

CALIFORNIA MANAGEMENT UPDATE

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Winter 2007

New Employment Laws For 2007 And Beyond

Along with celebrations and resolutions, the New Year brings new laws that affect private employers in California. Below is a brief overview of the most significant changes affecting the California workplace. All laws are effective January 1, 2007 unless otherwise stated.

Minimum Wage Increase: (new Labor Code § 1182.12)

Perhaps the most noteworthy new law for 2007 is the two-step increase in California's minimum wage. On January 1, 2007, California's minimum wage increased 75 cents from \$6.75 per hour to \$7.50 per hour. On January 1, 2008, the minimum wage will increase again to \$8.00 per hour. The increase is not indexed to allow for automatic adjustments beyond 2008. Assuming no other states increase their minimum wage, this change means California now ties for the third highest minimum wage and will have the highest minimum wage in 2008.

The increase in the minimum wage will also increase the minimum salary requirement for bona fide exempt employees under California law. Previously, in order to be exempt from overtime, a full-time employee must be paid an annual salary of at least \$28,080. The minimum salary requirement is now \$31,200 and will increase to \$33,280 on January 1, 2008. Please note that there are many other requirements that must be satisfied in order for an employee to qualify as exempt under both state and federal law. Mere payment of the minimum salary, alone, is insufficient.

The official notice, which must be posted in the workplace, can be downloaded from this web site: <http://www.dir.ca.gov/IWC/Minwage2007.pdf>.

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Finally, Some Clarity – California Department Of Fair Employment And Housing Approves Sexual Harassment Training Regulations

It took nearly a full year, but the California Department of Fair Employment and Housing has finally approved regulations to provide employers with guidance regarding California Government Code Section 12950.1 (“AB 1825”).

As we previously reported in our November 2004 California Management Law Update, as of January 1, 2006, all employers with 50 or more employees are required to conduct mandatory sexual harassment training of all supervisors. The training must be at least two hours in length and must cover certain specific topics. Each supervisor must be trained at least every two years, and a newly-hired or newly-promoted supervisor must be trained within six months of assuming supervisory roles.

While the statute provided some information, there were substantial gaps in the legislation, which required significant interpretation and “tea leaf” reading until the regulations were finalized. Many of those questions have now been answered.

The regulations define covered employer as one having 50 or more employees. To determine whether an employer has 50 or more employees, you need to count all full-time and part-time employees, as well as contractors. Additionally, if an employer has had 50 or more employees in 20 or more consecutive weeks in the current or prior year, that employer is required to provide the training. Significantly, not all of the employees must be located in California. So, if an employer has 10 employees in California and 40 employees in other states, that employer must comply with the requirements of the statute and regulations.

Another term that has now been defined is the term “supervisor.” A supervisor, for purposes of this statute, is anyone who has the ability to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or direct them, or adjust grievances or effectively recommend that action. A “supervisor” is one who utilizes independent judgment. Significantly, only supervisors located in California must be trained. Language was proposed to require training of anyone who supervised employees in California, even if the supervisor was not located in California. That language was rejected.

Much was discussed about what form the training must take and who is qualified to conduct the training. The regulations approve live training, e-training, and webinars/webcasts, but dictate certain requirements for each. All of the forms of training must have questions that assess learning, skill-building activities assessing understanding, and numerous hypothetical scenarios with questions.

Live training must be conducted by a “Qualified Trainer” (“QT”). An individual becomes a QT through: (a) formal education and training or substantial experience; and (b) being a “Subject Matter Expert” (“SME”). A SME has either: (a) legal education coupled with practical experience; or (b) substantial practical experience in training in harassment, discrimination and retaliation prevention. If the QT has formal education and training or substantial experience (requirement (a)) but is not a SME (requirement (b)), a SME must be available to answer questions and provide feedback either during the training session or within two business days after the question is asked. All live trainers must be qualified to discuss and provide training regarding what constitutes unlawful harassment, discrimination and retaliation, what steps to take if a complaint is made, how to report sexual harassment, how to respond to a sexual harassment complaint, employers’ obligations to investigate harassment complaints, what constitutes retaliation and how to prevent it, what are the essential components of an anti-harassment policy, and how sexual harassment affects the workplace. Additionally, live training must be conducted in a setting removed from the supervisor’s daily duties.

