2009 Labor Law Update

On January 1, 2009, New Rules Are in Effect in the Following Areas:

Earned Income Tax Credit Notice

California employers are required by California law to provide all employees with a notice of potential eligibility for the federal Earned Income Tax Credit. California Revenue and Taxation Code section 19853 requires that all employers provide this notice to all employees either at the same time as their annual wage summary (Form W-2), or within one week of providing the W-2 or Form 1099.

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

Family and Medical Leave Act

The U.S. Department of Labor published the final version of the Family and Medical Leave Act (FMLA) regulations pertaining to military families and qualifying exigencies. Importantly, among numerous, significant changes, the regulations define what a "qualifying exigency" is for purposes of qualifying for up to 12 weeks of FMLA leave. Families with active military personnel may now be eligible if their situation meets one of the new qualifying exigencies: short notice deployment, attendance at official military events or activities, arranging or providing childcare, attending school or daycare meetings, handling financial and legal matters, and rest and recuperation visits when the soldier is on leave.

Cell Phones Use &Texting

Since July 1, 2008, drivers have been required to use a hands-free device while talking on a cell phone and driving. Starting January 1, 2009, text-based communication while driving is prohibited as well, with the same penalties -- $20 for the first offense and $50 for subsequent offenses. Specifically, the law prohibits writing, sending or reading text-based communication including text messaging, instant messaging and e-mail, on a wireless device or cell phone while driving.

IRS Lowers Mileage Rate

The standard mileage reimbursement rate for employees who use their own cars for business purposes has been lowered from 58.5 cents per mile to 55 cents per mile, effective Jan. 1, 2009.

Invalid Waivers

A bill amended Labor Code 206.5 making null and void the execution of any release on account of wages due. Employers who violate this law are guilty of a misdemeanor. The new law -- effective January 1, 2009 -- adds the following language: "For purposes of this section, 'execution of a release' includes requiring an employee, as a condition of being paid, to execute a statement of the hours he or she worked during a pay period, which the employer knows to be false."

No-Match Letter Rules Update

The Department of Homeland Security (DHS) has published a supplemental final rule regarding an employer's obligations upon receipt of a Social Security no-match letter. However, this new rule is not yet effective due to federal litigation that has been pending against similar rulemaking since late 2007. Written arguments in the pending lawsuit will continue through February 24, 2009. In the interim, employers are well advised to scrutinize their existing policies with respect to no-match letters.

What should employers do now?

DHS' commitment to this rule indicates that illegal immigration and worksite enforcement will remain a top priority for ICE and DHS. As such, employers must remain diligent in their I-9 employment eligibility compliance efforts and stay abreast of frequent developments in this area. Additionally, while implementation of DHS' formal rule has been delayed by this federal litigation, it is still imperative that employers scrutinize their current policies and work with legal counsel on the appropriate handling of Social Security no-match letters received by the employer.

Temporary Employees

Wages for employees of temporary services employers shall be paid weekly or daily if an employee is assigned to a client on a day-to-day basis or to a client engaged in a trade dispute. This requirement does not apply to employees who are assigned to a client for over 90 consecutive calendar days unless the employer pays the employee weekly. Failure to do so can result in civil and criminal penalties.

Revised I-9 Form

On December 17, the Federal Register published an interim final rule that revises the list of documents acceptable for the Form I-9 employment eligibility verification process and unveils a revised Form I-9. The changes in the interim final rule take effect Feb. 2, 2009.

Passport Cards for I-9 Identification

The Departments of State and Homeland Security have begun to issue "passport cards" which may be used as a "List A" document to verify employment in accordance with the I-9 form.

The passport card is more limited in its uses for international travel (e.g., it may not be used for international air travel), but it is a valid passport that attests to the U.S. citizenship and identity of the bearer. Accordingly, the card may be used for the Form I-9 process and can also be accepted by employers participating in the E-Verify program.

The passport card is considered a List A document that may be presented by newly hired employees during the employment eligibility verification process to show work authorized status. List A documents are those used by employees to prove both identity and work authorization when completing the Form I-9.

