Legal Update

Firm Newsletter December 2009

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CALIFORNIA EMPLOYER'S ESSENTIAL 2010 LEGAL UPDATE

Happy Holidays! This issue reviews 2009 legal developments and new state and federal laws in effect for 2010 affecting employers. Among developments on the state level, alternative workweek schedule rules were given a tweak, a new **employee leave was created, and workers' compensation** penalties were increased. On the federal level, among other changes the FMLA military family leave was amended, GINA became effective, and the Lilly Ledbetter Fair Pay Act was enacted.

We also look back on 2009 and review significant court decisions that will affect the way you interact with your employers. The California Supreme Court clarified workplace privacy rights and also the legal standard for sexual harassment claims. The U.S. Supreme Court tackled reverse age discrimination, and sex harassment/retaliation, among other issues.

Thank you for your ongoing interest in this publication. I especially appreciate all of the feedback, comments and questions. I will endeavor to keep you updated in 2010 through this publication, educational seminars, and one-on-one consultation.

Have a happy and prosperous 2010!

Sincerely, Chris Olmsted

In setting up an AWS, an employer may propose a single work schedule, or it may propose a menu of work schedule options for workers to select.

CALIFORNIA LABOR & EMPLOYMENT LAW LEGISLATION
NEW LAWS ENACTED IN 2009

By Christopher Olmsted

Though the legislature in Sacramento proposed plenty of labor and employment legislation in 2009, relatively few bills were signed into law. Below is a summary of the new laws of major significance.

Alternative Workweek Schedules

AB 5

California law regarding alternative workweek schedules have been eased somewhat as a result of AB 5.

Alternative workweek schedules allow non-exempt employees in a "work unit" to work in excess of 8 hours per day without incurring overtime. (Unlike federal law, California law includes a daily overtime requirement.) Generally, an employer may propose AWS work schedules of up to ten hours per day (12 for healthcare workers). Hours in excess of 10 per day, or 40 per week are overtime. Typically employers propose schedules consisting of four ten hour days or a "9/80" schedule. Special procedures describe advance disclosure and a secret ballot election prior to implementation of the AWS.

The AWS can apply to a "work unit" within a company, rather than to all employees. Previously, the Labor Code did not define "work unit," although state regulations included a definition. The new law codifies the definition by amending California Labor Code § 511 to define a work unit as "a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision thereof." The amendment also clarifies that even *a single employee* may qualify as a work unit as long as his job function meets the definition.

In setting up an AWS, an employer may propose a single work schedule, or it may propose a menu of work schedule options for workers to select. Can the "menu" include a traditional 5 day week for those employees who do not want to work longer days? The amended law clarifies that the menu options may indeed include a regular schedule of five eight-hour days in a workweek. Consequently, employees who do not wish to work an AWS schedule may still vote in favor of the AWS by choosing to work the regular 8 hour day. This change greatly increases the odds of achieving the 2/3 employee supporting vote need to implement an AWS.

Additionally, the new law specifies how often employees may move from one schedule option to another on the menu. For example, if an employee opts to work four 10 hour days, how frequently can he opt to go back to regular 8 hour days? As amended, Labor Code § 511 allows employees to move from one schedule option to another on a weekly basis.

Civil Air Patrol Leave

AB 485

California has added a new leave right for members of the California Wing of the Civil Air Patrol.

The CAP is a civilian auxiliary of the U.S. Air Force. There are approximately 4,000 members in California.

Length of leave: 10 days per calendar year, with a three day limit per emergency.

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Covered employers: 15 or more employees.

Covered employees: Employees with at least 90 days of employment and who are volunteer members of the California Wing of the Civil Air Patrol.

Covered events: The employee is covered only when he or she is called to respond to "an emergency operational mission." Presumably this includes search and rescue missions and disaster relief efforts. It would apparently not include non-emergency duties.

Notice required: The law requires the employee to provide "as much notice as possible of the intended dates upon which the leave would begin and end."

Certification: The employer may require the employee to provide documentation of the need for the leave.

Return to duties: The employer must restore the employee to the position he or she held when the leave began or to a position with equivalent seniority status, employee benefits, pay, and other terms and conditions of employment.

Read the text: http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0451-0500/ab_485_bill_20091011_chaptered.pdf

Workers' Compensation Pre-designation of Personal Physician SB 186

Workers' compensation reform legislation enacted in 2004 afforded workers the ability to pre-designate their personal physician of choice as the first medical provider in case of a work-place injury. However, that ability was scheduled to end on December 31, 2009.

