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SIGNIFICANT CHANGES IN CALIFORNIA EMPLOYMENT LAW FOR 2009

No Text or Email While Driving

Effective January 1, 2009, Senate Bill 28 makes it illegal to drive a motor vehicle while using an electronic wireless communications device to write, send, or read a text-based communication. The bill defines "write, send, or read a text-based communication" as using an electronic wireless communications device to manually communicate with any person using a text-based communication, including, but not limited to, communications referred to as a text message, instant message, or electronic mail. This closed the gap left by SB 1613, which prohibited using a cell phone without a hands free device while driving a motor vehicle. For more information about revising your Handbook to include a prohibition on sending text messages and email messages while driving, contact Jennifer McClain at Jennifer@mrjlaw.net or any of our attorneys at (714) 972-2333.

Temporary Service Employers

Effective January 1, 2009, SB 940 requires that employees of temporary services employers be paid on a weekly basis or, if the temporary services worker is assigned to work "day-to-day", at the end of each day. The bill imposes Labor Code Section 203 penalties upon employers who violate its provisions.

Employer Compelled False Statements

Under California Assembly Bill 2075, effective January 1, 2009, employers may not require an employee to sign a statement of the hours worked or meal periods taken during the pay period if the employer knows the statement to be false. Any attempted "release" would be void and could subject the employer to a misdemeanor. This adds on to existing Labor Code Section 206.5(a) which prohibits an employer from requiring the execution of a release of a claim or right on account of wages due, or to become due, or made as an advance on wages to be earned unless payment of those wages has been made.

Computer Software Employees/ Over Time Pay

AB 10, effective September 30, 2008, amends Labor Code Section 515.5(a)(4) regarding the exemption from the requirement that an overtime rate of compensation be paid pursuant to Labor Code Section 510. The revisions broadens the existing overtime exemption for computer software employees by applying the exemption to those workers who receive not less than \$36 for each hour worked in each work week as well as those who are paid an annual salary of not less than \$75,000 for full-time employment, and paid not less than \$6,250 per month.

IRS Mileage Reimbursement Increase

Effective January 1, 2009, the new IRS mileage rate will be 55 cents per mile. This is a reduction from the current standard business mileage reimbursement rate of 58.5 cents per mile, effective through December 31, 2008.

New EDD Form

The Employment Development Department (EDD) released a new form for reporting new employees to the state. The new DE 34 Form can be accessed at:

http://www.edd.ca.gov/pdf_pub_ctr/de34.pdf

Minimum Wage in San Francisco

Effective January 1, 2009, the San Francisco minimum wage increases from \$9.36 to \$9.79 per hour. This increase applies to all employers with employees in the city.

Mandatory Sick Leave Bill Failed

In a victory for employers, AB 2716, which could have made CA the first state to mandate sick leave for all workers, died in the Senate Appropriations Committee in August 2008.

FEDERAL LEGISLATION

Family and Medical Leave Act (FMLA) Changes

The U.S. Department of Labor (DOL) issued new final regulations interpreting the Family and Medical Leave Act (FMLA), effective January 16, 2009. The regulations make a number of significant changes to the original regulations. While employers will have more leeway to obtain information from employees and health care providers, employers have additional obligations to inform employees of their rights and responsibilities under FMLA.

Employer Notice Requirements for FMLA Leave

Under the new rules, employers have more notice obligations for FMLA leave. The notice sections have been streamlined into a one-stop section covering all notice requirements.

- Covered employers must post a general FMLA notice even when they have no FMLA-eligible employees. Posting requirements may be satisfied through an electronic posting, as long as the posting otherwise meets the regulatory requirements. Electronic-only posting is permitted where all employees and applicants have access to electronic information.
- The regulations contain a new general notice sample. If an employer has no handbook or other written materials, it must provide the general notice to new employees upon being hired.
- Absent extenuating circumstances, the time frame for an employer to respond to an employee's request for leave is extended from 2 business days to 5 business days after receiving the request for leave or acquiring knowledge that the leave may be FMLA qualified.
- The employer may notify an employee of the hours counted against the FMLA leave entitlement orally and follow up with written notification on a pay stub at the next payday (unless the next payday is in less than one week, in which case the notice must be no later than the subsequent payday).

- Only one designation notice is required for each FMLA-qualifying reason per leave year, regardless of whether the leave is taken as a continuous block of leave or on an intermittent or reduced leave schedule basis.
- The individual notice requirements under 29 CFR § 825.301(b) of the current regulations have been separated into two new notice requirements or phases: “Eligibility/Rights and Responsibilities” notice and “Designation” notice. The current optional Form WH-381 (“Employer Response to Employee Request for FMLA Leave”) will be replaced with two optional forms, one to advise employees of their FMLA eligibility and rights and the other to formally designate leave as FMLA leave.

Fitness for Duty Certifications

A list of essential job functions must be provided with the designation notice if the employer will require a fitness-for duty certification. Employers may now demand more than a “simple statement” of the ability to return to work. Employers also may ask for fitness for duty certifications for intermittent leave if reasonable safety concerns exist.

