

# 2008 Labor Law Update

## On January 1, 2008, New Rules Are in Effect in the Following Areas:

### MINIMUM WAGE INCREASE

The California minimum wage and the minimum wage required for exempt employees increased on January 1, 2008.

Effective 1/1/08, the minimum wage for all employees increased to \$8.00 an hour.

Exempt employees must be paid at least twice minimum wage. Beginning 1/1/08, an employee must be paid the annual equivalent of at least \$33,280. An exempt employee must also meet the salary and job duties requirements.

### EARNED INCOME TAX CREDIT NOTICE

Effective Jan. 1, 2008, California employers who are required to provide unemployment insurance must notify all employees that they may be eligible for the federal Earned Income Tax Credit (EITC) within one week before or after, or at the same time, the employer provides an annual wage summary including but not limited to a Form W-2 or Form 1099.

Visit the What's New page on our Website for the language; *both English and Spanish.*

### HANDS-FREE DEVICES FOR DRIVERS

Effective July 1, 2008, drivers must use a hands-free device when using a cell phone while driving. Employers should implement policies in accord with this new provision.

### REVISED I-9 FORM

Employers must begin using the revised I-9 Form or be subject to all applicable fines and penalties under the Immigration and Nationality Act.

The newly revised form bears a revision date of June 6, 2007. The revised I-9 form reduces the number of documents employers may accept during the employment eligibility verification process. The most significant change to the revised I-9 form is the elimination of five documents from List A. Employers can no longer accept the following documents: Certificate of U.S. Citizenship (Form N-560 or N-570); Certificate of Naturalization (Form N-550 or N-570); Alien Registration Receipt Card (Form I-151); unexpired Reentry Permit (Form I-327); and unexpired Refugee Travel Document (Form I-571).

Another change was to add the most recent version of the Employment Authorization Document (Form I-766) to List A. (Note that the current version of the Permanent Resident Card or Alien Registration Receipt Card is Form I-551, which remains acceptable.)

Visit the What's New page on our Website for the new I-9 Form the document list and the deleted document list.

### NO-MATCH LETTER RULES

The Department of Homeland Security ("DHS") has abandoned its proposed no-match rule entitled Safe-Harbor Procedures for Employers Who Receive a No-Match Letter.

This rule is the subject of current litigation challenging its implementation because it would use the Social Security no-match records as a tool for immigration enforcement. On October 10, 2007, a federal court in California issued a preliminary injunction preventing DHS and the Social Security Administration ("SSA") from implementing the new rule. As a result, DHS requested that this lawsuit be placed on hold until March 2008 because DHS plans to revise and re-publish the rule. The court granted DHS' request to stay the litigation, but will require DHS to report monthly on its progress in publishing a revised rule. Employers should note that although the "safe harbor" provision is not effective at this time, DHS will continue to use the no-match letter as an enforcement tool.

### NO SSN'S ON PAYCHECKS

California employers are required to provide certain information on employees' pay stubs, including the employees' names and social security numbers. Effective January 1, 2008, only the last four digits of an employee's social security number, or an employee identification number other than a social security number, be shown on the pay stubs.

### MILITARY SPOUSE LEAVE

Effective immediately, a new leave of absence right for spouses of military personnel while the military spouse is on leave from active duty. The law allows for 10 days of unpaid time off.

To be eligible, the employee must have a spouse who is on active duty for any of the Armed Forces, National Guard or Army Reserves, in an area of military conflict. Leave will only be provided during: 1) periods of declared war, or 2) periods of deployment of the National Guard or Reserves.

Only employees who work an average of 20 or more hours per week are eligible. This law applies to private and public employers with 25 or more employees.

### IRS RAISES MILEAGE RATE

The standard mileage reimbursement rate for employees who use their own cars for business purposes rose from 48.5 cents per mile to 50.5 cents per mile in 2008.

### TEMPORARY DISABILITY PAYMENTS

Previously an injured worker could receive 104 weeks of TD benefits. However, those benefits had to be paid within 104 weeks of the first date that temporary disability was paid.

