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California Employment Law Newsletter

What's New for California Employers?

HOLIDAY EDITION

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

LEGISLATION

This has been a quiet year for legislation impacting employment law. The following will become effective on January 1, 2009.

Computer Professionals Overtime Exemption: Computer software professionals working full time who earn at least $75,000 per year ($6,250/month) are exempt from overtime pay. *Comment:* This revises prior law which stated the income minimum as $36 per hour, and that the employee primarily engage in work that is intellectual or creative.

Driving While Texting: The California Vehicle Code now states "a person shall not drive a motor vehicle while using an electronic wireless communication device to write, send or read a text-type based communication." *Comment:* Employers should modify their policies to prohibit their employees from texting while driving on company business, as that can lead to liability for the employer.

Disability Access: The new legislation is designed to increase equal access for individuals with disabilities while decreasing unwarranted disability-access litigation. *Comment:* This legislation will likely benefit employers and landlords, as plaintiffs can only seek damages where they have personally encountered a denial of access (as opposed to representing others in that regard).

Pay for Temporary Workers: Temporary staffing firms must pay temporary workers on assignment at least once a week regardless of when their temporary assignment ends. Employers must also pay the wages for work performed during a calendar week no later than on the regular company payday during the following calendar week. However, the new law makes clear that the end of an assignment for a temporary worker does not qualify as a termination or "discharge," and therefore, employers are not required to pay final wages immediately.

Immigration: Employers must start using revised Form I-9 on 2/2/09. *Comment:* The interim final rule makes the following changes to current I-9 rules: (1) expired documents are no longer considered acceptable for proof of identification or work authorization; (2) eliminates three more documents from List A (Temporary Resident Card and older versions of employment authorization card; (3) adds the new U.S. Passport Card to List A; and (4) revises the attestation section of the form.

FMLA

Effective January 16, 2009, the U.S. Department of Labor (DOL) published final regulations for the FMLA. The following *briefly* summarizes some of the key provisions of the new regulations.

Military Caregiver Leave: Eligible employees are able to take up to 26 weeks of job-protected "Military Caregiver Leave" during a single 12-month period. This leave must be used to care for a covered family member with a serious illness or injury that was incurred in the line of duty while on active duty in the armed forces.

[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.

Qualifying Exigency Leave: Eligible employees may also take up to 12 weeks of job-protected leave for a "qualifying exigency" arising from the employee's spouse, child or parent who has been called to active duty in support of a contingency operation. Eight situations are identified as to when a qualifying exigency leave may be taken.

Electronic Notice Posting: The new regulations state that "an electronic posting" of the FMLA notices may be sufficient in certain circumstances. Further, where an employer's work force is comprised of a "significant portion" of workers who are not literate in English, the employer must provide the general FMLA notice in a language which the employees are literate.

Employee Notice Requirement: The new regulations place an increased burden on the employee to provide notice of their need for FMLA leave to avoid disruption of the employer's business. If less than 30 days' notice is given, it must be "as soon as possible."

Fitness-for-Duty Certification: An employer may now require a fitness-for-duty certification that specifically addresses the employee's ability to perform the essential job functions, so long as employer has provided has provided the employee with a list of those essential job functions. Also, where reasonable job safety concerns exist, the employee may be required to update his/her fitness-for-duty certification every 30 days.

Serious Health Condition: The new regulations retain the six definitions of "serious health condition," but clarify issues related to those definitions: (1) If an employee is taking leave under the "three consecutive calendar days of incapacity leave, then the first visit to the health care provider must occur within seven days of the initial incapacity. (2) "Periodic visits to a health care provider" for chronic, serious health conditions means at least two visits to the health care provider each year.

Intermittent Leave: An employee who takes intermittent leave for planned medical treatment that is medically necessary has a statutory obligation to make a "reasonable effort" to schedule that treatment so that it will not unduly disrupt the employer's operations.

Breaks in Service: To be eligible, an employee must have worked at least 1,250 hours in the 12-month period preceding the leave request. However, those 12 months do not have to be consecutive.

Light Duty: Employees who accept "light duty" assignments while recovering from a serious health condition are not considered to be on FMLA leave.

Paid Leave Policies: Employers can apply their normal policies for taking paid leave when an employee substitutes paid leave for unpaid FMLA, regardless of the type of paid leave being substituted.

Failure to Designate FMLA Leave: An employer's failure to designate FMLA leave may not mean that the employer must give an additional 12 weeks of protected leave.

Perfect Attendance Awards: An employer can now deny a "perfect attendance" bonus or other award to employees who do not have perfect attendance because they took FMLA leave. However, the employer must treat all employees in the same manner.

New FMLA Forms: The DOL has also issued several new "prototype" forms that employers may use to comply with the FMLA, including a "Certification of Serious Health Condition – Employee's Own Condition," and "Certification of Serious Health Condition – Employee's Family Member Condition," a "Certification of Qualifying Exigency," a "Certification for Serious Injury or Illness or Coverage Service Member," a "Notice of

FMLA Eligibility and Rights Responsibilities," and a "Notice to Employee of FMLA Designation."

California Family Rights Act: Remember that California has its own family leave act (CFRA), which is generally consistent with FMLA, but does have some differences. Both statutes should be consulted by California employers in any given situation.

CFRA Notice: The forms from Kaiser regarding an absence may be sufficient to put an employer on notice that an employee suffered from a "serious health condition" protected by CFRA, *Avila v. Continental Airlines, Inc.* This was so in this case despite the fact that the employee's discrimination claim was dismissed.

MISCELLANEOUS

Americans with Disabilities Act Revisions: The ADA Amendments Act, which becomes effective on January 1, 2009, requires courts to "broadly" construe the definition of "disability" in favor of coverage of individuals under the ADA. The new law also provides that an impairment that substantially limits one major life activity need not limit other major life activities to be considered a "disability." Also, an impairment that is episodic or in remission will still be considered a "disability" under the new law if it would have substantially limited a major life activity when active. *Comment:* Remember that California has its own disabled worker rights act (FEHA). While the new ADA revisions tend to conform the ADA to FEHA, some important distinctions still exist. California employers should primarily be guided by FEHA restrictions in dealing with disabled workers.

Damages: A jury may not award punitive damages for a wage-and-hour violation of the California Labor Code. *Safaglio v. Walmart.* In this case, the jury awarded $195,000 in punitive damages for a restaurant's failure to provide meal and rest periods. *Comment:* This decision is a relief for California employers who often face punitive damage claims in routine cases alleging violations of the California Labor Code.

Privacy: Job applicants who had no marijuana-related convictions could not claim class-action statutory damages for prospective employers' questions regarding past convictions. *Starbucks Corporation v. Superior Court.* In this case, the court held that those job applicants could not allege injury that the applicable statute was designed to remedy. *Comment:* Employers are free to make inquiries into marijuana-related convictions without fear of privacy rights allegations.

MERRY CHRISTMAS & HAPPY HOLIDAYS TO YOU ALL!

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