SB 186 deleted the sunset provision. The pre-designation right is now permanent.

Note that workers are still required to designate their personal physician in advance and in writing. The right applies only where the employer offers non-occupational group health coverage. The worker must designate his or her regular physician or medical group. If a worker does not pre-designate a personal physician, in the event of an occupational injury, the employer may direct the worker to its designated medical provider network (MPN).

Workers' Compensation Uninsured Employer Penalty Increased 50% SB 313

The penalty for failing to procure workers' compensation insurance has increased at least 50%. California private sector employers must secure the payment of workers' compensation. Unless a company qualifies as self-insured, it must purchase insurance.

The Division of Labor Standards Enforcement enforces this law, and if it finds an employer to be uninsured, it issues a stop order requiring the company to cease operating until insurance is procured. Additionally, the DLSE imposes a monetary penalty. Existing law, found in California Labor Code § 3722, provides that uninsured employers must pay a penalty in the amount of $1,000 per worker. SB 313 increases the penalty to $1,500 per uninsured worker.

There is an alternative method of calculating the penalty, and the new legislation changes this method as well. The state may alternatively impose a penalty in the amount of twice the amount the employer would have paid in workers' compensation premiums during the

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*The penalty for failing to procure **workers'** compensation insurance has increased at least 50%.*

FEDERAL LABOR & EMPLOYMENT LAW LEGISLATION
NEW LAWS ENACTED IN 2009

By Christopher Olmsted

The Fair Pay Act significantly changes the statute of limitations (time to sue) for pay-discrimination claimants.

Lilly Ledbetter Fair Pay Act

In a move that could lead to a significant increase in employment litigation, on January 29th President Obama signed the Lilly Ledbetter Fair Pay Act of 2009 into law. Notably, it was the first act that he signed into law upon taking office. The Act negates a 2007 U.S. Supreme Court decision relating to the statute of limitations (deadline to sue) for pay discrimination claims. The case was titled *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*

The Fair Pay Act significantly changes the statute of limitations (time to sue) for pay-discrimination claimants. The old rule was that the statute of limitations began at the time the alleged pay decision was made. If a company discriminated against a woman by denying her a pay increase, for example, she would have to sue at the time of the denied increase. The new law provides that the time limit re-starts each time a paycheck is issued. Thus, an employee can sue for an alleged discriminatory pay decision made many years ago, assuming that the employee still suffers a disparate pay differential.

At the latest, employees will still have to file a charge with the EEOC within 180 days of termination.

The key provision is fairly simple. Section (3)(A) of the Act states:

> **"For purposes of** this section, an unlawful employment practice occurs, with respect to discrimination in com**pensation ... when** a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, *or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other prac**tice."***

The Act permits employees to recover up to two years in back pay. This means that although an employee can sue in connection with a

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period the employer was uninsured. If the employer is currently insured, then the penalty is calculated by counting the number of uninsured weeks during the past three years and multiplying by the employer's current insurance premium on a pro-rated basis. If the employer is currently uninsured, then the penalty is determined by calculating the payroll during the periods of no insurance, and applying a premium rate set by the state.

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pay decision made many years ago, damages are limited to the difference in pay during the two years before the lawsuit.

The Act extends the time to sue not only for instances of sex discrimination, but also other Title VII categories, including race, color, religion and national origin. The Act also amends the ADA and the ADEA so that the same rule applies to disability discrimination and age discrimination claims.

Additional information:

http://www.barkerolmsted.com/news/legal-updates/newsletter0104.php

GINA

The Genetic Information Nondiscrimination Act ("GINA") became effective on November 21, 2009. Generally, this federal law prohibits employers from acquiring or using genetic information about its employees, with certain exceptions.

Genetic information includes, for example, information about an individual's genetic tests, genetic tests of a family member, and family medical history. (Note: family medical history is commonly gathered by medical providers and therefore any medical information maintained by employers may well include "genetic information.") Genetic information does not include information about the sex or age of an individual or the individual's family members, or information that an individual currently has a disease or disorder. Genetic information also does not include tests for alcohol or drug use.

New GINA Poster

The law requires an employer to post notices describing the Federal laws prohibiting job discrimination based on race, color, sex, national origin, religion, age, equal pay, disability and, as of this month, genetic information.

