisputed facts showed that Gateway had no right to control the "manner and means" of accomplishing Varisco's work. *Comment:* Happily for Gateway, the Court sided with its position in this case as misclassification of independent contractor can be a very expensive proposition.

Statute of Limitations: Equitable tolling of the time within which an employee must file a FEHA claim occurs while the employee pursues internal administrative remedies. *McDonald v. Antelope Valley Community College District.* Here, the employee was pursuing internal grievances during the one year following the alleged acts of discrimination and so did not file a FEHA claim within that time. The Court sided with the claimant, finding that the one-year limitations period within which a FEHA claim must be filed was extended while the internal grievance was ongoing. *Comment:* Courts are generally willing to give claimants some latitude in extending their time to file statutory claims while they are attempting to redress grievances, internally.

Arbitration: Parties to an arbitration agreement can set standards for judicial review of arbitration decisions. *Cable Connection, Inc. v. Direct TV, Inc.* The California Supreme Court held that an arbitration agreement may expressly provide for appellate review of an arbiter's decision. *Comment:* Judicial review of arbitration awards is clearly a two-edged sword. While it ensures that the arbiter will follow the law and not abuse his/her discretion, the appeal may significantly increase the cost of arbitration.

If you have questions regarding any of the aforementioned employment law developments, contact your LGG attorney or Ron Souza at rsouza@lgglaw.com.

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