

2007 CALIFORNIA & FEDERAL LABOR LAW UPDATE

WAGE AND HOUR

Minimum Wage — AB 1835 will raise California's minimum wage to \$8.00 per hour in two years. The increase puts the state on course to have the highest minimum wage in the nation when the full hike takes effect. The rate increase takes effect in two stages: Minimum wage earners got a 75 cents per hour boost on Jan. 1, 2007, to \$7.50, and then will get another 50 cents per hour raise on Jan. 1, 2008. Note that this law does not automatically boost the wage rate annually based on changes in the Consumer Price Index, as other minimum wage proposals would have done.

The increase will affect California employers and employees in these ways:

1. Nonexempt minimum wage earners saw a quick 75 cents per hour increase in their wages. And, when the \$8 rate takes effect in 2008, these employees who work full time will receive a \$2,600 increase in their annual earnings.
2. Some exempt workers may get a raise because the minimum salary that employees must earn to qualify for the executive, administrative, and professional exemption from overtime under state law is pegged to the state minimum wage. These employees must receive a salary that is at least two times the California minimum wage based on a full-time workweek. Effective Jan. 1, 2007, this means exempt employees must earn at least \$2,600 monthly (or \$31,200 annually). As of Jan. 1, 2008, the minimum monthly salary will jump to 2,773.33 (or \$33,280 a year). In 2006 the minimum salary for exempt employees was \$2,340 a month (\$28,080 annually).
3. Those who qualify for California's commissioned sales exemption may receive a larger paycheck. These employees must earn at least 1½ times more than the state minimum wage for every hour worked in a week. Thus, effective Jan. 1, 2007, they must earn at least \$11.25 per hour, and effective Jan. 1, 2008, they must earn at least \$12.00 per hour.
4. Even employees covered by collective bargaining agreements may see a pay adjustment. That's because state law contains an overtime exemption for employees covered by a collective bargaining agreement if the agreement provides for employees' wages, hours of work, and working conditions, as well as premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of at least 30 percent more than the state minimum wage. To qualify for this exemption, the hourly rate as of Jan. 1, 2007, must be \$9.75, rising to \$10.40 on Jan. 1, 2008.

Overtime Exemption for Private School Teachers — AB 2613 clarifies that private school teachers who don't hold a California teaching credential can qualify for an overtime exemption. The new law provides that overtime requirements don't apply to an individual employed as a teacher at a private elementary or secondary school for children enrolled in kindergarten or grades 1 through 12 provided the teacher meets each of these four conditions:

- 1) is primarily engaged—spends more than 50 percent of work time—in the duty of imparting knowledge to pupils by teaching, instructing, or lecturing;
- 2) customarily and regularly exercises discretion and independent judgment in performing teacher duties;
- 3) earns a monthly salary equivalent to at least two times the state minimum wage for full-time employment; and

- 4) has attained at least one of the following levels of professional advancement: a baccalaureate or higher degree from an accredited institution of higher education; or, current compliance with California Commission on Teacher Credentialing requirements or the equivalent certification in another state.

Note that this exemption doesn't apply to tutors, teaching assistants, instructional aides, student teachers, daycare providers, vocational instructors, or similar employees.

Wage Statements — AB 2095 helps harmonize existing Labor Code provisions regarding recording overtime hours on pay stubs. Existing law requires employers to pay overtime wages no later than the payday for the next payroll period. However, overtime hours worked in a payroll period must be recorded on the itemized wage statement for that same payroll period. Thus, while overtime hours worked but not yet paid are reflected on one wage statement, the payment is reflected on the next.

The new measure permits employers to instead show the overtime hours worked in a pay period on the wage statement for the next regular pay period. The hours must be itemized as corrections, and the corrections must identify the dates of the pay period to which they refer. This method will permit employees to see their overtime hours and receive payment for these hours in the same pay period.

Pay Check Stubs — Employees may agree to receive an electronic wage statement (pay check stub) instead of a hard copy.

AB 2095 — Permits paying and reporting overtime in the pay period following the pay period in which the overtime was worked.