The EEOC has revised its "Equal Opportunity is the Law" poster. This new version reflects current federal employment discrimination law (including the Americans with Disabilities Act Amendments Act of 2008). The poster was revised to add information about the Genetic Information Nondiscrimination Act of 2008, which is effective November 21, 2009. The revised poster also includes updates from the Department of Labor.

Employers can either download and post the poster, or download a new version of the whole poster. The poster is available at this link: http://www.eeoc.gov/posterform.html

The EEOC has published a "Q&A" relating to the new law. The publication can be found at this link: http://www.eeoc.gov/policy/docs/qanda_geneticinfo.html

Related Articles:

GINA Becomes Effective November 2009

http://www.barkerolmsted.com/news/legal-updates/newsletter0148.php

EEOC's Proposed GINA Regulations Limit ADA Inquiries

http://www.barkerolmsted.com/news/legal-updates/newsletter0121.php

FMLA Military Leave Amendments

In October 2009, the FMLA Military Leave law was amended when President Obama signed the National Defense Authorization Act for Fiscal Year 2010. By way of background, military leave was added to the FMLA on January 28, 2008, when President Bush signed into law H.R. 4986, the National Defense Authorization Act for FY 2008 (NDAA).

The 2008 NDAA amended the FMLA in two ways. First, it allows an employee to take up to 26 workweeks of leave to care for certain family members in the military who suffer a serious in-

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GINA prohibits employers from acquiring or using genetic information about its employees, with certain exceptions.

The October 2009 amendment expands Military Caregiver Leave by allowing family members of veterans to take leave.

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jury or illness in the line **of duty ("Military Caregiver Leave").**

Second, the NDAA permits an employee to take up to 12 weeks of FMLA leave for "any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." The family member must be a member of the National Guard or Reserves (not regular military).

The October 2009 amendment expands Military Caregiver Leave by allowing family members of veterans to take leave. The veteran must have been injured in the line of duty, and the medical treatment must be received within five years of serving in the military.

The amendment also expands the definition of **serious "injury or illness"** for purposes of Military Caregiver Leave. The definition now includes the aggravation of existing or pre-existing injuries. Therefore an employee may take up to 26 weeks of leave to care for a service member who has a pre-existing injury or illness which was aggravated in the line of duty.

The October 2009 amendment also expands qualified exigency leave. Under the 2008 law, the service member had to be in the reserves; regular military was excluded. That exclusion has been removed. The law now allows family members of all covered active duty service members to take exigency leave.

Related articles:

FMLA Amended to Include Military Family Leave

http://www.barkerolmsted.com/news/legal-updates/newsletter0020.php

FMLA Update: Department of Labor Publishes **"Qualified Exigency" Military** Leave Form

http://www.barkerolmsted.com/news/legal-updates/newsletter0102.php

Request our Complimentary Military Leave Checklist

Federal Minimum Wage Increase

The federal minimum wage increased to $7.25 per hour effective July 24, 2009. Though the change is of concern to employers in other

(Continued on page 7)

Complimentary FMLA/CFRA Checklist And Military Leave Checklist

As a benefit to our firm clients and our subscribers who are company executives, managers and in-house corporate HR professionals, we offer a complimentary FMLA/CFRA checklist and Military Leave checklist.

The checklist will assist you in determining whether your company is covered by the law and whether the employee is eligible for leave.

Please email Chris Olmsted at cwo@barkerolmsted.com for your complimentary copy.

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states, California's minimum wage is currently $8.00 per hour. The federal increase is of no consequence to most California employers.

This 10.7% increase affects 30 states where minimum wage is at or below the prior federal level.

Aside from California, there are 18 other states not affected by the federal increase because they currently have minimum wages at or above $7.25 per hour. A few states have minimum wages higher than California: Oregon ($8.40), Vermont ($8.06) and Washington ($8.55). Connecticut, Illinois, Massachusetts match California's $8.00 minimum.

A new minimum wage poster from the U.S. Department of Labor is available for free download on its website. Follow this link for the poster: http://www.dol.gov/-esa/-whd/-regs/-compliance/-posters/-flsa.htm.

California employers should post the federal minimum wage despite the fact that the state's minimum is higher.

ARRA COBRA Subsidy

Employers' obligations under COBRA have been significantly increased by the American Recovery and Reinvestment Act of 2009 (ARRA). ARRA is commonly known as the economic stimulus legislation recently passed by Congress and signed by President Obama.