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Companies Must “Shine The Light” On Their Security Breaches

Recent high-profile computer security breaches, perhaps most notably involving the University of California at Los Angeles, where the personal information of approximately 800,000 individuals was accessed illegally, remind us that everyone is at risk of having their electronically-stored information compromised. When such security breaches occur, businesses are required to comply with California’s “Shine the Light” privacy laws, codified at California Civil Code §§1798.80-1798.84. Enacted in 2000, this statute requires companies to “come clean” if and when a security breach occurs that involves the compromise of personal information. While undoubtedly focused on the protection of personal information of consumers, given its broad construction, the statute also protects the personal information of employees.

As a preventive measure against security breaches, California Civil Code §1798.81.5 specifically requires all businesses that possess or license the personal information of California residents to “implement and maintain reasonable security procedures and practices” to protect personal information from “unauthorized access, destruction, use, modification, or disclosure.” In the event a security breach occurs, this law requires that any person or business *conducting* business in California, which either owns or licenses computerized data that includes “personal information” about California residents, must “disclose any breach of the security of the system following discovery or notification of the breach in the security of the data to any resident of California whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person.” “Personal information” is defined as the individual’s name (first initial and last name is sufficient), in conjunction with any one of the following data elements, when one or the other is not encrypted: (1) social security number, (2) driver’s license number or California identification card number, (3) credit card number, debit card number or other financial account number along with the code or password that enables access to the account, or (4) medical information.

This law is not restricted to persons or companies located in California, but applies to any person or business that *conducts* business in California. Moreover, this law applies to data “owned or licensed” by a person or company even if the personal information is contracted to a third party or if the security breach was due to the fault of the third party. It is noteworthy to mention that the disclosure must be made in “the most expedient time possible and without unreasonable delay,” unless otherwise advised by a law enforcement agency.

The statute mandates specific notice procedures unless the breached entity already maintains its own notification procedures as part of an information security policy that is consistent with the statute. The breached entities must notify affected California residents by either: (1) written notice, (2) electronic notice in accordance with 15 U.S.C. §7001, or (3) substitute notice in cases where the business has insufficient customer contact information, the costs of notification exceed \$250,000 or the number of residents affected exceeds 500,000. Substitute notice can take any one of the following forms: (1) e-mail, (2) via the breached entity’s web site or (3) notification through major statewide media.

Employers’ Bottom Line:

Employers should ensure that their security procedures and practices reasonably protect against unauthorized disclosure of the personal information of their customers and employees. When a security breach occurs, employers must immediately contact affected individuals in a manner consistent with California law.

If you have any questions regarding the issues discussed in this article or California labor or employment law issues in general, please contact the Ford & Harrison attorney with whom you usually work or the author of this article, Alice Wang, awang@fordharrison.com, 213-237-2405, in our Los Angeles office. •



Prior Periods Of Employment Must Be Considered When Determining An Employee's Eligibility For FMLA Leave

In a case of first impression in the federal appellate courts, the First Circuit Court of Appeals recently held that employers must consider prior periods of employment when determining whether an employee satisfies the 12-month length of employment requirement under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601, *et seq.* See *Rucker v. Lee Holding Co.* (1st Cir., Dec. 18, 2006).

In *Rucker*, the plaintiff had been employed as a car salesman for only seven months when he took a medical leave of absence. After his employment was terminated two months later, the plaintiff filed suit alleging that his termination violated the FMLA.

The FMLA provides that an eligible employee is entitled to leave for, among other things, "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). To be considered an "eligible employee", an individual must have been employed: (1) "for at least 12 months by the employer with respect to whom leave is requested . . ."; and (2) "for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A).

"However, in the absence of contrary authority, it is recommended that employers combine all periods of employment when determining whether an employee has satisfied the FMLA's 12-month employment requirement."

While the plaintiff in *Rucker* had only been employed for a period of seven months at the time he commenced his leave, he had previously been employed by the same employer for five years, although that previous period of employment ended five years before he was re-hired.