Partial Day Payment for Exempt employees — The Division of Labor Standards Enforcement (DLSE) has revised the rules for partial day deductions for exempt employees. If an employee has not worked at least 4 hours of a workday for personal business, it is now legal to deduct PTO or Vacation in minimum increments of 4 hours. If the employee is ill and entitled to PTO, then only 4-hour increments may be deducted from PTO. An exempt employee may have Sick Leave deducted in smaller amounts when the employee has a sick leave plan, which does not provide for payoff on termination. However, if the employee has used all sick leave or has not yet earned sick leave, only entire workdays may be deducted without pay. It is strongly recommended that you check with Counsel before making any deductions for Exempt employees.

Car Wash Industry — SB 1468 extends the repeal date of the Car Wash Industry compliance program from 1/1/2007 to 1/1/2010.

ARBITRATION

Arbitration Agreements

Under AB 1553, if an arbitration agreement requires that arbitration of a dispute must be demanded or initiated within a specified period of time, the filing of a civil lawsuit within that period will toll the time limitations contained in the arbitration agreement for that dispute. Tolling is from whichever comes first:

- 1) the date the lawsuit is filed until 30 days after a final finding

by the court that the case must be arbitrated; or
2) 30 days after the final determination of the lawsuit.

CHILD SUPPORT

Child Support Fraud — Under AB 2440, a penalty will be assessed against an employer that knowingly assists an employee or contractor to evade a child support obligation. The penalty is three times the value of the assistance provided, such as three times the fair market value of the assets transferred or hidden, or the amount of the wages or other compensation paid to the child support obligor but not reported. The maximum liability, however, cannot exceed the entire child support obligation the employee owes.

Under this law, actions taken to knowingly assist a child support obligor to escape, evade, or avoid paying court-ordered or court-approved child support include the following, if the employer knew or should have known of the child support obligation:

- 1) hiring or employing the child support obligor as an employee in a trade or business and not filing a timely report of new employees with the California New Employee Registry maintained by the state Employment Development Department (EDD);
- 2) engaging the child support obligor as a service provider and failing to file a timely report with the EDD; and
- 3) when engaged in a trade or business, paying wages or other forms of compensation for services given by a child support obligor that are not reported to the EDD, such as cash payments or payments via barter or trade.

DISCRIMINATION AND HARASSMENT

Sexual Harassment Training — AB 2095 clarifies which supervisors must be trained under the existing sexual harassment training law, AB 1825, which requires employers with 50 or more employees to provide sexual harassment prevention training every two years to supervisory employees. It had been unclear whether the law covers employees and supervisors located outside California.

Now AB 2095 specifies that employers have to train only those supervisors who are located in California. In addition, the measure confirms that in determining whether an employer meets the 50-employee threshold for coverage, all of the employer's employees will be counted whether they are in California or elsewhere. (Note that the 50-employee threshold doesn't apply to public employers, which are covered regardless of the number of employees they have.) These clarifications are consistent with the latest draft of proposed regulations to implement AB 1825.

Even though the new law requires employers to train only supervisors here in California, the best practice is to cast a broader net, training all supervisors wherever they're based. That's because the training mandated by AB 1825 can be an important tool in preventing harassment claims. And, depending on the circumstances, your having provided supervisors with comprehensive training can help limit your liability or damages if you're sued for sexual harassment.

Sexual Orientation Protections — SB 1441 expands discrimination protections to state programs including workers' compensation and unemployment and disability insurance. It adds sexual orientation to the list of protected categories. It also defines the terms "sex" and "sexual orientation" as having the same meaning as under the California Fair Employment and Housing Act. Further, the measure states that discrimination includes the perception that a person has any of the enumerated characteristics—sex, sexual orientation, race, religion, age, disability, etc. or that the person is associated with a person who has, or is perceived to have, any of these characteristics.

Domestic Partner Taxation — SB 1827 permits registered domestic partners to file joint state income tax with their earnings treated as community property like married couples.

