



LYNCH, GILARDI
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CALIFORNIA EMPLOYMENT LAW NEWSLETTER

What's New for California Employers?

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Ronald J. Souza
LYNCH, GILARDI & GRUMMER
A Professional Corporation
170 Columbus Avenue, 5th Floor
San Francisco, CA 94133
(415) 397-2800

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

LEGISLATION

Collective Bargaining Poster: As reported in earlier newsletters, the National Labor Relations Board (NLRB) will require employers to post an official government notice advising employees of their legal rights under the National Labor Relations Act (NLRA) by January 31, 2012. The notice must be placed where other employment notices are customarily placed as well as online if the employer customarily communicates with employees about personnel matters in that way. Among other things, the notice must (1) inform employees of their right under the NLRA to unionize and/or engage in other “protected concerted activities” related to union organizing, (2) list examples of unlawful employer conduct, (3) provide information for employees on filing charges against the employer and (4) offer contact information at the NLRB. There are significant penalties for non-compliance. *Comment:* There is still some chance that the January 31st posting deadline may be delayed by pending court action.

San Francisco Poster: Employers with more than 20 employees who are covered by San Francisco’s health care program must spend a certain amount per hour on health care coverage for San Francisco-based employees. That amount starts at \$1.46/hour for employers with between 20 and 100 employees. *Comment:* As indicated, this requirement applies only to medium and large employers with employees covered by San Francisco’s health care program.

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.

SAN FRANCISCO MINIMUM WAGE

As reported in earlier newsletters, the following new California laws will go into effect beginning January 1st:

Credit Checks (AB 22): Employers may not obtain or use credit reports of prospective employees for many positions. However, this law does not apply to persons hired for the following positions:

- (1) A managerial position,
- (2) A position for which credit information is required by law,
- (3) A position that requires regular access to bank or credit card account information, social security numbers, or date of birth,
- (4) A position that will allow an employee to be a signatory on the employers bank account,
- (5) A position that involves access to confidential or proprietary information (e.g. trade secrets),
- (6) A position that involves regular access to cash totaling \$10,000 or more,
- (7) Any position with certain financial institutions.

Comment: Where an employer seeks credit information, the applicant must be apprised of the specific reason the employer is obtaining the report so that one of the aforementioned exemptions apply. The other requirements of the Fair Credit Reporting Act (FCRA) or the California counterpart (ICRA) must still be observed.

PDL Health Insurance (SB 299): Employers of 5 or more employees subject to the FMLA and CFRA must provide health insurance coverage to eligible pregnant employees taking these leaves. *Comment:* Remember that to qualify for the FMLA/CFRA, employees must work 1250 hours in a 12-month period and have at least 12 months of service with the employer.

Independent Contractor Misclassification (SB 459): This new law provides for an entire administrative scheme, an additional potential liability for employers who misclassify employees as independent contractors. Fines of \$5,000 to \$25,000 for each violation may be imposed. *Comment:* This law will be difficult to implement as the various state agencies use different criteria for determining who is an “independent contractor.”

Organ/Bone Marrow Donor Leave of Absence (SB 272): Employers must give at least 30 business days of paid leave for organ donors and 5 business days of paid leave for bone marrow donors in a one-year period, and that the one-year period is measured from the date the employee's leave begins and consists of 12 consecutive months.

Written Notice of Terms/Conditions of Employment (AB 469): Non-exempt employees must be provided with written notice, at the time they are hired (or at the time of later changes) of the following information:

- (1) Rates of pay,
- (2) Allowances claimed as a part of minimum wage (e.g. meal or lodging allowances),
- (3) Regular payday designation,
- (4) The employer's name, address, and telephone number,
- (5) The name, address, and telephone number of the employer's workers' compensation carrier.

Comment: The Labor Commissioner is in the process of preparing a template that complies with the above requirements and can be used in the case of virtually all employees. Also, the aforementioned requirement applies only to non-exempt employees.

Written Commission Agreement (AB 1396): Employers doing business in California must prepare written contracts for any agreements with employees that involve commissions as a method of payment for services.

2012 MINIMUM COMPENSATION RATES

The following minimum compensation rates will go into effect for both exempt and non-exempt employees:

Federal:

Non-exempt (\$7.25/hour)
Executive (\$455/week on salary basis)
Professional or Administrative (\$455/week on salary or fee),
Computer (\$27.63/hour).

State:

California Non-exempt (\$8.00/hour or \$10.24/hour in San Francisco),
Executive, Professional or Administrative (\$2,773.33/month on salary),
Computer (\$38.89/hour or \$81,026.25/year)

Oregon Non-exempt (\$8.80/hour)
Nevada Non-exempt (\$7.25/hour)
Arizona Non-exempt (\$7.65/hour).

DISCRIMINATION

Disability: A special education teacher failed to comply with her continuing education requirements (3 hours of college credit over a 5-year period) which caused her to lose her certification. She claimed that her school district failed to accommodate a disability in petitioning for a state exemption from this requirement. *Johnson v. Board of Trustees.* The trial and District Court upheld summary judgment on the grounds that plaintiff's failure to maintain her continuing education requirements rendered her “unqualified” for her position so that an accommodation was not required. *Comment:* This decision affirms that employees must be able, in all respects, to perform their job duties to fall under the protection of the disability discrimination laws.

New EEOC Age Bias Regulation: The EEOC recently approved a draft final regulation clarifying that the Age Discrimination in

Employment Act (ADEA) “reasonable factors other than age” test is the proper standard. It will be easier for workers to establish disparate treatment claims under this standard and put a heavier burden on employers in defending such claims. *Comment:* This new regulation eliminates the “business necessity test” which was formally used to determine “reasonable factors other than age” which made easier the defense of these cases for employer attorneys.

MISCELLANEOUS

Ministerial Privilege: A wrongful termination claim arose from a church’s dismissal of a teacher who co-habitated with her boyfriend out of wedlock. *Henry v. Red Hill Evangelical Lutheran Church of Tustin.* The Court of Appeals affirmed that the ministerial exemption protected the religious institution in this case. *Comment:* Employees of religious institutions should realize that their civil rights may be limited by the constitutional protection of religion.

Wage and Hour: California law requires the payment of overtime compensation for work performed in California by software instructors who live elsewhere. *Sullivan v. Oracle Corporation.* The court thus affirmed that the California Labor Code governs work performed in this state irrespective of the residency of the employee. *Comment:* This decision is in line with earlier California decisions extending the protection of State law to workers in this state—even if undocumented.

Privacy: The Health Insurance Portability and Accountability Act (HIPAA) privacy and security audits began in November 2011. The HIPAA Act of 2009 requires the State Department of Health and Human Services to perform periodic audits of covered entities and business associates to assure compliance of privacy and security rules under HIPAA of 1996. *Comment:* As explained in prior

newsletters, HIPAA rules generally do not apply to employers outside the health care industry.

Violence Prevention: All “relevant evidence” must be considered in workplace violence proceedings including otherwise inadmissible hearsay. *Kaiser Foundation Hospitals v. Wilson.* This decision makes it easier for employers to obtain restraining orders to protect their employees from violence in the workplace. *Comment:* Sensibly, the safety of workers trumps legal technicalities as to threats of violence in the workplace.

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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