ARRA entitles employees involuntarily terminated between September 1, 2008 and December 31, 2009 to continue health care coverage through COBRA by paying only 35 percent of their premiums for up to nine months. The remaining 65% is paid by employers, who may deduct the cost from federal payroll taxes. Employers must immediately comply with the law by providing notice to eligible individuals, collecting 35% of the premiums from the employees, paying 65%, and filing quarterly tax returns claiming a credit for the 65% subsidized amount.

The premium subsidy is currently set to expire on December 31, 2009, meaning that employees terminated after that date will not be eligible for the subsidy. However, Congress is currently considering legislation that would increase the subsidy from 65 percent to 75 percent and extend it from nine to 15 months.

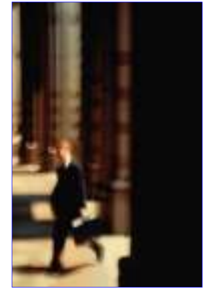
Related Articles:

COBRA Subsidy Update: IRS Clarifies Law; Also: Model Notice Forms Available; Cal-COBRA Employers Get a Break

http://www.barkerolmsted.com/news/legal-updates/newsletter0112.php

COBRA Obligations Expanded; Economic Stimulus Bill Adds Premium Subsidy

http://www.barkerolmsted.com/news/legal-updates/newsletter0106.php



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GOVERNMENT AGENCY UPDATE
NEW REGULATIONS AND OPINIONS IN 2009

In an August 19, 2009 opinion letter, the DLSE approved of an ***employer's*** *proposal to temporarily reduce* ***exempt worker's*** *workweek from five to four days, with a commensurate 20% reduction in salary.*

California DLSE Approves Salary Reduction For Furloughed Exempt Workers

With the economy in flux, businesses are looking for ways to reduce payroll without losing talent. Some companies have put their hourly workers on a "work furlough" by reducing the number of hours or days in a weekly schedule. But can the same be done for salaried exempt workers? Normally, salaries cannot be adjusted based on the number of hours worked in a workweek.

The answer is yes, according the California's Division of Labor Standards Enforcement ("DLSE"). Although the rules for salaried exempt workers are strict in California, in a recent opinion letter, the DLSE endorsed a salary reduction commensurate with a workweek reduction.

In an August 19, 2009 opinion letter, the DLSE approved of an employer's proposal to temporarily reduce exempt worker's workweek from five to four days, with a commensurate 20% reduction in salary.

Read the opinion: http://www.dir.ca.gov/dlse/opinions/2009-11-23.pdf

California AWS Summer Schedules

In an opinion letter dated March 23, 2009, the DLSE approved of an alternative workweek schedule for summer months only.

The inquiring employer proposed a schedule of four 9-hour days and one 4-hour day during summer months, and regular eight hour days for the rest of the year. The question was whether this schedule counted as a "regularly scheduled alternative workweek schedule," or, alternatively, whether the employer had to hold a new election every year for the summer schedule.

The DLSE approved the proposed summer AWS because it proposed a fixed schedule that will occur each year, and it is regularly occurring because it will be in effect for each full week between June and September.

Read the opinion: http://www.dir.ca.gov/dlse/opinions/2009-03-23.pdf

Federal Department of Labor Opinion Regarding Training Classes

The Department of Labor issued an opinion letter on the topic of pay for employee training. Technicians employed by a telecommunications company took online training courses at home in preparation for a voluntary training course (which would be on paid time) on a new technology system.

The DOL opined that the employees should be paid for their time at home online. Although the training was voluntary and after regular working hours, and the employees performed no productive work during the training, the course was directly related to the skills needed for the employees' jobs. Because of this last factor, the DOL opined that under federal regulations, the workers must be paid.

More information:

http://www.barkerolmsted.com/news/legal-updates/newsletter0120.php

E-Verify Rule for Federal Contractors

In 2008, President Bush signed an Executive Order requiring federal contractors to use the E-Verify System, to verify the employment eligibility of their workers as defined in the Executive Order. On September 8,

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2009, new E-Verify regulations went into effect.

Generally, federal contractors must enroll in and use E-Verify for all employees hired during the contract period as well as for all existing employees assigned to perform work under the contract. Subcontractors with contracts valued at over $3,000 for services or construction must also use E-Verify. There are some exemptions to the requirement, including contracts of fewer than 120 days in duration, certain off-the-shelf products, and contracts valued at less than $100,000.

Employers not mandated to use E-Verify may still voluntarily enroll in the system.

For more information on E-Verify:

http://www.dhs.gov/files/programs/gc_1185221678150.shtm

Federal No Match Rules Rescinded

After much controversy and litigation, the Department of Homeland Security threw in the towel and rescinded its proposed No Match rules.