Light Duty Not FMLA Leave

Time spent in "light duty" work does not count against an employee's FMLA leave entitlement. The employee's right to job restoration is on hold while an employee performs a light duty assignment. At the end of the voluntary light duty assignment, the employee has the right to be restored to the position the employee held at the time the employee's FMLA leave began or the employee may use the remainder of his or her FMLA leave entitlement.

Limited Consideration of Medical Information

Since an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA) and may trigger requests for paid leave or workers' compensation benefits, employers may now follow procedures for requesting medical information under the ADA or paid leave or workers' compensation programs without violating the FMLA. Employers may consider any information received pursuant to such procedures or benefit program in determining an employee's entitlement to FMLA-protected leave. The change permits employers to directly contact an employee's health care provider but only to authenticate or clarify the certification.

Bonus Payments for Employee on Leave

The regulations modify the rules for perfect attendance awards to allow employers to disqualify employees from payments based on achievement of a specified job-related goal such as attendance, where the employee has not met the goal due to FMLA leave, as long as this is done in a nondiscriminatory manner. 29 CFR § 825.215 (c)(2).

Eligibility for Employees with a Break in Service

Currently, employees are eligible to take FMLA leave if they have been employed by the employer for at least 12 months and have at least 1,250 hours of service in the 12-month period preceding the leave. The new regulation 29 CFR § 825.110(b)(1) states that although the 12 months of employment need not be consecutive, employment periods prior to a break in service of 7 years or more need not be counted in determining whether or not the employee has been employed by the employer for at least 12 months.

Retroactive Designation

The new FMLA rules permit retroactive designation of FMLA if the employer fails to provide timely notice and the delay does not cause employee harm or injury. Employees and the employer can mutually agree that the leave be retroactively designated as FMLA leave where the leave would qualify for FMLA leave protection.

Leave for a Qualifying Exigency Relating to Military Service

The FMLA rules implement two new military family leave entitlements for eligible specified family members:

(1) Up to 12 weeks of leave for certain qualifying exigencies arising out of a covered military member's active duty status, or notification of an impending call or order to active duty status, in support of a contingency operation, and

(2) Up to 26 weeks of leave in a single 12-month period to care for a covered service member recovering from a serious injury or illness incurred in the line of duty on active duty. Eligible employees are entitled to a combined total of up to 26 weeks of all types of FMLA leave during the single 12-month period.

The DOL defined “qualifying exigency” to include the following 8 situations: (1) short-notice deployment, (2) military events and related activities, (3) childcare and school activities, (4) financial and legal arrangements, (5) counseling, (6) rest and recuperation, (7) post-deployment activities, and (8) additional activities to address other events which arise out of the covered military member’s active duty or call to active duty status, provided the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave. A new optional WH384 form has been adopted to allow employees to self-certify the reasons that support their claims of qualifying exigencies.

New Poster Requirements

The revised FMLA regulations create new poster and notice requirements. New posters can be ordered at <http://www.calbizcentral.com/Store/Products/Pages/PLE2009.aspx>. The new regulations increase the penalty if an employer fails to post the required FMLA poster. An employer that willfully violates the posting requirement may be assessed a civil penalty by the Wage and Hour Division not to exceed \$110 for each separate offense under 29 CFR § 825.300(a)(1).

Federal ADA Amended

Effective January 1, 2009, Congress enacted the Americans with Disabilities Act (ADA) Amendments Act of 2008 which defines “disability” to more broadly encompass impairments that substantially limit a major life activity. The Act also states that mitigating measures including assistive devices, auxiliary aids, accommodations, medical therapies and supplies have no bearing in determining whether a disability qualifies under the law. Changes also clarify coverage of impairments that are episodic or in remission that substantially limit a major life activity when active, such as epilepsy or post traumatic stress disorder.

FAR Rule and E-Verify Program

On November 14, 2008, the Department of Defense, NASA, and General Services Administration issued a final rule amending the Federal Acquisition Regulation (FAR) to require that contractors and subcontractors doing business with the U.S. government use the E-Verify program to check the employment eligibility of all new hires and employees directly performing work under federal contracts, unless an exemption applies. This rule will take effect on January 15, 2009.

RECENT CALIFORNIA CASE DECISIONS

Conflict Over Meal and Rest Periods is Not Resolved

On July 22, 2008, the California Court of Appeal in *Brinker v Superior Court* (WL 2806613 (Cal. App. 4 Dist., July 22, 2008)), held that California employers are only required to “provide” or “make available” meal and break periods to its non-exempt employees and are no longer required to ensure that such breaks are taken; an employer need only authorize and permit a rest period every four hours (or major fraction thereof); where impracticable, the rest period need not be in the middle of each work period; and an employer may only be liable for “off-the-clock” work if it knew or should have known that its employees were working off- the-clock. However, the California Supreme Court accepted review of the case so it may not be cited until the Supreme Court issues a decision on the matter.

The 2009 California Employment Law Update should not be construed as legal advice or legal opinion on any facts or circumstances. The contents are intended for general information purposes only. We recommend that you consult counsel concerning your own situation and any specific legal questions you might have.