Now injured workers are eligible for 104 weeks of temporary disability as long as those benefits are paid within five years of the date of injury. Benefits are still capped at 104 weeks, but the injured worker has a longer period of time in which to collect those benefits.

### COMPUTER PROFESSIONAL RATE LOWERED

The law exempts a computer professional from overtime requirements if the employee is primarily engaged in work that is intellectual or creative. The hourly minimum compensation was reduced from \$41 to \$36, effective Jan. 1, 2008. The rate for 2009 will be set by Oct. 1, 2008 by the Department of Industrial Relations.

### EMPLOYEES MUST PROVE ABILITY

The California Supreme Court determined that the federal ADA requires employees to prove that they can perform the essential functions of the job they hold or seek, with or without reasonable accommodation.

The court said an employee must prove that they can do the job, not the employer prove they cannot. Put another way, if they can't do the job regardless of accommodation, they cannot claim discrimination under the ADA. Employees must prove their ability to perform the job's essential duties.

### CRACK DOWN ON WC "DEADBEATS"

The Labor Commissioner is authorized to identify employers who are not providing workers' compensation insurance for their employees, and post the information to a website. The Labor Commissioner should begin more aggressive efforts in cracking down on employers who do not have proper workers' compensation coverage in place, as well as on those employers who improperly misclassify employees as independent contractors.

### EEOC REVISES AGE DISCRIMINATION RULES

The EEOC has made clear that the ADEA prohibits only age discrimination against employees that are older than their co-employees. Thus, favoring an older individual over a younger individual, based on age, is not an ADEA violation, even if the younger individual is at least 40 years old.

The Commission issued a "final rule" exempting employers from age-discrimination regulations if they cut benefits for retirees when they're old enough to get help from Medicare, saying the rule would support companies' longstanding practice of coordinating their retiree-health-care benefits with Medicare.

#### **SEPARATE AGREEMENTS NEEDED**

Including a mandatory, binding arbitration statement in an employee handbook is insufficient to create a contract with employees to require arbitration of employment-related disputes. A California court of appeal clarifies that in order for a court to compel arbitration an employer must provide evidence of a signed arbitration agreement.

An acknowledgment of receipt of an employee handbook, particularly a handbook that refers to a nonexistent, separate arbitration agreement, will not stand.

#### **SHOWING UP IS AN ESSENTIAL FUNCTION**

Employees taking unexcused absences on short notice fail to show that they are qualified to perform the essential functions of a job under the federal Americans with Disabilities Act (ADA) if they cannot demonstrate regular and reliable attendance at work, particularly when the job is caring for seriously ill patients in need of dialysis.

This is in contrast with a job that could be performed off-site or put off until another time. Further, if an accommodation is requested or required, employees must provide employers with sufficient notice of their need.

#### **PAYCHECKS CASHING WITHOUT COST**

California Labor Code section 212 requires employers to ensure paychecks may be cashed without delay and without a fee or a discount.

A large national corporation paid its employees with out-of-state checks that employees were charged a fee to cash at banks. Labor Code provides for a civil penalty of \$100 per aggrieved employee per pay period for the initial violation and \$200 per pay period for each subsequent violation.

#### **ONE-YEAR STATUTE ON LATE PAYMENT**

When seeking only waiting time penalties under Section 203 of the Labor Code, and not back wages as well, the statute of limitations is one year under Section 340(a) of the California Code of Civil Procedure, a state Court of Appeal has ruled.

#### **LUMP SUM EXPENSE REIMBURSEMENT**

Employers can satisfy their statutory obligation to reimburse employees for business expenses by paying employees a lump sum added to their base compensation to reflect those expenses, the California Supreme Court has ruled.

To do so the employers must provide a method to apportion the enhanced compensation so as to distinguish the amount of base salary from the amount paid for business expenses.