For years, the Social Security Administration ("SSA") has been sending "No-Match Letters" to employers who employed individuals whose social security numbers ("SSN") did not match their personal information. The SSA, however, provided unclear guidance to employers responding to the letters. Seeking to fill the void, DHS the agency responsible for enforcement of our immigration laws, issued a new rule describing the steps an employer must take when it receives a "no match" letter from DHS or the Social Security Administration (SSA).

In October 2007, the AFL-CIO labor union obtained a court injunction prohibiting enforcement of the new rule. The DHS subsequently issued amended regulations, seeking to address some of the flaws raised by the union. But the effort lost steam, particularly after the new administration took over in 2009.

"After further review," wrote the agency in its rescission notice, "DHS has determined to focus its enforcement efforts relating to the employment of aliens not authorized to work in the United States on increased compliance through improved verification, including participation in E-Verify, ICE Mutual Agreement Between Government and Employers (IMAGE), and other programs." The rescission becomes effective November 6, 2009.

Concurrent with the rescission, ICE has dramatically stepped up its inspection of employer I-9 audits. ICE has issued nearly 1,700 notices of inspection nationwide since July 2009.

DHS notes that employers should still react when receiving a no match letter. An employer who receives such a letter may be seen to be on notice that the worker could be illegal. "Receipt of a No-Match letter, when considered with other probative evidence, is a factor that may be considered in the totality of the circumstances and may in certain situations support a finding of "constructive knowledge." A reasonable employer would be prudent, upon receipt of a No-Match letter, to check their own records for errors, inform the employee of the no-match letter, and ask the employee to review the information."

Given that the receipt of a No-Match letter could be deemed notice of an immigration problem, employers who receive No Match letters should take action to protect themselves from possible immigration enforcement actions.

First, upon receipt of a No Match letter, the company should research its own records to check for typographical errors. If no errors are found, the employer should notify the employee that the SSN is incorrect. Ideally the notice should be in writing.

Concurrently with the rescission of the No Match Rules, ICE has dramatically stepped up its inspection of employer I-9 audits.

2009 CALIFORNIA SUPREME COURT LABOR & EMPLOYMENT CASES

Not all sexual conduct in the workplace is ***"sexual harassment."*** *It is a question of degree.*

Workplace Privacy

Hernandez v. Hillsides, Inc.

In a case involving secret videotaping, the California Supreme Court ruled that although employees may sometimes have a reasonable expectation of privacy in the workplace, an employer may sometimes intrude upon that privacy for legitimate business reasons.

A residential facility for abused and neglected children installed video monitoring equipment in the private office of two female clerks in an effort to catch a person who had been accessing internet pornography during night hours. Though the employer never operated the equipment during the day, when the employees discovered the equipment, they sued for invasion of privacy.

The Court acknowledged that the two employees had an expectation of privacy in their private office. It was an enclosed area. Moreover, the company had not warned employees that they may be monitored.

Nevertheless, the **employer's intrusion was** justified. Catching the pervert was a legitimate objective. Further, the employer took steps to minimize the intrusion. The equipment did not operate during the day when employees were present, and the camera focused on the computer desk only, not the entire room.

Employers should carefully draft workplace monitoring policies and take other steps to limit expectations of privacy. Monitoring should be limited to what is necessary. Some monitoring (like bathrooms and locker rooms) is prohibited by California law.

More details on the case:

http://www.barkerolmsted.com/news/legal-updates/newsletter0136.php

Sexual Harassment

Hughes v. Pair

Not all sexual conduct in the workplace is **"sexual harassment." It** is a question of degree. An employer who sexually harasses an employee can be liable for damages under both federal law (title VII of the Civil Rights Act of 1964

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The company should advise the employee to resolve the issue with the SSA within a reasonable period of time. Thirty to ninety days ought to be sufficient.

If the employee is unable to resolve the discrepancy then the employer should probably terminate the employee.

Employers should be aware that improper terminations may be a violation of federal law. The DHS wrote in its commentary that it **"acknowledges that an** employer who terminates an employee without attempting to resolve the issues raised in a No-Match letter, or who treats employees differently based upon national origin, perceived citizenship status, or other prohibited characteristics may be found to have engaged in unlawful discrimination under the anti-discrimination provision of the Immigration and Nationality Act of **1952 ("INA").**

As a reminder, employers should be using the most recent Form I-9, with a revision date of August 2009.