NLRB Rule on Political Speech

In July 2008, the president of the National Labor Relations Board (NLRB) issued guidelines to employers concerning employee participation in political advocacy activities and providing guidance to employers as to when disciplinary actions for these activities may be appropriate.

The memorandum provides that:

* Non-disruptive political advocacy for or against a specific issue, related to a specifically identified employment concern that takes place during employees' own time and in non-work areas, is protected;

* On-duty political advocacy for or against a specific issue, related to a specifically identified employment concern is subject to restrictions imposed by lawful and neutrally applied work rules;

* Leaving or stopping work to engage in political advocacy for or against a specific issue, related to a specifically identified employment concern may also be subject to restrictions imposed by the employer.

Workers' Comp Injury Reporting

Labor Code section 6409.1 was amended to change the reporting of work related injuries and illnesses. Currently, form 5020 must be filed with the Division of Labor Statistics and Research (DLSR) within five days of an incident. Once the regulations are finalized, insured employers must file a form as prescribed by the Division of Workers' Compensation (DWC) with the DWC, and self-insured employers must use a new, yet to be created, electronic form within the time specified by the DWC. Amended reports following a death must now be filed with the DLSR instead of the DWC. Insurers must use a new, yet to be created, electronic form with the DWC.

The bill specifies that regulations must be created to implement these changes, which will not go into effect until the regulations are finalized.

Minimum Pay for Exempt Computer Professionals

Effective January 1, 2009, Labor Code 515.5 was amended to allow payment to computer professionals as a monthly or annual salary. Before this change, computer professionals had to earn a minimum hourly rate, set by the Division of Labor Statistics and Research (DLSR) annually. The hourly rate for 2009 is increased from $36.00 to $37.94. For 2009, the minimum monthly salary exemption is $6,587.50, and the minimum annual salary exemption is $79,050.00.

Exemption for Physicians Paid Hourly

A licensed physician or surgeon who is primarily engaged in performing duties for which licensure is required is exempt from overtime if he/she is paid at least the minimum hourly rate set annually by the state.

Effective January 1, 2009, the minimum hourly rate is $69.13. This exemption does not apply to employees in medical internships or resident programs, physician employees covered by collective bargaining agreements or veterinarians.

Chain Restaurants - Nutritional Info

A new law requires chain restaurants with 20 or more facilities in California to post nutritional information. Beginning July 1, 2009, to December 31, 2010, each facility must disclose nutritional information or calorie count information about the food it serves. Nutritional information includes, but is not limited to, all of the following, per standard menu item, as that item is usually prepared and offered for sale:

* Total number of calories;
* Total number of grams of carbohydrates;
* Total number of grams of saturated fat; and
* Total number of milligrams of sodium.

Court Decisions of Note

California Supreme Court To Determine Employer Obligations Related To Meal Periods

The California Supreme Court recently granted review of the Court of Appeal's decision in Brinker Restaurant Corp. v. Superior Court of California, which held, among other things, that under California Labor Code § 512 employers must provide (i.e., make available) meal periods to employees, but do not have to ensure that meal periods are actually taken, provided that the employer does nothing to dissuade, discourage, or impede the taking of meal periods. The California Supreme Court's grant of review has the effect that the Brinker case may not be cited or relied on by any court or a party in any other court action. The California Supreme Court will now decide the issues involved in the Brinker case.

A week after the Supreme Court granted review of Brinker, another California Court of Appeal in Brinkley v. Public Storage, Inc. also held that an employer's obligation under California law is to make available meal periods, rather than to ensure that they are taken. The California Supreme Court may grant review of the Brinkley case as well, which would make it uncitable also if the Court does so.

However, in the meantime, there are numerous federal district court cases in California that have held that although the employers are required to provide meal periods, they are not obligated to ensure that their employees take meal periods and those court decisions can be cited. In addition, the California Division of Labor Standards Enforcement (DLSE) has issued a Memorandum to its staff which adopts the well-reasoned line of federal district court decisions (as well as of the Brinker and Brinkley decisions) and which states DLSE's position as follows:

"Taken together, the language of the statute and the regulation, and the cases interpreting them demonstrates compelling support for the position that employers must provide meal periods to employees but do not have an additional obligation to ensure that such meal periods are actually taken."