HEALTH AND SAFETY

Cell Phone Restrictions — The California Wireless Telephone Automobile Safety Act, SB 1613, will make it illegal beginning July 1, 2008, to drive a motor vehicle while using a wireless phone unless the phone is configured to allow hands-free listening and talking and is used in that manner while driving. Violations carry a \$20 fine for the first offense and \$50 for subsequent offenses. The law contains some exceptions, as follows:

1. The hands-free mandate doesn't apply if a phone is being used for emergency purposes. This includes making an emergency call to law enforcement, the fire department, a health provider, or other emergency services.
2. The law exempts emergency services professionals who must use a wireless phone while driving an emergency vehicle in the course of their duties.
3. The law doesn't apply to school bus drivers or drivers of public transit vehicles. However, another section of the California Vehicle Code prohibits wireless phone use by these drivers unless for work or emergency purposes.
4. The law doesn't apply to a person driving on private property.
5. The law doesn't apply to the use of a digital two-way radio that uses a wireless phone, as long as the device is operated by depressing a push-to-talk button, doesn't require immediate proximity to the user's ear, and the person is driving one of these vehicles:
 - tow trucks; motor trucks (designed for transporting property), or
 - truck tractors requiring either a class A or B driver's license (*note the exemption doesn't apply to pickup trucks*);
 - vehicles used exclusively for agricultural operations; certain farm vehicles that are exempt from registration and that display a special identification plate;
 - commercial vehicles registered to a farmer and driven by the farmer or the farmer's employee and transporting agricultural products,
 - farm machinery,
 - or farm supplies to or from a farm.

NOTE: The two-way radio exemption expires in 2011.

Smoking in the Workplace — AB 2067 extends and clarifies the prohibition on smoking in the workplace. This law clarifies that the prohibition on knowingly permitting smoking in enclosed spaces in places of employment includes lobbies, lounges, waiting areas, stairwells, elevators and restrooms. It prohibits smoking inside public buildings, except in covered parking lots.

AB 2695 — Allows an employer to obtain a restraining order against a threatening individual that covers multiple employees and work sites.

Health Worker Fingerprints — SB 1759 requires specified health related workers to submit electronic fingerprint images to the Department of Justice (DOJ) and requires applicants to be responsible for any cost associated with transmitting the fingerprint images. The individuals affected are:

- Certified nurse assistants and home health aides.
- Nursing home administrators.
- Administrators, program directors, and fiscal officers of adult

day health care centers.

- An owner or owners, anyone having a 10 percent or greater interest in the corporation, partnership, or association, and administrators of home health agencies and private duty nursing agencies.

Contractors with Revoked Licenses — AB 2897, aimed at construction safety, will make it harder for a contractor whose license has been revoked to work under another business' license. An individual who was a member, officer, director, owner, or partner of a license that was revoked and who meets specified criteria will be barred from performing acts regulated by the contractors' licensing law on behalf of a licensee, except as a bona fide nonsupervising employee.

The new law also requires such individuals to notify prospective employers in writing of the license revocation before becoming employed by an entity that is subject to board licensure. What's more, a licensee is prohibited from knowingly hiring such individuals except as bona fide non-supervising employees. Violations of this law will carry fines of up to \$4,500 and/or up to one year in jail.

Electricians 1-1-07 Deadline for Certification — Electricians must gain a 3 year certification in order to continue working in California without one-on-one supervision. The law, at Labor Code Section 3099.2 and at 8 California Code of Regulations Section 290.0, requires certification "for those persons who perform work as electricians for contractors licensed as Class C-10 electrical contractors under the Contractors' State License Board Rules and Regulations."

Disaster Preparedness — Under AB 3058, the California Office of the Small Business Advocate must develop a web-accessible handbook to help small businesses prepare, respond to, and recover from emergencies. They are required to conduct at least three meetings by July 1, 2008, and annual meetings thereafter, to share best practices for small business disaster preparedness. The meetings must be held in consultation with small business organizations and take place at different locations throughout California.

Food handling — SB 144, which goes into effect on July 1, 2007, prohibits retail food employees who are suffering from symptoms of certain illnesses that can be transmitted by food (such as Hepatitis A or salmonella) from engaging in food handling.