Finding ambiguity as to whether the FMLA requires that previous periods of employment be counted toward the 12-month employment requirement, the Court of Appeals relied on regulations promulgated by the United States Department of Labor (DOL), and the DOL's interpretation of those regulations, which establish that previous periods of employment do count. Thus, despite the five-year gap between periods of employment, the Court found that the plaintiff was an eligible employee for purposes of the FMLA, since his two periods of employment, when combined, satisfied the FMLA's 12-month employment requirement.

Employers' Bottom Line:

Being a case of first impression, it is always possible that another federal appellate court will reach a different result than the court in *Rucker*. Likewise, the Department of Labor may choose to clarify its regulations upon which the court's decision was based. However, in the absence of contrary authority, it is recommended that employers combine all periods of employment when determining whether an employee has satisfied the FMLA's 12-month employment requirement.

If you have questions regarding this case or the FMLA in general, please contact the Ford & Harrison attorney with whom you usually work or the author of this article, Brian Peters, bpeters@fordharrison.com, 213-237-2409, in our Los Angeles office. •



California Supreme Court To Review Whether Noncompetition Agreements Are Invalid Even If Narrowly Tailored

On November 29, 2006, the California Supreme Court granted review of the Court of Appeal's decision in *Edwards v. Arthur Andersen LLP*, which had rejected the so-called "narrow restraint" exception to California's general prohibition on noncompetition agreements. The appellate court had held that a noncompetition agreement between an employee and employer, prohibiting the employee from performing services for certain clients of the employer, was invalid under California Business and Professions Code § 16000.

The "narrow restraint" exception has been developed by federal courts interpreting California law. California Business and Professions Code § 16600 provides that "[e]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The state legislature has created limited statutory exceptions that validate contracts restraining competition when those contracts relate to the sale of a business, the dissolution of a partnership, or the sale or disposition of a stockholder's stock in a corporation. Over the years, some courts have concluded that the use of noncompetition agreements may be acceptable if they only "narrowly restrain" an employee's ability to compete against his or her former employer, i.e., they leave a substantial amount of the market available to the employee for competition.

In *Edwards*, the California Court of Appeal, Second Appellate District, expressly rejected the "narrow restraint" exception to Business and Professions Code § 16600. It held that a noncompetition agreement between the plaintiff and his former employer, which prohibited the employee from performing services for certain former clients – even under circumstances where the client approached the employee – was invalid under § 16000. "Such a noncompetition agreement is invalid even if the restraints imposed are narrow and leave a substantial portion of the market open to the employee."

The appellate court further found that the narrow restraint doctrine raised serious public policy concerns because it encouraged employers to "draft noncompetition agreements that push the envelope of the 'narrowness' requirement" and simulta-

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Sexual Harassment Training for Supervisors: (amended Government Code § 12950.1)

Since the passage of AB 1825 in 2005, all employers with 50 or more employees are required to conduct mandatory sexual harassment training of all supervisors every two years. The law, however, has been unclear as to whether a covered employer must train its supervisors who are located outside of California. Now, according to amended Government Code § 12950.1, no training is required. Only supervisors located in California need to be trained. However, it is a good idea to provide such training to any supervisor who will be supervising employees based in California.

Passport Requirement: (Western Hemisphere Travel Initiative (WHTI))

Many employees travel as part of their job. For those who travel by air, they must be aware that starting January 23, 2007, all travelers, including U.S. citizens, must present valid passports when entering the United States by air from any part of the Western Hemisphere (Canada, Mexico, Central and South America, the Caribbean and Bermuda). Employers should ensure that employees are aware of this new requirement and that they know how to update – or obtain, if necessary – their passports. Travelers who plan to leave the country before the effective date and return after it must be prepared to present a valid passport upon entry to the U.S.

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Reporting Overtime: (amended Labor Code § 204)

Previously, employers in California were faced with a conflict regarding the reporting of overtime hours. While employers were permitted to pay overtime wages in the next consecutive pay period under California law, they were still required to report those hours during the period they were worked. Now, employers can report the overtime hours on the same payroll date as the hours are paid (i.e., in the next consecutive pay period). The hours must be itemized as corrections on the pay statement.

DFEH Postings Available Online: (amended Government Code § 12950)

Under existing law, employers must post the California Department of Fair Employment and Housing (DFEH) employment discrimination poster (Form DFEH-162, amended 05/06) and sexual harassment information sheet (Form DFEH-185) in a prominent and accessible location. Now, the DFEH is required to make the postings available online. The materials can be accessed at <http://www.dfeh.ca.gov/Publications/postersemp.asp>.

