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California UPDATE

EMPLOYMENT LAW

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Importance of the Interactive Process in Accommodating Employees with Disabilities

The recent California Court of Appeals decision in *Nadaf-Rahrov v. Neiman Marcus Group* highlights the importance of employers engaging in a thorough interactive process when dealing with injured or disabled employees. The employee, who went out on medical leave, was a fitter at a large department store. The employee's physician said that she was unable to perform work of any kind. After approximately 10 weeks of medical leave, the employee informed her employer that she could not return to her original position and requested reassignment. The employee's doctor also recommended reassignment. The employer determined that until the employee's physician removed the restriction that the employee could not perform work of any kind, no further discussion was necessary, and that the employee could contact the employer once she was returned to work.

After extending her leave several times and exhausting her sick and vacation leave, the employee was terminated. A California appellate court determined that the employer did not sufficiently engage in the interactive process.

The appellate court stated that an employer cannot simply conclude, without a thorough investigation, that no suitable, alternative job positions are available and, therefore, that the interactive process would have been futile. An employer has a responsibility to share information about available jobs with the employee once the employee has provided medical restrictions. An employer should also determine whether an employee is willing to relocate, and may have to consider vacant positions in other offices and geographic locations.

Additionally, if an employer "could have anticipated" a future job opening, it may be a reasonable accommodation for an employer to extend an employee's leave of absence until that position becomes available. Further, an employer's requirement that the employee's doctor provides a medical release to return to work before continuing the interactive process may be unreasonable because the employee's doctor might need to know the specifics of an alternative position in order to determine whether the employee can return to work.

Consequently, employers who have disabled employees attempting to return to work should engage in a thorough interactive process with their employees and document all efforts in order to avoid potential liability. Even if no accommodation appears to be available, failure to engage in this interactive process can be a separate violation of California law. ◆

Hourly Rate Increased for Licensed Physician Exemption

Under California law, a licensed physician or surgeon who is primarily engaged in performing duties for which licensure is required is exempt from overtime if he or she is paid at least the minimum hourly rate set annually by the state. Effective January 1, 2009, the minimum hourly rate is increased to $69.13. This exemption does not apply to employees in medical internships or resident programs, physician employees covered by collective bargaining agreements or veterinarians. ◆

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Changes to Computer Professional Exemption

California recently extended the overtime exemption for computer professionals to apply to those paid a salary as well as those paid on an hourly basis. This is good news for employers because prior to the amendment, there was no flat salary rate that guaranteed exemption for these employees. Effective on January 1, 2009, the minimum hourly rate for an employee to be classified as an "exempt" computer professional in California is $37.94, the minimum monthly salary is $6,587.50, and the minimum annual salary is $79,050.00. Of course, these employees must also continue to meet the "duties test" under California Labor Code 515.5 to be classified as exempt. ◆

New Year, New Rules

Employers with operations in California need to be aware of several new laws affecting their businesses. The following is a list of new laws that have recently gone into effect or will take effect in 2009.

New Regulations for Family and Medical Leave Act. The final version of the federal Family and Medical Leave Act (FMLA) regulations pertaining to military families and qualifying exigencies were published. The regulations now define "qualifying exigency" for purposes of FMLA leave eligibility. 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.

No "Texting" While Driving. Starting January 1, 2009, text-based communication while driving is prohibited as well as non-hands-free cell phone use, 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.

Waivers Invalid on Account of Wages Due. A bill amended California Labor Code 206.5 making null and void the execution of any release on account of wages due. In other words, an employer may not ask an employee to waive a claim for wages owed to the employee. 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."

New Wage Requirements for Temporary Employees. Wages for employees of temporary service agencies must 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.

Workers' Comp Injury Reporting. California 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.

Passport Cards for Identification on I-9. The Departments of State and Homeland Security have begun to issue "passport cards" that 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 (e.g., it may not be used for international air travel), but 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 also can 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.

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

The memorandum provides that: (1) 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; (2) 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; and (3) 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.

Nutritional Information for Chain Restaurants. 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
Total number of milligrams of sodium

San Francisco Commuter Benefits. As of December 20, 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: (1) a pre-tax election of a maximum of $110 per month, consistent with current federal law; (2) an employer-provided transportation pass (or reimbursement for one) equal in value to $45 (or more) per month; and/or (3) employer provided transportation at no cost to employees. Additional rules and regulations will follow. Failure to comply with this program will result in an "infraction" and monetary fines against your company. ◆

Remember to Update Your Workplace Posters!

