2010 Labor Law Update

On January 1, 2010, New Rules Are in Effect in the Following Areas:

NEW RULES - LAWS

COBRA Subsidy Extended

The COBRA subsidy extension provisions of the DOD Act are effective immediately and are retroactive to the effective date of the original COBRA subsidy program under ARRA.

The window for determining eligibility for participation in the program has been extended by two months. The revised program will apply to individuals who lose their group health plan coverage due to an involuntary termination of employment between January 1, 2010 and February 28, 2010. The deadline was December 31, 2009.

In addition, the House of Representatives has passed the Jobs for Main Street Act of 2010 (the Jobs Act), which would further expand the COBRA subsidy program class through the end of June 2010 if enacted.

Lilly Ledbetter Fair Pay Act

The first bill signed into law by President Obama virtually eliminates the statute of limitation for claims of wage discrimination. In essence, a new claim is created every time an allegedly discriminatory paycheck is received.

ADA Amendments Act and Regulations

The ADAA became effective on January 1, and substantially expanded the scope of the ADA. Overturning a series of U.S. Supreme Court Opinions, the ADAA lowers the standard for determining whether a individual is disabled under the ADA.

New I-9 Form

The new form version is dated August 7, 2009. Employers should stop using all previous versions of the Form I-9. This new edition of the form is approved for use through August 31, 2012.

State Withholding Tax Increase

Increases employee withholdings, supplemental wage withholding, and wage stock options and bonuses. The tax is already in effect.

Earned Income Tax Credit Notice

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.

Expansion of FMLA Coverage

The 2010 National Defense Authorization Act (NDAA) includes provisions expanding Family and Medical Leave Act military family leave benefits. The 2010 NDAA extends FMLA exigency leave coverage to family members of active duty members of the Armed Forces. It also expands the potential period during which FMLA caregiver leave might be provided. Now, eligible employees may take FMLA caregiver leave for up to five years after the veteran ends active duty. The expanded FMLA rights are effective immediately. Employers should amend their FMLA policies to reflect these expanded military family leave rights.

GINA is Here

The Genetic Information Nondiscrimination Act of 2008 (GINA), is now in effect. The EEOC's summary of GINA says:

Title II of the Genetic Information Nondiscrimination Act of 2008 protects applicants and employees from discrimination based on genetic information in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. GINA also restricts employers' acquisition of genetic information and strictly limits disclosure of genetic information.

Genetic information includes information about genetic tests of applicants, employees, or their family members; the manifestation of diseases or disorders in family members (family medical history); and requests for or receipt of genetic services by applicants, employees, or their family members.

Computer Pros & Licensed Physicians

Rates for exempt computer professionals and licensed physicians do not change for 2010. Effective Jan. 1, 2010

Mileage Reimbursement Rates

The Internal Revenue Service has issued the 2010 optional standard mileage rates used to calculate the deductible costs of operating an automobile for business, charitable, medical or moving purposes.

Beginning on Jan. 1, 2010, the standard mileage rates for the use of a car (also vans, pickups or panel trucks) will be:

- 50 cents per mile for business miles driven
- 16.5 cents per mile driven for medical or moving purposes
- 14 cents per mile driven in service of charitable organizations

The new rates for business, medical and moving purposes are slightly lower than last year's. The mileage rates for 2010 reflect generally lower transportation costs compared to a year ago, the IRS says.

EEOC Changes the Rules

There has been a significant development regarding the rights of employers to terminate an employee who has exhausted a job protected leave of absence. The EEOC has taken the position that if an employee is on a disability leave of absence the employer may not automatically terminate the employee when the legally required leave of absence expires. For example, if an employee is on a FMLA disability leave, once the 12 weeks of FMLA have expired the employer may not use that time limit as a reason to terminate the employee.

The employer is now required to treat a request for additional leave as a request for a "reasonable accommodation" under the Americans with Disabilities Act. That will require the employer to meet with the employee and engage in an "interactive process" to determine if the employee can grant the additional leave without creating an undue hardship on the employer.

