California Labor and Employment Law Developments for 2010

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Most likely due to the focus on significant "goings-on" at the federal level and concern over the state's economy, the flow of employment laws enacted in 2009 from the State Legislature was a trickle compared to prior years. In fact, according to the *Sacramento Bee*, nearly 20% fewer bills were signed into law in 2009 compared to 2008.

Nonetheless, there were some bills worthy of note. The following is a summary of some of the more notable bills that were enacted, some that were not but that remain potential problems for employers, and some of the year's more significant federal and state cases impacting employers.

1. Newly-Enacted California Laws

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

Approved by the Governor on February 20, 2009, Assembly Bill ("AB") x25 amends California Labor Code section 511. 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 classi-

fication, a separate physical location or a recognizable subdivision." Further, the bill authorizes inclusion of a regular schedule of eight-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 unintended overtime costs.

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 AB 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. Employers should ensure their payroll service implemented these changes. Employers should also be ready for employees who may want to change their tax withholding amounts to compensate for slimmer paychecks.

Nooses Prohibited In The Workplace

Several symbols are identified as so incendiary that they are banned from display under California Penal Code Section 11411. For example, persons who display swastikas or burn crosses for the purpose of terrorizing another can face criminal charges. This year, the list was expanded to include the display of nooses. Under AB 412, a person who hangs a noose in a workplace (or other protected locations), knowing that it is a symbol representing a threat to life and does so for the purpose of terrorizing someone who works there, will face jail time not exceeding a year, a fine up to $5,000, or both.

"The Electronic Discovery Act," California Assembly Bill 5 Amends The California Civil Discovery Act

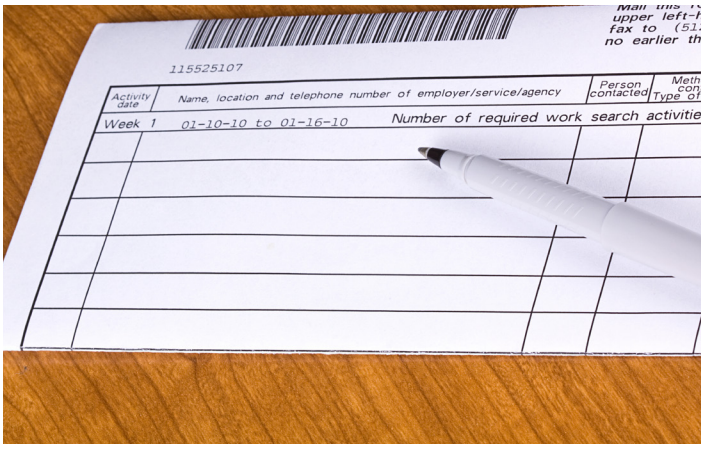
AB 5 was approved by the Governor on June 29, 2009 and filed with Secretary of State June 29, 2009. Employers of all sizes should be aware of recent amendments to the California Civil Discovery Act, which outline procedures for the production of electronically stored information during litigation. The 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.

Changes To The Workers' Compensation Law

Two new bills made changes to the state's workers' compensation law, which affect employer obligations. AB 483 will require that rating organizations maintain websites where any person can obtain information about whether an employer is insured for workers' compensation. AB 1093 addresses employer liability for workers' compensation claims when an employee claimant is injured or killed on the job by a third party. The employer will still be liable for the claim even if the third party's sole motivation for causing the harm was his or her personal beliefs about the employee's race, religious creed, color, national origin, age, gender, disability, sex, or sexual orientation.



Reminder: Sexual Harassment Training Was Due In 2009

AB 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.