#### **LEAD EMPLOYEE MAY BE A "SUPERVISOR"**

A lead employee may be a supervisor in determining liability for sexual harassment under the California Fair Employment and Housing Act. Denying the employer's motion for summary judgment, the District Court ruled that the plaintiff could proceed to trial on her claims that the employer was strictly liable for alleged sexual harassment by a lead employee.

Although the lead had no authority to hire, fire, discipline, or transfer employees, factual disputes existed regarding his authority to direct employees and his influence on employment decisions.

#### **IRS SAYS FEDEX OWES \$319,000,000 TAXES**

FedEx Corp said on Friday that the U.S. Internal Revenue Service found that its FedEx Ground independent contractors should be reclassified as employees for tax purposes and that the company faced related taxes and penalties of more than \$319 million for 2002.

The IRS is auditing similar issues for 2004 through 2006, the package delivery company said in the filing with the U.S. Securities and Exchange Commission. The Teamsters have asserted FedEx Ground workers are in fact employees.

FedEx Ground uses 15,000 drivers who are paid as independent contractors. Under this system, FedEx Ground drivers can own multiple routes, employing other drivers to deliver packages. Investors like the model because it helps FedEx save money and compete against main rival United Parcel Service Inc. and its unionized work force.

#### **EMPLOYERS MAY DEDUCT PARTIAL DAYS**

The DLSE has endorsed the position taken by the California Court of Appeal last year that employers may deduct partial-day absences from exempt employees' accrued vacation/PTO banks for absences of 4 hours or more without jeopardizing their exempt status.

The DLSE amended its Enforcement Policies and Interpretations Manual to reflect the new decision. This is a clear position reversal from that stated in a 2002 opinion letter which suggested that such deductions might jeopardize exemptions under the "salary basis" test and expose employers to significant risks of having to pay overtime to exempt workers.

#### **EMT'S MUST GET BACKGROUND CHECKS**

A new state registry of emergency medical technicians and rules on checking for criminal activity in their pasts. And for the first time, all prospective rescuers would be required to undergo FBI and California law enforcement background checks before being hired by a fire department or private ambulance company.

California is the only state in the nation that has no uniform registry for EMTs or statewide requirements for criminal background checks. Rescuers disciplined or

fired in one jurisdiction have been able to get jobs in others, with their new employers unaware of their previous problems.

#### **HIPAA EXTENSION**

Extends Health Insurance Portability Accountability Act's duration by two years to July 1, 2010.

#### **NLRB: OK TO BAN EMAIL FOR UNIONIZATION**

Employers can prohibit workers from using the office e-mail system for union activities, so long as they prohibit solicitations from any outside organization, the National Labor Relations Board has ruled.

The board said its 3-2 decision sets a new labor relations standard that allows employers to prohibit union activity through the company's e-mail system while at the same time permitting office chitchat and personal messages.

#### **CIVIL RIGHTS ACT OF 2007**

California law includes 51 provisions prohibiting discrimination against members of protected classes, but the list of protected classes varies from statute to statute. Assembly Bill 14 amends the existing nondiscriminatory provisions to be consistent with the Unruh Civil Rights Act and Government Code section 11135. In addition to adding consistency, AB 14 automatically updates other non-discriminatory provisions whenever either the Unruh Civil Rights Act or Government Code section 11135 modify their lists of protected classes.

#### **NOT ALL INAPPROPRIATE CONDUCT HARASSMENT**

A California appellate court decision clarifies that not every instance of inappropriate conduct can give rise to a "hostile work environment" sexual harassment claim. Specifically the court determined that three instances of offensive behavior over a five-week period, though inappropriate, did not demonstrate the continuous, pervasive harassment necessary to show a hostile work environment.

Note that although the employer in this case was not found liable for sexual harassment, the decision nevertheless underscores the potential liability employers face from sexual harassment claims.

To minimize this risk, employers should have strongly worded policies in place forbidding sexual harassment and should ensure that their supervisors are trained in sexual harassment prevention. In addition, employers should be sure to investigate all complaints of harassment quickly and thoroughly. Please contact Pacific Employers directly to discuss any questions relating to the effect this decision may have on your workplace.