UNEMPLOYMENT INSURANCE

Fraud — AB 2293 penalizes education institution employers that submit willfully false statements about a worker's employment or termination to the California Employment Development Department (EDD) in connection with an unemployment insurance claim. The new law authorizes the EDD to assess a penalty if an educational institution employer, or any employee, officer, or agent of that employer, willfully makes a false statement or representation, or willfully fails to report a material fact regarding any week during which the services were performed or any time granted to the claimant for professional development during his or her employment with that employer.

The penalty must be between 2 and 10 times the claimant's weekly benefit amount.

WORKERS' COMPENSATION

Apportionment — AB 1368 creates a rebuttable presumption that hernia, heart trouble, and pneumonia experienced by public safety employees and manifested during employment arose out of employment. Note that under existing law, a physician who prepares a report addressing the issue of permanent disability due

to a claimed industrial injury must apportion the causation of the permanent disability. This new law, however, deletes this apportionment requirement when the physician is evaluating a public safety member's hernia, heart trouble, or pneumonia that manifested during his or her employment.

Predesignation — AB 2068 makes some changes to predesignation rules. Existing law, until April 30, 2007, provides an employee with the right to be treated by his or her personal physician from the date of injury if, among other things, the physician agrees to be predesignated. No more than seven percent of employees in the state can receive predesignated care.

This new bill deletes the April 30, 2007, repeal date and the limit on the maximum percentage of employees that may be predesignated. The bill also broadens the definition of personal physician for predesignation purposes to include medical groups that meet specified requirements (until Dec. 31, 2009).

Roofing Contractors — AB 881 requires all roofing contractors to have workers' compensation insurance, whether or not they currently have employees.

This law requires all roofers to have workers' compensation insurance, and authorizes the Contractors State License Board's Registrar of Contractors to remove the roofing classification from a contractor license for failure to maintain workers' compensation insurance, requires insurers to conduct annual audits of their roofing customers' payroll, and directs the Workers' Compensation Insurance Rating Bureau (WCIRB) to compile an annual report.

Self-insured Reporting — AB 2087 requires the California Division of Workers' Compensation to prepare an aggregated summary of all self-insured employers' liability to pay compensation (as reported on the employers' required annual reports). The division must then make those summaries available to the public on the self-insurance section of the Department of Industrial Relations' website. Separate summaries are required for public and private self-insured employers.

Death Benefits — AB 2292 mandates that workers' compensation death benefits be paid to a surviving dependent, personal representative, heir, or other person entitled to compensation under the workers' compensation laws, regardless of any amount of the deceased employee's accrued and unpaid compensation that is paid or owing to a surviving dependent, personal representative, heir, or other person entitled to a deceased employee's accrued and unpaid compensation.

FEDERAL LAW

National Labor Relations Board

Revised Definition of "Supervisors" — A recent National Labor Relations Board (NLRB) ruling in Oakwood Healthcare, Inc. provides a much needed clarification of the standards to determine which employees qualify as "supervisors" under the National Labor Relations Act. By a 3-2 vote, the Board held that the permanent charge nurses employed by the Employer, Oakwood Heritage Hospital, an acute care hospital, exercised supervisory authority in assigning employees within the meaning of Section 2(11) of the National Labor Relations Act. Also clarified were the terms "assign," "responsibly to direct," and "independent judgment."

The U.S. Pension Protection Act — Signed by President Bush in August, the law increases employers' funding requirements for their defined benefit pension plans. The act was designed to ensure adequate funding of company pension plans and curb the

need for federal bailouts. But it has a side effect that may not be such a boon to some workers: Some employers have frozen their defined-benefit plans in favor of beefed-up 401(k) plans, which don't have promised retirement payouts, are affected by stock market fluctuations and usually require workers to contribute earnings and manage.

Undocumented Immigrant Workers — Congress failed to pass any meaningful reforms. But that didn't stop federal authorities from arresting undocumented workers in massive roundups in beef-packing plants around the country, reflecting a tougher tone of enforcement by the feds.