2. Vetoed, Stalled Or Pending California Bills

Governor Schwarzenegger *vetoed* a number of bills that would have negatively impacted California businesses. Here are a few that might resurface:

Senate Bill 789 (Steinberg):

This bill, presumably patterned after the Employee Free Choice Act, would permit agricultural employees to select their labor representatives by submitting a petition to the Agricultural Labor Relations Board accompanied by representation cards signed by a majority of the bargaining unit. The board would then conduct an investigation to determine whether to certify the labor organization as the exclusive bargaining representative for the particular agricultural employees. Within five days after receiving a petition, the board would be required to make a nonappealable administrative decision. If the board determined that the representation cards meet specified criteria, then the labor organization would be certified as the exclusive bargaining representative. If the board determined that the cards were deficient, it would notify the labor organization and grant the labor organization 30 days to submit additional cards. The Bill was protested by the California Agriculture Coalition, many local business associations, and by the California Chamber of Commerce.

Senate Bill 810 (Leno):

Introduced on February 27, 2009 and reintroduced January 13, 2010, this bill seeks to add single-payer health care coverage under the Health and Safety Code.

Currently, state law provides for programs to provide health care services to persons who have limited incomes such as the Healthy Families Program administered by the Managed Risk Medical Insurance Board, and the Medi-Cal program

administered by the State Department of Health Care Services. Senate Bill ("SB") 810 would establish the California Healthcare System regulated by the newly-created California Healthcare Agency. All California residents would be eligible for certain health care benefits under the California Healthcare System. The System would negotiate for or set fees for health care services provided through the system and pay claims for those services. As expected, SB 810 creates a myriad of boards and agencies. It also creates an Office of Patient Advocacy within the agency to represent the interests of health care consumers relative to the system.

More to come on health care both on the federal and state level.

Assembly Bill 793 (Jones and Brownley)

AB 793 proposed to add Section 355.5 to the Code of Civil Procedure. Its intent was to "specify when a cause of action for unlawful discrimination or unlawful employment practice with respect to compensation accrues for determining whether a complaint was filed." However, as drafted the law appeared to apply to any California statute regarding compensation, and not just the California Fair Employment and Housing Act (FEHA).

In addition, applying a federal "Ledbetter law" in California could result in greater liability for employers because federal law applies a two-year back-pay limit to wage damages whereas the FEHA has no such limit; thus, California employers could be exposed to unlimited damage awards.

Below is the Governor's Veto Message:

> *I am returning Assembly Bill 793 without my signature. The bill seeks to address the United States Supreme Court's decision in* Ledbetter v. Goodyear Tire and Rubber Co.*, which dealt with an interpretation of federal law. However, Congress has already abrogated this decision by enacting the Lilly Ledbetter Fair Pay Act earlier this year. Therefore, this bill is unnecessary as it addresses a decision that has been mooted by subsequent legislation that has no direct application in California. Moreover, as drafted, this measure is far more expansive than the federal law and could pose unreasonable and unlimited liability for California employers. For these reasons, I am unable to sign this bill. Sincerely, Arnold Schwarzenegger*

Assembly Bill 1000 (Ma and Skinner)

Currently, state law does not require employers to provide their employees paid sick leave[1]. AB 1000 would provide that an employee who works in California for seven or more days in a calendar year is entitled to paid sick days, which accrue at a rate of one hour for every 30 hours worked. An employee would be entitled to use accrued sick days beginning on the 90th calendar day of employment.

Assembly Bill 849 (Swanson)

The California Family Rights Act, (CFRA) permits an eligible employee to take up to 12 workweeks of unpaid protected leave during any 12-month period (1) to bond with a child who was born to, adopted by, or placed for foster care with, the employee, (2) to care for the employee's parent, spouse, or child who has a serious health condition, or (3) because the employee is suffering from a serious health condition rendering him or her unable to perform the functions of the job. Under the CFRA, "child" means a biological, adopted, foster, or stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under 18 years of age or an adult dependent child. The CFRA "parent" means the employee's biological, foster, or adoptive parent, stepparent, legal guardian, or other person who stood in *loco parentis* to the employee when the employee was a child. AB 849 would increase the circumstances under which an employee is entitled to protected leave by (1) eliminating the age and dependency elements from the definition of "child," (2) expanding the definition of "parent" to include an employee's

1 Employers might be governed by local ordinances requiring sick leave. For example, San Francisco requires employers in San Francisco to offer paid sick leave to employees. AB 1000 is patterned after the San Francisco Ordinance.

parent-in-law, and (3) permitting an employee to take leave to care for a seriously ill grandparent, sibling or grandchild.