Cellular Telephone Usage: (SB 1613)

Looking ahead, employers should be aware that by July 1, 2008, California will ban the use of hand-held cellular telephones and similar devices while driving a motor vehicle. Hands-free operated devices will be permitted. Employers may want to consider revising their policies to reflect this change and to ensure that employees who are expected to use cellular telephones while driving on company business utilize hands-free devices.

San Francisco Paid Sick Leave: (Proposition F)

Beginning February 6, 2007, San Francisco employers must provide paid sick leave to employees who are employed within the geographical limits of the city and county of San Francisco. Employers must provide 1 hour of sick leave for every 30 hours worked. Sick leave may be taken for the employee's own illness or to provide care for a sick child, parent, sibling, grandparent, grandchild, spouse, domestic partner, or "designated person." Employees of small employers (fewer than 10 employees including part-time and temporary employees) may accrue up to 40 hours of paid sick leave. Employees of larger employees may accrue up to 72 hours of leave. Leave begins to accrue as of February 6, 2007 for employees employed on or before that date. For employees hired after February 6, 2007, paid sick leave begins to accrue 90 days after the commencement of employment.

USERRA Posting

All private sector and state government employers must post a notice in the workplace informing employees of their rights under the Uniformed Services Employment and Reemployment Rights Act. The latest version of the USERRA poster can be downloaded here: http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf.

Informational Pamphlets to Distribute to Employees

Several informational pamphlets have been revised and can be downloaded from the web to distribute to employees.

Paid Family Leave – The latest Paid Family Leave brochure (form DE 2511) may be downloaded at: <http://www.edd.ca.gov/direp/pflpub.asp#de2511.pdf>.

State Disability Insurance -- Form DE 2515, or the State Disability Insurance Provisions (For Disabilities Beginning on or After January 1, 2003) is accessible here: <http://www.edd.ca.gov/direp/dipub.htm>.

Information for the Unemployed -- "For Your Benefit-California's Programs for the Unemployed" (form DE 2320), describes services provided by the EDD. The latest version can be accessed here: <http://www.edd.ca.gov/uiirep/uiipub.htm>.

Workers' Compensation Medical Care -- Two new publications, the fact sheet "The Basics About Medical Care For Injured Workers" and the medical booklet "Getting Appropriate Medical Care For Your Injury", are now available at: <http://www.dir.ca.gov/chswc/>. For more information about these new laws, please contact the author of this article, Jennifer Olson, jolson@fordharrison.com, 213-237-2406, in our Los Angeles office, or the Ford & Harrison attorney with whom you usually work. •

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The regulations expressly permit “e-training.” If an employer elects to use an “e-training” program, the program must be developed and approved by qualified trainers or SMEs. If the e-training program is a self-study program, there must be an opportunity for the supervisor to ask questions of a QT while taking the program, and employers must ensure that the supervisor spends at least two hours taking the course.

Another approved method of training consists of webinars or webcasts. If an employer elects to use this type of training, it must ensure that the supervisor takes the entire program, and there must be documentation of active participation during the program, such as interactive content, questions, hypothetical scenarios, etc.

The regulations specify certain subjects that must be covered in the training. Mandatory training subjects include: (a) the legal definition of sexual harassment; (b) statutory provisions; (c) types of conduct constituting harassment; (d) remedies available to harassment victims; (e) strategies to prevent harassment; (f) practical examples; (g) limited confidentiality of the complaint process; (h) resources available to victims of harassment; (i) employer’s obligation to conduct an effective investigation; (j) what to do if the supervisor is personally accused; (k) antiharassment policy elements; (l) how harassment complaints are filed; and (m) how to prevent harassment, discrimination, and retaliation. If an employer so chooses, it may address other forms of harassment as part of the training program.

Because all supervisors must be trained every two years, and within six months of being hired or promoted into a supervisory role, the regulations provide guidelines for how to track the training conducted. The regulations discuss “Training Year Tracking” or TYT. Using the TYT method of tracking, the training employer may designate the “training year” and retrain by the end of the next training year, two years later. Newly hired or promoted supervisors trained within six months of assuming supervisory duties may be included in next group training year, even if that is sooner than two years. Employers can shorten but not lengthen the training year.