In a case such as this employers should obtain professional advice before terminating an employee whose job protected period of a leave of absence has expired.

Alternative Workweek Schedules

The law regarding alternative workweek schedules was amended to permit an eight hour day as a valid alternative schedule.

Additionally, the Division of Labor Standards Enforcement issued an opinion letter stating that under some circumstances, an alternative workweek schedule may be in place for less than a full year - for example during the summer months only.

Out-of-State Marriages

California recognizes out-of state marriages as legal in California if they are legal in the state where the marriage occurred.

E-Verify for Federal Contractors

Federal contractors and subcontractors must use the E-Verify system when hiring employees. Other employers may use verification system if they wish.

Civil Air Patrol Leave

Employers with more than 15 employees are subject to a new leave for employees who are volunteer members of the Civil Air Patrol.

No-Match Letter Rules Suspended

Homeland Security has rescinded its No-Match rules for employers.

Furlough of Exempt Employees

Because reduction of exempt employees' work hours poses significant legal risks and reduction of exempt employees' salary can be seriously demoralizing, employers might consider implementing furloughs or shutdowns on a workweek basis.

A furlough of exempt employees for an entire workweek would not jeopardize the exemption because an exempt employee is not entitled to a weekly salary for any week in which no work is performed. Accordingly, it is best that any furloughs be for full weeks that coincide with the workweek to reduce the risk of losing exempt status.

If implemented correctly, this is the safest option. But there are risks:

- Absolutely no work permitted

A problem may arise where exempt employees perform seemingly insignificant "work" while on furlough. The popularity of BlackBerrys and ease of remote connections or voicemail makes it likely that exempt employees may use these tools to "work" while on furlough. The performance of such minimal work, if "suffered" by the employer, creates an

obligation to pay the exempt employee's full salary.

To avoid this problem, employers should inform exempt employees in writing that no work is authorized during the furlough period without express advance written approval. The discretion to authorize work should be limited to one or two high-level executives to minimize the potential that exempt employees perform work during the shutdown.

NEW CA DLSE RULE

A recently issued opinion allows employers to reduce an exempt employee's salary and hours worked, at the same time, without endangering the worker's status as a salaried exempt employee.

In the example used, the state labor agency permitted an employer faced with economic difficulties to reduce the work schedule of exempt employees from five days to four days. The state DLSE or Department of Labor Standards Enforcement ruled in a recent opinion letter that simultaneously reducing the employee's salary by 20% "did not violate the 'salary basis' for the workers' overtime exemption under the state Labor code and wage orders" as long as the employer's action is a temporary measure.

This is a radical change, since the DLSE took the opposite position in 2002. In an opinion letter issued in that year, the California agency ruled that the employer could reduce an employee's salary. However, if the employee's work hours were also reduced, that changes the employee from exempt to non-exempt status.

This is a primary concern for California employers, since non-exempt employees are entitled to overtime under state law. California has the strictest overtime regulations of any state, requiring overtime after 8 hours per day, double-time after 12 hours per day, and special premiums on the 7th consecutive day of work.

The new California policy on exempt employees includes several crucial conditions:

* When economic conditions permit, the exempt employee must be restored to full salary
* The salary reduction is permitted only when the employer is experiencing "significant economic difficulties"
* Affected employees whose new salary is not at least twice the state minimum wage for full-time employment, will become eligible for overtime
* The employer cannot alter the employees salary so often that the salary basis becomes a "sham."

This newest California exempt employee regulation puts the state law on a par with federal regulations under the Fair Labor Standards Act (FLSA). However, there is one important exception: under FLSA, the salary reduction must be in effect for at least 3 months. Under California regulations, the original salary must be restored as soon as economic conditions permit.

U.S. DEPARTMENT OF LABOR UPDATE

In response to the question *"Is time spent after hours in online training compensable?"* The answer is that unless it is exempt training, Yes, according to the U.S. Department of Labor and California's Division of Labor Standards Enforcement.