The form can be found at this link: http://www.uscis.gov/files/form/i-9.pdf

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(Title VII)) and California law (the Fair Employment and Housing Act (FEHA)) when the sexually harassing conduct is so **"pervasive or severe" that** it alters the conditions of employment.

In a case titled *Huges v. Pair*, the California Supreme Court rejected a harassment claim because it was not sufficiently severe or pervasive. Notably, *Hughes v. Pair* was not an employment case, but the Supreme Court applied sexual harassment standards from FEHA and Title VII.

The Court examined the conduct and comments of an estate trustee directed at the mother of the estate beneficiary. During a telephone conversation, the trustee made a few crudely phrased romantic overtures. Later, at a public event, he made a vulgar sexual comment.

The Court ruled that these comments, though wholly inappropriate, **were not "pervasive." The** trustee made the comments on only two brief occasions. The court also found that these com**ments were not "severe," rejecting the plaintiff's** claim that the trust had threatened sexual assault.

The bottom line is that the California Supreme Court has endorsed a moderate standard for sexual harassment. Isolated sexual comments and mildly offensive sexual conduct is certainly in poor taste, and against company pol**icy, but it won't rise to the** level of illegal sexual harassment.

More details on the case:

http://www.barkerolmsted.com/news/legal-updates/newsletter0133.php

Same-Sex Marriage

Proposition 8

In May 2009, the Supreme Court validated Proposition 8 as an amendment to the California Constitution. The case, titled *Strauss v. Horton*, examined the legal process necessary to amend the Constitution and did not directly address the question of same-sex marriage.

Despite the fact that same-sex marriages are not permitted in California, employers should note that same-sex couples who are registered domestic partners have workplace rights nearly equivalent to heterosexual married couples. Couples must register to achieve this status.

More details on workplace rights and same-sex marriage:

http://www.barkerolmsted.com/news/legal-updates/newsletter0126.php

Labor & Employment Law Court Procedures

Class Action Lawsuits

The California Supreme Court issued two rulings in 2009 relating to class action lawsuits: *Amalgamated Transit Union v. Superior Court* and *Arias v. Superior Court*

At issue here are two California laws. One is the unfair competition law, which allows a private party to bring an unfair competition action on behalf of others (including for labor law violations), but only if **the person "has suffered** injury in fact and has lost money or property as a result of the unfair **competition." The other** law is the Labor Code Private Attorneys General Act of 2004 **("PAGA"), which provides that an "aggrieved employee" may bring an** action to recover civil penalties for violations **of the Labor Code "on** behalf of himself or herself and other current or **former employees . . . ."**

Issue 1: May a plaintiff labor union that has not suffered actual injury under the unfair competition law, and **that is not an "aggrieved employee" under the** Labor Code Private Attorney General Act of 2004, nevertheless bring a representative action under those laws (1) as

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Despite the fact that same-sex marriages are not permitted in California, employers should note that same-sex couples who are registered domestic partners have workplace rights nearly equivalent to heterosexual married couples.

In 2004, California voters passed Proposition 64. The proposition was aimed at curtailing litigation abuse of the unfair competition laws.

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the assignee of employees who have suffered an actual injury and who are aggrieved employees, or (2) as an association whose members have suffered actual injury and are aggrieved employees? The California Supreme Court's answer is "no." Labor unions cannot bring class action claims on behalf of its members for violation of these two laws because the unions have not suffered injury. Employees must bring the claims themselves.

Issue 2: Must a representative action under the unfair competition law be brought as a class action? The California Supreme Court's answer is "yes." In 2004, California voters passed Proposition 64. The proposition was aimed at curtailing litigation abuse of the unfair competition laws. It was too easy for plaintiff lawyers to file these claims purportedly on behalf of large groups of people. One way the proposition restrained plaintiff lawyers was to require that representative actions under the statute be brought as class actions.

Issue 3: Must a Labor Code Private Attorney General (PAGA) claim be brought as a class action. The Supreme Court's answer is "no." Aggrieved employees may file a PAGA claim without following class action procedures. Unlike the unfair competition law, which was amended to add class action requirements, PAGA contains no such restrictions. One employee may sue his employer to recover Labor Code penalties on behalf of himself as well as all other affected employees.

The California Supreme Court's rulings are a mixed bag. On the one hand, unions cannot bring class action claims on behalf of union members, and employees must follow class action rules to bring an unfair competition lawsuit (for labor violations) against an employer. On the other hand, PAGA claims are not subject to class action rules and therefore are much easier to file and pursue.