Clearly, if enacted, this bill would have a serious impact on an employer's operations as it greatly expands an employee's right to be away from the workplace for a "protected" reason.

3. New Federal Amendments

Extension of COBRA Rights, With Cal-COBRA Likely To Follow

As most employers are aware now, in 2009 Congress authorized a subsidy to terminated employees for payment of COBRA ("Consolidated Omnibus Budget Reconciliation Act of 1985") benefits. Ordinarily, 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.

However, the federal subsidy was set to expire on December 31, 2009. President Obama signed the Fiscal Year 2010 Defense Appropriations Act on December 19, 2009. The Act extended the maximum period for receiving the subsidy for an additional six months, through June 2010. It also extended the eligibility period, such that employees who were eligible for COBRA benefits because of involuntary termination between September 1, 2008 and February 28, 2010 could receive the subsidy. In another bill signed into law on March 2, 2010, the eligibility period was extended again to March 31, 2010. Now, employees who are eligible for COBRA due to involuntary termination on or before March 31, 2010, are eligible for the federal subsidy.

California has taken steps to mirror the federal rules for employees of 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 AB 23, Cal-COBRA now requires health care service plans providing group coverage to employers of 2 to 19 employees to offer subsidized continuation coverage that matches the federal program.

However, AB 23 was written to expire on December 31, 2009. The Legislature or Governor Schwarzenegger are expected to extend the Cal-COBRA subsidy to again mirror the federal extension—but it appears they are not quite sure how to do it. Reportedly, the Governor believes his Administration can execute the extension with no change in the law. However, a recent call to the Assembly Health Committee revealed that the legislature is still trying to decide whether California law has to be changed or not. The expectation is that there will not be a break in coverage under Cal-COBRA.

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.

4. Significant Cases And Agency Decisions From 2009

The courts issued some important decisions this year.

Costco Wholesale Corp. v. Superior Court

Costco 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 California Supreme Court rejected this, holding that the attorney-client privilege attached to the entire opinion letter, not simply the portions expressing a legal opinion.

Indergard v. Georgia-Pacific Corporation

In *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 that require employees submit to a physical capacity evaluation to ensure they can safely perform a physically demanding job. 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.

Roby v. McKesson Corp

Both the California Supreme Court and Courts of Appeal made headway in dealing with harassment claims. The California Supreme Court issued a far reaching decision in *Roby v. McKesson Corp.* that explored the circumstances where official employment actions by management can be not only evidence of discrimination, but also evidence of harassment in a hostile work environment claim. Roby was a 25-year employee who began experiencing "panic attacks" after 22 years of employment. A year later, McKesson Corp. adopted a complex attendance policy with progressive discipline components that operated to the disadvantage of employees like the plaintiff who had disabilities or medical conditions that required several unexpected absences in close succession. Roby was disciplined several times due to absences that were caused by her medical condition. She was ultimately terminated. Her supervisor was often hostile towards her, making demeaning comments, gestures and facial expressions in response to Roby's body odor and sores, which were caused indirectly by her medical condition. He also applied McKesson's attendance policy to her, even though he knew about her medical condition, and he would assign her to work phones during office parties.

The Court concluded that the jury could infer that his hostility was because of her medical condition, including his decision to apply McKesson's attendance policy without inquiring if an accommodation was possible. This case is significant because it paves the way for plaintiffs' lawyers to argue that the routine application of personnel policies and official employment actions actually constitute unlawful harassment.

Haberman v. Cengage Learning, Inc.