COURT DECISIONS OF NOTE

California Court Rejects Non-Competition Agreement As Necessary To Protect Confidential Information.

In 2009 a California Court of Appeal published a decision continuing the trend against enforcement of non-competition clauses in California. In *Dowell v. Biosense Webster, Inc.,* the Second Appellate District affirmed a finding that non-compete and non-solicitation agreements not narrowly constructed only to protect trade secrets are void under California law.

The court also expressed doubts as to whether even those more narrow non-compete agreements are authorized under California law.

APPELLATE COURT RULES ON TIP POOLING

In a case titled *Chau v. Starbucks*, a California appellate court has added a new dimension to rules regarding tip pooling in California. Non-Servers can receive pooled tips.

US SUPREME COURT RULES FOR WHITE FIREFIGHTERS

In Race Bias Case there is such a thing as "reverse" race discrimination.

The Court addressed this issue in a case titled *Ricci v. DeStefano*. The case was filed by white firefighters who alleged that they were unfairly denied promotions because of their race.

U.S. SUPREME COURT RAISES EMPLOYEE BURDEN IN AGE BIAS CASES

The U.S. Supreme Court issued a significant employment law decision that will make it more difficult for an employee to prove a case of intentional discrimination under the Age Discrimination in Employment Act ("ADEA") as compared to the burden required under Title VII of the Civil Rights Act of 1964.

SAFETY

AB 1083

Adds requirements to Health and Safety Code requiring all licensed hospitals to annually conduct a safety and security assessment. Effective now.

Cal/OSHA Warns Employers About Heat Illness Safety Compliance.

Cal/OSHA has reminded employers to implement heat illness prevention policies, and warns them about agency enforcement measures.

NEW FED OSHA CRACKDOWN

Under pressure from the labor-friendly Obama administration and the new Secretary of Labor Hilda Solis, OSHA is ramping up its enforcement efforts against workplace safety violators.

As part of this beefed-up enforcement, there are 7 significant new OSHA developments impacting American employers.

The new workplace safety mandates:

1. **Recordkeeping:** OSHA announced its national emphasis program on recordkeeping. This emphasis program will include greater scrutiny of employer maintained OSHA logs, whether employers are recording all workplace recordable injuries/illnesses, and more.

2. **Annual verification of lockout/tagout procedures:** OSHA will focus on whether employers are complying with the requirement to conduct periodic inspections (at least annually) of the energy control procedures as required by 20 CFR 1910.147 (c)(6)(i).

3. **A general lockout/tagout policy does not comply with OSHA regulations:** Employers must have a separate lockout/tagout procedure for each different piece of equipment.

4. **Combustible dust standard:** On April 29, 2009, OSHA announced it would initiate rulemaking on combustible dust hazards. OSHA will issue an Advanced Notice of Proposed Rulemaking and convene related stakeholder meetings to evaluate possible regulatory methods, and request data and comments on issues related to combustible dust.

5. **Per employee penalties for PPE and training violations:** OSHA has issued its final rule allowing OSHA to cite employers on a "per employee basis" for failure to wear/use required personal protective equipment (PPE). This rule applies to PPE and training. As a result, an employer who has failed to properly train employees or who has employees not wearing or using PPE may receive a citation per employee.

6. **Liability of general contractors for hazards they did not create and/or where their own employees were not exposed:** The Eighth Circuit Court of Appeals in *Solis v. Summit Contractors, Inc.* held that OSHA regulations do not preclude OSHA from issuing citations to a general contractor under the multi-employer citation policy simply based on the fact that the general contractor "controls" the worksite regardless of whether or not the general contractor created the hazard or had its own employees exposed to the hazard.

7. **OSHA settlement agreements and additional employer obligations:** Employers should be aware that OSHA is mandating uniformity in the language of ALL settlement agreements. Additionally, OSHA is including in all settlement agreements language that seeks to use the settlement process as a way to get employers to agree to undertake additional obligations.