The final interpretation on the obligations of California employers with respect to meal periods will come from the California Supreme Court, but we think that there are good reasons that the Supreme Court should agree with the Court of Appeal's decisions in Brinker and in Brinkley, with their reasoning and that of numerous federal district courts in California, and the DLSE.

Right to Terminate Employees for Medical Marijuana Use

The California Supreme Court decided in *Ross v. RagingWire* that an employee who was fired for failing a drug test due to medical marijuana use does not have a valid claim for disability discrimination or wrongful termination against the employer.

Accommodation and the Interactive Process

The Court of Appeal found that there was a triable issue of fact as to whether Neiman Marcus was responsible for the breakdown in the interactive process by requiring plaintiff to provide a release to return to work listing her restrictions before discussing other open job positions, as providing information about available positions could have assisted the plaintiff and her doctor in providing specific work restrictions.

Moreover, the Court of Appeal found that a reasonable jury could determine that Neiman Marcus' decision to terminate plaintiff's employment without advance warning or further discussion was unreasonable and caused a break down in the interactive process.

The lesson to be learned from this case is that the employer cannot rely on the doctor's leave certificates to terminate employment without exhausting all possibilities for accommodation with the employee.

Supreme Court Makes It Harder to Defend Disparate Impact Age Discrimination Claims

Employers who are considering layoffs or reductions in force should make sure they carefully examine whether such action will have an adverse action on older workers. If the statistics demonstrate such adverse action, employers must take extra precautions to ensure that they have legitimate and objective explanations supporting the selection process that are entirely separate from age or age-related characteristics and are likely to be considered reasonable by an independent factfinder.

Failure to engage in such an analysis prior to implementing a layoff or reduction in force, is now more likely to expose the employer to substantial liability.

SAN FRANCISCO STUFF

San Francisco Commuter Benefits

Beginning 120 days after August 22, 2008, San Francisco employers with 20 or more employees are required to provide commuter benefits to employees who work at least 10 hours per workweek within the geographic boundaries of San Francisco. This includes offering employees at least one of the following transportation benefits:

* A pre-tax election of a maximum of $110 per month, consistent with current federal law;
* An employer-provided transportation pass (or reimbursement for one) equal in value to $45 (or more) per month;
* Employer provided transportation at no cost to employees

Additional rules and regulations will follow, so keep an eye on newsletters. Failure to comply with this program will result in an "infraction" of monetary fines against your company. Contact Pacific Employers immediately if you have employees working in San Francisco, so your company can prepare to comply.

San Francisco Health Care Ordinance

On September 30, 2008, the U.S. Ninth Circuit Court of Appeals issued a decision for small-business owners in San Francisco. In a highly watched health care case, the Court ruled that the San Francisco Health Care Security Ordinance and the corresponding Health Access Plan were not preempted by the Employee Retirement Income Security Act (ERISA).

San Francisco's Health Care Security Ordinance, enacted by the city in 2006, mandates that all private employers with more than 20 employees pay an assigned amount of money toward employee health care or pay the city a fee based on the number of employees and hours worked.

Executive Orders

E-Verify System Effective 2-20-09

Beginning February 20, 2009 and pursuant to an Executive Order signed by President Bush, the Department of Homeland Security will require private employers who provide goods or services to the federal government to use the E-Verify system in order to confirm their workers' employment eligibility. E-Verify is an online government database against which employers can check a person's work status. The system cross-references employee I-9 forms with records from the Social Security Administration to identify mismatches in submitted social security numbers. It also indicates whether an employee is authorized to work in the United States. The new mandate will apply to federal prime contracts having a monetary value in excess of $100,000 (known as the simplified acquisition threshold); however, the rule will apply to federal subcontracts having a value above $3,000.