NEW EMPLOYMENT LAW FOR 2010

By Diane M. O'Malley, Esq. & Eli R. Makus, Esq
Hanson Bridgett, LLP

The flow of significant new employment laws this year from the State Legislature was more of a trickle compared to prior years. In fact, according to the Sacramento Bee, nearly 20% fewer bills were signed into law this year compared to last year. The following is a summary of some of the notable bills that made it through the legislative labyrinth that directly impact employers.

Amendments to Labor Code Section 511 Add New Flexibility For Alternative Workweek Schedules

California Labor Code section 511 outlines the process for adopting alternative workweek schedules. Currently, an employer can propose an alternative workweek schedule that is either a single, standard work schedule or part of a menu of work schedule options offered to the employees. The schedule must be approved by secret ballot election of at least 2/3 of the affected employees in a "work unit."

The recent amendments to section 511 provide clarification for the term "work unit" and offer more flexibility to employees. A "work unit," previously undefined, is now defined as "a division, a department, a job classification, a separate physical location or a recognizable subdivision." Further, the bill authorizes inclusion of a regular schedule of 8-hour days in the menu of work schedule options, with specified overtime compensation. With the consent of their employer, employees could move on a weekly basis from one work schedule to another on the adopted menu of work schedule options.

Adopting alternative work schedules can be complicated. This new bill provides some clarification and provides more flexibility to employees, depending on what schedules are approved. As before, employers must ensure that they follow the requirements outlined in section 511 carefully if they propose an alternative work schedule so that they do not incur overtime costs.

Cal-COBRA Provisions Match Federal COBRA Premium Assistance Program

As most employers are aware now, Congress provided assistance to terminated employees this year for payment of COBRA ("Consolidated Omnibus Budget Reconciliation Act of 1985") benefits. Previously, under the basic COBRA rules, an individual who is involuntarily terminated may elect COBRA coverage for 18 months, but must pay 100% of the premium for that coverage. The federal stimulus bill in 2009 reduced the employee's payment to 35% of the premium for up to nine months. The employer must pay the remaining 65%, but can then recover that money by claiming a credit on their payroll tax return. The federal provisions expired on December 31, 2009, but President Obama signed a six-month extension on December 19, 2009 – thus extending the benefit to terminated employees through June 2010.

California has taken steps to mirror the federal rules for smaller employers. COBRA applies to employers of 20 or more employees. Cal-COBRA ("California Continuation Benefits Replacement Act") applies to employers of 2 to 19 employees. With Assembly Bill 23, Cal-COBRA now requires health care service plans providing group coverage to employers of 2 to 19 employees to offer continuation coverage that matches the federal program.

However, AB 23 was written to expire on December 31, 2009. Governor Schwarzenegger will likely sign an extension for Cal-COBRA to mirror the federal extension, but no such extension has yet been signed.

FMLA Service Member Leave Provisions Expanded

The Family Medical Leave Act ("FMLA") was amended in 2008 to incorporate special leave provisions for military families. In 2009, these provisions were expanded with three significant changes. First, the military caregiver entitlement was expanded to include recent veterans, not just current veterans. Second, covered illnesses and injuries under the FMLA now include serious health conditions that existed before active duty, but were aggravated by military service. Finally, family member exigency leave is expanded to allow family members of the regular Armed Forces to take leave under certain conditions. Employers should revisit their FMLA policies to ensure these changes are incorporated.

Accelerated Wage Withholdings Under California Law

The Franchise Tax Board will be collecting income taxes sooner from California employees as one of many efforts to increase cash flow in the midst of the State's current fiscal crisis. Under Assembly Bill 17, employers were required to begin using new payroll tax rate tables as of November 1, 2009 that increase the income tax withholding rates. The new withholding tables increase the amount employers are required to withhold for California income tax by 10 percent.

This bill was adopted to address the fiscal emergency declared by the Governor on July 1, 2009. While it does not increase taxes, it accelerates the State's income tax collections.

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Harrison's Role Expands

Heather Harrison has been promoted to the new position of CALA's Vice President of Public Policy and Public Affairs. Having served as CALA's Vice President of Public Policy since 2001, she will take on additional responsibilities shaping CALA's public relations efforts as well as managing the integration of the association's policy initiatives and communications. *"I'm looking forward to expanding my contributions to CALA and the Assisted Living profession"*, she said. Congratulations, Heather!

In the Spotlight

- Newly Created Senior Vice President Position for Integral Senior Living

  Integral Senior Living (ISL) announced it has promoted Suzanne Foley to Senior Vice President of Human Resources. She is responsible for employee relations, employee training and development, compensation and benefits and serves as risk manager. Ms. Foley is Senior Professional Human Resources (SPHR) certified and has more than 14 years human resources experience in senior housing and developed policies for more than 100 communities.

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Employers should ensure their payroll service implemented these changes. Employers should also be ready for employees who want to change their tax withholding amounts in light of these changes.

Electronic Discovery Amendments Added To The California Civil Discovery Act

Employers of all sizes should be aware of recent amendments to the California Civil Discovery Act, which outline procedures for the production of electronically stored information during litigation. The changes are very similar to amendments made to the Federal Rules of Civil Procedure a couple of years ago. The bill also outlines procedures for discovery by means of copying, testing, or sampling, in addition to inspection of documents and things and electronic information. Finally, mirroring the federal rules, the bill provides that sanctions shall not be imposed for failing to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of routine, good faith operation of an electronic information system.

This bill serves as a reminder of the importance of preserving electronically stored information as soon as a claim is known to the employer. It also underlines the importance of having a comprehensive document and electronic information management system in place.

Reminder: Sexual Harassment Training Was Due In 2009

Assembly Bill 1825, signed in 2004, requires employers with more than 50 employees to provide two hours of sexual harassment training to their supervisors every two years. The first training was required in 2005. Refresher training was due two years later in 2007, and again in 2009. Of course, all newly hired or promoted supervisors must receive appropriate training within six months of assuming that position. Any employers who missed the deadline should take immediate steps to train supervisors who last received the training in 2007.

Significant Case Law From 2009

The courts issued some important decisions this year. Two warrant attention. *Costco Wholesale Corp. v. Superior Court* is a case wherein Costco hired an attorney to investigate whether certain managers were exempt from California's overtime laws. The trial court, despite attorney-client privilege objections, permitted the factual portions of the resulting opinion letters to be produced in discovery. The Supreme Court rejected this, holding that the attorney-client privilege attached to the entire opinion letter, not simply the portions expressing a legal opinion.

In a separate disability case, *Indergard v. Georgia-Pacific Corporation*, the 9th Circuit held that a required physical capacity examination may constitute a prohibited "medical examination" under the Americans with Disabilities Act ("ADA"). Under the ADA, an employer cannot require that a current employee undergo a medical examination unless it is job-related and consistent with business necessity. This case comports with already existing state law and should be a reminder to employers, especially those in the assisted living industry, which may require that employees submit to a physical capacity evaluation to ensure they can safely perform a job that requires lifting and moving residents. The key distinction between the two is that a physical capacity evaluation is designed to determine whether an employee can do a job, while an improper medical examination is designed to reveal any physical or mental impairments. Employers should review their recruitment policies to ensure that they are not conducting improper medical evaluations.

This year promises lots of activity in labor and employment law. The California Supreme Court is expected to offer guidance, and hopefully clarity, on meal and rest period rules. Also, the United States Supreme Court recently agreed to review a 9th Circuit decision addressing employee privacy in electronic messaging.