The Department of Homeland Security has strengthened rules to require employers to terminate employees with “unreconciled” Social Security numbers. New emphasis may result in more firings of illegal workers as well as legal workers with paperwork problems.

AGENCY ACTION

IRS Raises Mileage Rates for 2007

The Internal Revenue Service adjusted the standard mileage reimbursement rate for employees who use their own cars for business purposes to 48.5 cents per mile in 2007, up from 44.5 cents per mile in 2006.

Employers who use the IRS standard mileage rate to reimburse employees may deduct the reimbursement as a business expense. If employers use the approved rate (or a lower rate), the IRS considers that requirements to substantiate and adequately account for the expense are satisfied without extensive documentation of actual expenses.

Beginning January 1, 2007, the standard mileage rates for the use of a car (including vans, pickups, or panel trucks) will be:

- 48.5 cents per mile for business miles driven;
- 20 cents per mile driven for medical or moving purposes (up from 18 cents in 2006); and
- 14 cents per mile driven in service to a charitable organization.

The primary reasons for the higher rates were higher prices for vehicles and fuel during the year ending in October.

NLRB Recognizes Nurses as Supervisors

In a decision that the labor movement has been dreading -- the National Labor Relations Board ruled in a Michigan case that full-time “charge nurses” should be considered supervisors, thus making them ineligible for union protections under federal law.

The ruling came in the case of Oakwood Healthcare, one of three cases known collectively as the “Kentucky River” cases because they were intended to clarify issues raised in a 2001 U.S. Supreme Court case, *NLRB vs. Kentucky River Community Care*.

Verizon Communications Inc. will pay almost \$49 million to 12,326 current and former female employees as part of a landmark class-action lawsuit alleging pregnancy discrimination. The figure makes the case the largest pregnancy discrimination settlement in the history of the U.S. Equal Employment Opportunity Commission. It covers women in 13 states and Washington, D.C.

COURT ACTION

Electronic Discovery — Employers need to be more rigorous about saving electronic data such as e-mail, according to new federal rules for “e-discovery” that took effect last year. Further, a U.S. magistrate judge in Kansas City, Kan., ruled in a precedent-setting judicial opinion in September 2006 in an age discrimination lawsuit against Sprint/United Management Co.,

that the company must produce “metadata” in pretrial document discovery.

Metadata is information about the creation, tracking and changes in electronic files. It provides a computer file history that may be hidden from most computer users but is retrievable by technically adept users.

The U.S. Supreme Court in *Burlington Northern and Santa Fe Railway Co. v. White*, ruled in that an employee who suffers discrimination or retaliation doesn't have to prove an economic disadvantage to win the case.

The court said the standard of proof should be that the actions taken against the employee were adverse enough that they “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”

Anually we provide a list of Good Practices for the new year. Here they are in brief:

- **Minimum Wage Increase** — This increase, from an hourly \$6.75 to \$7.50 also changes the exempt salary monthly minimum from to \$2,340 to \$2,600 or annually from \$28,080 to \$31,200 during 2007. Other rates based on the minimum wage also change. Also, plan now for the \$8.00 rate in 2008! Also, get rid of full SS Numbers by 2008.
- **Take Sex Harassment Rules Seriously** — Major court decisions and new law (AB 1825) have created substantially greater complexity to sex harassment rules, it is not to be messed with.
- **Review “Salary-exempt” Positions** — Overtime penalties are substantial for misclassified personnel.
- **Employee Clockouts For Meal Periods** — With little hope for reform, protect yourself with proof of meal periods.
- **Get On-duty Meal Agreements Signed** — If employees must work at meals, get agreements signed.
- **Review Pre- & Post-Duty Responsibilities** — Putting on uniforms, and washing up, may be working time.
- **Consider Everyone As A Protected Class Employee** — Everyone is a victim, begin from that premise.
- **Learn The “Interactive Process”** — Always get more information on how you can accommodate.
- **Bring Handbooks Up To Date** — The laws change, your policies need to change with the law.
- **Create/Review Sales Commission Contracts** — You're the author, so poor language will be construed against you, make sure they protect you.