On the other hand, a California Court of Appeal determined that harassment claims were properly dismissed on summary judgment in *Haberman v. Cengage Learning, Inc.* The court reiterated existing case law that provides isolated inappropriate comments alone do not create a hostile work environment. Alicia M. Haberman sued her former employer, Cengage Learning, as well as her former supervisor and Cengage's national sales manager, for sexual harassment, retaliation, breach of contract and intentional infliction of emotional distress. The trial court granted defendants' motion for summary judgment, and the Court of Appeal affirmed on the ground that the acts of alleged harassment fell "far short" of establishing a pattern of continuous, pervasive harassment necessary to show a hostile working environment under the Fair Employment and Housing Act. Among other things, the individual defendants' oral and e-mail comments to Haberman were not sexual in nature, were not compliments of or requests to date her and generally did not evidence conduct sufficiently severe or pervasive as to alter her conditions of employment and create a hostile work environment. Similarly, the court affirmed dismissal of Haberman's claims for retaliation and intentional infliction of emotional distress.

United Steel v. ConocoPhillips

Wage and hour class actions remained prevalent this year. Several California courts, state and federal, wrestled with certification. For example, in *United Steel v. ConocoPhillips* (January 6, 2010) the Ninth Circuit determined that when reviewing certification motions, district courts may not assume, that problems will arise, and decline to certify the class on the basis of a mere possibility of a problem that may or may not be realized. The district court had denied plaintiffs' motion to certify a putative class raising meal and rest period claims out of concern that practical obstacles could potentially develop if plaintiffs' legal theory was ultimately rejected. Plaintiffs' certification argument rested on a so-called "on duty" theory. The district court reasoned that if Plaintiffs' "on duty" theory was rejected (either because the meal periods were not actually "on duty" or, alternatively, that the conditions prerequisite to a lawful "on duty" meal period were satisfied), the court would be faced with a case requiring individualized trials on each class member's claims to determine whether or not they actually missed meal breaks.

The Ninth Circuit held that the district court did indeed abuse its discretion when it assumed, for the purpose of Federal Rule of Civil Procedure 23 certification analysis, that the Plaintiffs' legal theory would fail. It reasoned that a court can never be "assured" that a plaintiff will prevail on a given legal theory prior to a dispositive ruling on the merits, and a full inquiry into the merits of a putative class's legal claims is precisely what both the Supreme Court and the Ninth Circuit have cautioned is not appropriate for a Rule 23 certification inquiry. Accordingly, the court reversed and remanded for reconsideration of Plaintiffs' certification motion.

"Faltering Company" WARN Act Notice Interpretation

In a disappointing January 4, 2010 Opinion Letter, John C. Duncan, the Director of California's Department of Industrial Relations, found the efforts by Insync Marketing Solutions LLC to find a buyer before it closed in February 2009, laying off 200 workers, was not sufficient to allow Insync to be exempted from the requirement to provide 60 days notice of a shutdown, relocation, or mass layoff under certain circumstances.

In some circumstances – known as the "faltering company" exemption, when the employer is actively seeking capital or business when the WARN Act notice would be required to be given, no notice is required under the Labor Code.

Labor Code section 1402.5 states the exemption:

(a) An employer is not required to comply with the notice requirement contained in subdivision (a) of Section 1401 if the department determines that all of the following conditions exist:

(1) As of the time that notice would have been required, the employer was actively seeking capital or business.
(2) The capital or business sought, if obtained, would have enabled the employer to avoid or postpone the relocation or termination.
(3) The employer reasonably and in good faith believed that giving the notice required by subdivision (a) of Section 1401 would have precluded the employer from obtaining the needed capital or business. . . .

(d)This section does not apply to notice of a mass layoff as defined by subdivision (d) of Section 1400.

Labor Commissioner Duncan took a very restrictive view of the exemption and found that because Insync was not seeking capital at the precise time needed under the exemption, but rather was seeking a buyer, it could not take advantage of it. In other words, because it shut down on February 20, 2009, it needed to demonstrate that it was actively seeking capital or business on or about December 22, 2008. Because it could not, it was not entitled to the exemption and thus was required to give its employees notice.