Information regarding sexual harassment, workers' compensation, state disability insurance, paid family leave and unemployment insurance have been revised for the new year. Be sure to check that all workplace posters are up-to-date. Employers can be fined up to $17,000 for failing the post the 16 required notices in a conspicuous place in the workplace.

Governor Vetoes Anti–Employer Legislation

Governor Schwarzenegger recently vetoed a raft of bills passed by the state legislature that would have added to the legal and regulatory burdens of California employers. The vetoed bills include:

- **SB 1113 Incentive to Sue**. Would have expanded rewards to plaintiffs for costs of litigation stemming from private attorney general actions while providing no cost recovery for defendants when actions are found to be baseless.
- **AB 2279 Employee Safety**. Would have curtailed employers' right to maintain drug-free workplace policies and exposed employers to potential litigation by prohibiting employers from refusing to hire applicants or fire current workers because they use medical marijuana.
- **AB 2386 Agricultural Labor**. Would have eliminated the requirement for secret-ballot elections for union representation among farm employees, and created a new, unsupervised process called a mediated election.
- **SB 840 Government Health Care**. Would have created a new government-run health care system financed from an unspecified tax increase.
- **SB 1115 Workers' Comp**. Would have increased workers' compensation costs and rolled back the reforms from 2004 by making apportionment very difficult to prove.
- **SB 1717 Workers' Comp**. Would have increased workers' compensation costs and rolled back reforms by arbitrarily doubling permanent disability benefits and altering the 15 percent up/down provision in current law.
- **AB 437 Increased Employer Exposure**. Could have resulted in significant new liability exposure for employers by stating that the Legislature rejects U.S. Supreme Court decisions that provided clear limits on statues of limitation for lawsuits relating to employer decisions.
- **AB 1583 Independent Contractors**. Would have established new penalties and liability for independent contractor misclassification by creating joint and several liability penalizing advisors who work with businesses on determining worker status.
- **AB 2918 Credit Reports**. Would have unduly restricted the ability of businesses to use legally available information in employment decisions, including consumer credit reports.
- **AB 3063 Employment Decisions**. Would have prohibited employers from asking applicants to disclose prior criminal convictions, which could impact an employer's hiring decisions.
- **SB 1661 Unemployment Insurance**. Would have created a new eligibility requirement for employees to receive unemployment insurance benefits financed by increased employer contributions to the UI trust fund.

These examples of misguided legislation are a stark reminder that a majority of the California Legislature still clings to the false dichotomy of "workers vs. the company," and fails to understand that one cannot really be "pro employee" unless one is also "pro employer." Last time we looked, the only folks providing jobs to employees were the employers.
The next governor – Jerry Brown? Bill Lockyear? John Garamendi? Dianne Feinstein? – may be much less inclined to pick up the veto pen. Employers beware. ◆

California Employment Laws Apply to Nonresident Employees Working in California

In *Sullivan v. Oracle Corporation,* the United States Court of Appeals for the Ninth Circuit held that out-of-state employees sent to work on assignments in California may be governed by the provisions of the California Labor Code. Specifically, in Oracle, the company dispatched three non-California software instructors to California to teach for between one to five weeks. The instructors later sued alleging violations of the California Labor Code.

Initially, the district court agreed with Oracle that California law did not apply to nonresidents. But the Ninth Circuit reversed: "Contrary to Oracle's assertions, the California Labor Code is clearly intended to apply to work done in California by nonresidents." Arguably, the logic of this opinion reaches employees who work less than a full workweek in California. Given the many unique features of the California Labor Code (e.g., the treatment of accrued vacation, the meal and rest period requirements, the employer indemnity obligations), employers now must consider these distinctions before sending employees into California, even for short periods of time. ◆

Don't Forget to W.A.R.N. Employees Before a Mass Layoff

Due to the country's current economic circumstance, many employers are faced with conducting mass layoffs or plant closures. In 1988, the federal Worker Adjustment and Retraining Notification Act (WARN) was implemented to assist employees and their families and communities in preparing for a plant closure or mass layoff by requiring employers to provide advance notice of the decision and imposing penalties for noncompliance.

In 2003, California created its own law providing for a similar notice for mass layoffs, relocations and terminations. "Cal-WARN," as the law is often referred to, prohibits an employer from ordering a mass layoff, relocation or termination at a covered establishment unless the employer gives written notice of the order 60 days before the order takes effect.