Incentive Pay Forfeiture

Schachter v. Citigroup

David Schachter was hired as a stockbroker for what is now Citigroup. As part of his compensation, he chose to participate in the company's employee stock purchase plan. The plan allowed him to divert 5% of his earnings to pay for company stock at below market prices.

The plan provided that if an employee remained in the company's employ for the two years following the purchase of restricted stock, title to the shares vested fully with the employee, free of any restrictions. However, if an employee voluntarily terminated employment or was terminated for cause before the end of the two-year period, the employee forfeited his or her restricted stock as well as the percentage of annual income designated by the employee to be paid as shares of restricted stock.

Mr. Schachter quit his job before two years, and the company said he forfeited his stock. Unhappy with the loss of these earnings, Mr. Schachter filed a class action lawsuit.

The broker alleged that forfeiture provisions of employer's voluntary incentive compensation plan violated state labor law and amounted to conversion of wages.

The California Supreme Court rejected the former employee's claims. Based on the terms of the stock plan, the broker never earned the right to the stock. "Schachter necessarily agreed his compensation would consist of cash payments and a retention-based conditional interest in the shares, with the latter being earned only if he remained with [the company] for two years," wrote the court. "He elected not to remain for the designated period.... Accordingly, Schachter did not earn-and thus had no right to receive either the restricted stock or the funds used to purchase it."

The Court rejected the broker's argument that he was entitled to a pro-rata share of the stock, in a manner analogous to vacation pay.

2009 U.S. SUPREME COURT LABOR & EMPLOYMENT CASES

Reverse Discrimination

Ricci v. DeStefano

Nineteen city firefighters from the City of New Haven, Connecticut alleged that the city discriminated against them with regard to promotions. Seventeen of the firefighters were white and two of were Hispanic. They had passed the test for promotions to management. However, there was a public outcry when it became known that none of the black firefighters who passed the exam had achieved a high enough score to be considered for promotion. The City of New Haven invalidated the test results. City officials stated that they feared a lawsuit over the test's disparate impact on a protected minority. The complainants claimed they were denied the promotions because of their race.

The Court held 5-4 that New Haven's decision to ignore the test results violated Title VII of the Civil Rights Act of 1964. The Court noted that sometimes giving preference to a certain race is acceptable. It may be necessary, for example, to remedy past discriminatory practices. But an employer may not do so unless it has a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.

The City could not demonstrate a strong basis in evidence to find the tests inadequate and that it would face disparate impact liability if it had certified the results. The low pass rate for African Americans was not alone sufficient justification. The City had hired a professional consultant and spent $100,000 to develop the test, and the questions had been carefully screened so that they were job related. The City was unable to explain its "flawed test" theory. Moreover, there was insufficient evidence to show that alternative testing methods could have produced a less adverse result. Thus, throwing out the test was just pure unjustifiable discrimination against the whites and Hispanic firefighters.

More details on the case:

http://www.barkerolmsted.com/news/legal-updates/newsletter0128.php

Federal Age Discrimination in Employment Act (ADEA)

Gross v. FBL

In *Gross v. FBL*, a sharply divided U.S. Supreme Court held that plaintiffs pursuing age discrimination under the federal Age Discrimination in Employment Act (ADEA) are held to a more stringent burden of proof than under other discrimination laws such as Title VII. Plaintiffs must show that age discrimination was the basis for an adverse employment action, instead of merely showing that age was one motivating factor.

The Court found that an employer need not show that it would have made the same adverse employment decision regardless of age, even if the employee produces some evidence that age may have been a contributing factor in the decision. The burden of proof rests entirely on the plaintiff that the adverse decision would not have happened but for discrimination.

More details on the case:

http://www.barkerolmsted.com

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Plaintiffs must show that age discrimination was the basis for an adverse employment action, instead of merely showing that age was one motivating factor.

A collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.

(Continued from page 13)
/news/legal-updates/newsletter0129.php

Sexual Harassment/Retaliation

Crawford v. Metropolitan

Both federal and California law protect employees who oppose illegal harassment or discrimination, as well as employees who participate in an investigation. What exactly does it mean **to "oppose" a practice?**

The U.S. Supreme Court examined this question in a decision published on January 26, 2009 titled *Crawford v. Metropolitan Government of Nashville*. Employers should note this decision because it clarifies the anti-retaliation aspect of Title VII, and by analogy, the California Fair Employment and **Housing Act ("FEHA").**

The court held that the Title VII anti-retaliation provision's protection extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation.