The ruling clearly demonstrates how careful employers must be when faced with financial difficulties that could lead to the shutting down of the business.

New DLSE Opinion Letter Regarding On-Duty Meal Agreements

California's wage orders have long provided for employers to enter into "on duty meal agreements" with their employees when "the nature of the work prevents an employee from being relieved of all duty" for a meal period. The agreement must be in writing and must permit the employee to revoke the agreement at any time. There has been little guidance on when the nature of the work "prevents" an employee from being relieved of all duty and employers have been rightfully wary of whether such agreements can safely be entered into and relied upon. The Division of Labor Standards Enforcement ("DLSE") has fluctuated in its own guidance on this topic since it first entered the fray with a generally worded opinion letter in 1994. In a 2002 opinion, the DLSE outlined a five-factor test and opined that the nature of the work must make it "virtually impossible for the employer to provide an off-duty meal period." This letter seemed to authorize on-duty meal agreements in only the most extreme circumstances.

In 2009, however, the DLSE offered a new opinion with a softer bent. Although still relying on a multi-factor test, the DLSE explicitly rejected the 2002 "virtually impossible" standard, calling it "narrow, imprecise and arbitrary" and stating there was no such requirement in the wage orders. Although the 2009 opinion deals with a narrow factual setting involving drivers transporting hazardous materials, the letter suggests on-duty meal agreements may be permissible under more situations. The DLSE observed, for example, that it would be "impossible or impractical" to send out relief drivers for meal periods when drivers traveled throughout the state. Shortly after the June 2009 letter, a district court evaluated whether the nature of the work for bus operator employees who drove fixed routes justified on-duty meal periods. See *Amalgamated Transit Union v. Laidlaw Transit Services, Inc.,* 2009 U.S. Dist. LEXIS 69842 (S.D. Cal. Aug. 10, 2009). Again, it was a narrow set of facts, but in line with the DLSE letter (although it did not cite to the letter), the court found that using relief drivers would be a "logistical disaster" and that the nature of the work prevented off-duty meal breaks.

5. Significant Decisions Anticipated In 2010

Significant cases at both the federal and state level are expected in 2010. Here are two in particular that are worth tracking.

The California Supreme Court is expected to offer guidance, and hopefully clarity, on meal and rest period rules. The Court granted review of *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)* in October of 2008. The key issue in the case is whether employers have an affirmative duty to insure that employees take meal and rest breaks, or whether employers simply are required to make meal periods and rest breaks available to their employees. The Court is also expected to offer guidance on whether claims alleging meal and rest period violations are amenable to class action treatment. All briefing was completed in October 2009, but the Court has not yet scheduled oral argument.

Also, the United States Supreme Court recently agreed to review a 9th Circuit decision out of California addressing employee privacy in electronic messaging. In *Quon v. Arch Wireless*, the 9th Circuit concluded that a police officer had a reasonable expectation of privacy in text messages he sent using a department-issued alpha-numeric pager. He regularly exceeded his allotment of text messages per month, but had been informed that if he paid for the monthly overages, the department would not audit his messages. It turned out most of his messages were personal and sexually explicit. The 9th Circuit found his 4th Amendment rights prohibiting unlawful search and seizure had been violated, along with the federal Stored Communications Act of 1986. The Supreme Court's

decision may have far reaching implications on the ability of employers to monitor communications on devices they provide to employees for work purposes.

6. Summary And Predictions

Based upon the bills the California legislature brought forth unsuccessfully last year, it is likely we will see more efforts this year to increase employee entitlements and taxes upon employers. The costs associated with the implementation of these and other bills, if enacted, will have a significant adverse impact on California's employers. As always, developments in labor and employment law in California remain unpredictable—stay tuned.

More Information

If you would like to pursue the subject of this newsletter or other labor and employment matters, please contact Diane O'Malley, Eli Makus, or any Hanson Bridgett attorney with whom you have an existing relationship.

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