Despite their similarities, there are several important differences between Cal-WARN and federal WARN. Most significantly, Cal-WARN applies to terminations at a "covered establishment," rather than a "single site of employment," and Cal-WARN applies in cases of "mass layoff, relocation or termination," rather than "plant closings" or "mass layoffs." Unlike federal WARN, Cal-WARN does not include an "unforeseen business circumstance" exception to notice. Employers are encouraged to consult with legal counsel if faced with a mass layoff, relocation or termination of business in California. ◆

The Effect of Prop 8 on California Employment Law

The passage of Proposition 8 (amending the California Constitution to define marriage exclusively as a union between a man and a woman) leaves many questions unanswered. One question on the minds of California employers is the extent to which the Proposition will affect the employment relationship. For the reasons discussed below, constitutional and civil rights issues aside, it is unlikely that Proposition 8 will have a practical impact on an employer's obligation to provide certain rights and benefits to employees in same-sex domestic partnerships.

Proposition 8 was initiated in response to the May 2008 California Supreme Court Decision in *In Re Marriage Cases*, 43 Cal. 4th 757 (2008). In that decision, the Court held that laws prohibiting same-sex marriage violate the equal protection and inalienable rights provisions of the California Constitution. The ruling went into effect in June 2008. Following this decision, religious groups opposed to gay marriage collaborated to add Proposition 8 to the November ballot. The Proposition, referred to as the California Marriage Protection Act, proposed an amendment to the California Constitution that limited marriage to opposite-sex couples. On November 5, 2008, 52.5 percent of California voters approved the Proposition.

While legal challenges to this Proposition were immediately filed, and as the legal fate of same-sex marriage hangs in the balance, many employers are left wondering how these issues affect their obligations under California employment law. Fortunately, this may be one area left unaffected by the same-sex marriage debate. The reason is simple: the majority of benefits and rights afforded to California employees arise under the California Domestic Partners Act (CDPA), which was unaffected by Proposition 8. The CDPA provides that: "Registered domestic partners shall have the same rights, protections, and benefits…as are granted to and imposed upon spouses." As it pertains to the employment relationship, employers are prohibited from discriminating against employees who are in same-sex domestic partnerships. It also affords such employees equal right to employee benefits, which include but are not limited to: medical insurance, public pension plans, life insurance and various employment benefits, such as membership discounts, travel discounts and the payment of relocation expenses.

Overall, the best advice for California employers is to continue to remain compliant with the CDPA and equally distribute employee benefits to employees who are in a registered domestic partnership. In the end, the CDPA remains the touchstone for determining an employer's obligation to its employees under California law. ◆

Time for Bringing DFEH Claims Is Tolled When Employees Choose an Employer's Internal Complaint Process First

A recent California Supreme Court decision gives employees more time to file a Fair Employment and Housing Act (FEHA) claim when the employee first elects to utilize a company's own internal complaint process. The employee in the case first filed a formal complaint letter with her employer in October 2001 claiming that she was the victim of racial discrimination. The employer informed the employee of her right to file a complaint with the California Department of Fair Employment and Housing (DFEH) at any time. After an internal investigation, the employer found no evidence of discrimination. The employee appealed the finding through the employer's internal appeals process, but her allegations were ultimately found to be unsubstantiated.

In October of 2002, almost two years after the alleged discrimination took place, but while the internal review process was still ongoing, the employee filed a claim with the DFEH. The DFEH issued the employee a right-to-sue letter, and one year later she brought a discrimination claim in state court. The employer argued that the employee's time to bring the case had expired. The case eventually reached the state Supreme Court. The Supreme Court applied the principle of "equitable tolling" to stop the clock on the one-year statute of limitations for filing a claim with the DFEH when an employee utilizes an employer's internal complaint process. Equitable tolling is a judicially created doctrine that prevents the statute of limitations from running. Equitable tolling is automatic when exhaustion of an administrative remedy is mandatory, but with this decision it will apply even when an employee is informed of his or her right to file a DFEH claim and voluntarily chooses to follow informal grievance procedures instead.

Employers are encouraged to accurately document all steps used to resolve internal complaints and to communicate the actions taken to the relevant employees. Despite the legislative intent to prohibit FEHA claims from popping up years after the fact, employers must now be aware that these types of claims can still be brought after extensive and long term in-house review. ◆

McDonald v. Antelope Valley Cmty. Coll. Dist., Cal., No. S153964, 10/17.08

REMINDER: On January 1, 2009, minimum wage in San Francisco increased to $9.79.

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