Because "oppose" is undefined by statute, it carries its ordinary dictionary meaning of resisting or contending against. **A person can "oppose"** conduct by responding to someone else's questions just as surely as by provoking the discussion. Relying on an EEOC interpretation of the law, **the Court wrote: "When** an employee communicates to her employer a belief that the employer has engaged in ... a form of employment discrimination, that communication virtually always constitutes the employee's opposition to the activ**ity."**

Read more details:

http://www.barkerolmsted.com/news/legal-updates/newsletter0103.php

Dispute Resolution & Arbitration

14 Penn Plaza LLC v. Pyett

In *14 Penn Plaza LLC v. Pyett*, a union had entered into a collective bargaining agreement that required union members to submit all employment discrimination claims to binding arbitration.

When unionized night watchmen were reassigned to porter duties, they grieved the reassignment, alleging a violation of the CBA and age discrimination. The union pursued the claims, but later dropped the age claim. The workers filed an age discrimination charge with the EEOC, and later sued the employer. The trial court and the appellate court re**jected the employer's** claim that the workers could not file a civil lawsuit, but rather must submit to arbitration on account of the union agreement.

The U.S. Supreme Court ruled in favor of the employer. It held that a provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.

Schedule 2010 Sexual Harassment Prevention Training

Is 2009 your training year for supervisors or managers? Schedule the mandatory harassment prevention training with Chris Olmsted. *Competitive rates!*

For more information on the training program, email him at cwo@barkerolmsted.com or call (619) 682-4820.

UPCOMING SEMINARS

2010 LEGAL UPDATE WEBINAR

Are you ready for 2010? Participate in a live webinar with Q & A to get started on the right track!

Date: January 22, 2010

Time: 8:30 a.m. to 9:30 a.m. (plus Q&A time)

Location: Online and via teleconference
Cost: FREE!

This Legal Update covers a number of legal developments that will affect how employers interact with their employees in 2010 and beyond. Chris Olmsted will be presenting a live webinar on January 22, 2010 where he will elaborate on these developments and provide practical tips for complying with new laws and recent court decisions.

Topics Include:

- New California labor & employment laws
- New Federal labor & employment laws
- Regulatory agency developments
- Important 2009 California Supreme Court decisions
- Significant 2009 U.S. Supreme Court decisions

There will be live Q&A time after the main presentation. Come prepared with your questions!

To participate you will need a computer with internet access and a phone line.

Advanced registration is necessary. Please call or email Nicole at (619) 682-4040 or nrs@barkerolmsted.com for more information on registration.

FUNDAMENTALS OF EMPLOYMENT LAW

Prefer an in-person seminar? We've got that covered too!

Date: January 14, 2010

Time: 8:30 a.m. to 4:45 a.m.

Location: Double Tree Club Hotel, 1515 Hotel Circle South, San Diego, CA 92108
Cost: $309

This is an all-day seminar covering a variety of essential employment law topics. The course is designed to provide an overview and update on the following topics:

⇒ Hiring and firing in the current economy
⇒ Immigration issues in the workplace
⇒ FLSA/Wage and hour in today's economy
⇒ Employee privacy
⇒ ADA
⇒ FMLA compliance
⇒ Sexual, racial and other harassment
⇒ Unionization and union avoidance

The topics will be presented by a panel of seven attorneys, including Chris Olmsted (who will present on the ADA topic).

The seminar is presented by Sterling Education Services, Inc. To see a brochure and register, visit www.sterlingeducation.com, or call (715) 855-0498. Or email/call our office: (619) 682-4040 / cwo@barkerolmsted.com

Be sure to register for one of the upcoming legal update seminars to make sure that you start the year 2010 on the right track!

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What We Do:

- Defense of lawsuits in state and federal court.
- Legal consultation on compliance with state and federal labor and employment law statutes and case law.
- Representation in agency enforcement actions or hearings, including DLSE, EDD, Labor Commissioner claims, and more.
- Formulation of compliant employee handbooks, procedures and records.
- Training on HR/legal issues.

EMPLOYMENT LAW REFERENCE MATERIALS AVAILABLE

If you have missed one of our seminars, we have complimentary written materials available for your review. Examples include:

- Wage and Hour Law for Construction Contractors: How to Avoid Getting Sued
- Employee Discipline and Termination
- California Leaves of Absence

Please contact Chris Olmsted for complimentary copies.

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