It is the employer’s burden to establish and verify that all supervisors are appropriately trained in a timely manner. To verify the training, records must be maintained reflecting the name of supervisor being trained, the date on which the training occurred, the type of training, and the name of the trainer. Training records must be maintained for a minimum of two years.

Most of the questions that have arisen under the sexual harassment training statute were answered by the regulations. While the Office of Administrative Law must still approve these regulations, there is no reason to believe there will be any further delay providing employers with this much-needed guidance.

Employers’ Bottom Line:

Sexual harassment training for supervisors is now the “law of the land” in California. If you have any questions regarding the new regulations or the law mandating sexual harassment training, please contact the Ford & Harrison attorney with whom you usually work or the author of this article, Helene Wasserman, hwasserman@fordharrison.com or 213-237-2403, in our Los Angeles office. •

Employers May Recover Commissions Advanced To Employees But Never Earned

Generally, California Labor Code § 221 prohibits employers from collecting from employees any wages previously paid to the employees. Employers who pay their employees in whole or in part on a commission basis sometimes seek to recover commissions previously paid on the basis that the commission were never actually earned by the employees.

The recent California Court of Appeal decision in *Koehl v. Verio, Inc.*, 142 Cal. App. 4th 1313 (Cal. App. 2006), addresses when employers may legally recover commissions advanced to employees. In *Koehl*, several employees sued their former employer, an internet company, for recovering commissions previously advanced to them. Per its written commission plans, the employer would pay commissions when an order was “booked,” but could recover a commission from an employee under certain circumstances, typically involving the cancellation of the internet services within 90 days of activation. Sales were not considered “complete” until the time period had passed.

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California Supreme Court - Continued from pg. 5

neously burdened employees with “the task of guessing, at his or her peril, whether a court might find particular restrictions sufficiently narrow or overly broad.”

Whether the “narrow restraint” exception has any continued viability will remain unresolved until the California Supreme Court issues its opinion.

Employers’ Bottom Line:

Noncompetition agreements are generally unenforceable in California. While employers may require employees to agree not to use trade secret information to compete against them, either during or after the employees’ employment, agreements designed to prohibit or limit an employee from competing against his or her former employer through otherwise lawful means have been routinely rejected by the courts. Whether the California Supreme Court will provide employers with a little more leeway in this regard and recognize the “narrow restraint” exception is yet to be seen.

If you have questions regarding noncompetition agreements under California law or other California labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work or the author of this article, Stephen Kroll, skroll@fordharrison.com, 213-237-2407, in our Los Angeles office. •

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The Court of Appeal concluded that the advanced commissions were not wages, but an advancement of commissions not yet earned (even though the commission agreements did not use the term “advance”). The court ruled that a salesperson could be required to pay back excess advances when there is a written agreement between the employer and employee authorizing such charge backs and the agreement clearly states that the advanced commission is not deemed to be “earned” until some future condition is satisfied.

The court also ruled that even if the advanced commissions were considered to be “wages” under California law, Labor Code § 224 permitted charge backs when they: (1) are authorized in a writing signed by the employee; and (2) did not reduce the employee’s “standard wage,” which the court defined as the employee’s base rate of pay. In *Koehl*, the employees were paid a base salary plus commissions and the employer only recovered unearned commissions from subsequent commission advances, not from the employees’ base salaries.

Employers’ Bottom Line:

It is clearly settled law in California that employers can seek to recover commissions advanced to employees that are never actually earned. To be legally permissible, such charge backs must be authorized in a writing signed by the employee and the agreement must identify the criteria for an advanced commission to be deemed earned. The key for employers is to craft commission plans which clearly state that employees are receiving advancements on future anticipated commissions and identify what criteria must be satisfied for the commission to be earned. Another option, of course, is to only pay commissions once all the criteria for earning the commission have been satisfied.

If you have questions regarding this article or other California labor or employment law issues, please contact the Ford & Harrison attorney with whom you usually work or the author of this article, Brian Peters, bpeters@fordharrison.com, 213-237-2409, in our Los Angeles office. •

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Certification as a Labor and Employment Specialist is not currently available in Tennessee.

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