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**SIGNIFICANT CHANGES IN CALIFORNIA
EMPLOYMENT LAW FOR 2010**

Minimum Wage Increases

California minimum wage remains \$8.00 an hour, effective January 1, 2008. The federal minimum wage increases to \$7.25 per hour, effective July 24, 2009. San Francisco's minimum wage rate increases from \$9.36 per hour to \$9.79 per hour, effective January 1, 2009.

Alternative Work Schedule

Effective February 20, 2009, California Assembly Bill 5, gives employers more flexibility in scheduling their workweek. The regulation amends CA Labor Code § 511, which permits employers to implement a schedule of more than 8 hours in a day, with out paying overtime. The regulation that previously permitted a company to vote on one alternative work schedule, now provides for a menu of work options, which may varies from week to week (still subject to the voting procedure). This means that employees can vote for either a standard five 8 hours days (5/8) schedule or an alternative work schedule, such as 4 ten hour days (4/10) or select a schedule that changes from week to week. It is important that employers follow the proper voting and reporting procedures or the schedule may be found invalid, which could lead to overtime penalties.

COBRA Subsidy Extension

On December 21, 2009, the COBRA subsidy that was originally established under the American Recovery and Reinvestment Act of 2009 ("ARRA") was extended to February 28, 2010. The ARRA extends the cost subsidies for an additional 6 months for a total of 15 months of subsidized coverage. The extension applies to COBRA payments made on or after February 17, 2009. Eligible employees will be required to pay only 35% of their COBRA premium while employers and taxpayers will subsidize the remaining 65%. The annual income of the individual must be less than \$125,000 if single or \$250,000 if married. Once the employee qualifies for coverage under another group health plan or Medicare, his or her eligibility for this coverage will end. Employers and plan administrators must provide eligible employees with information on the COBRA subsidy. Information on the notice requirements is available on the COBRA Web site at www.dol.gov/cobra.

Electronic Discovery Amendments

On June 29, 2009, AB 5 amended CA's Civil Discovery Act to include procedures for discovering electronically stored information in a lawsuit. This law is not aimed at employers but will impact employers in litigation. Employers may experience a cost increase as a party may now obtain discovery of electronic information. If the propounding party does not request a particular format (ie disk, pdf files, etc.) then the responding party may provide the information in the manner it is ordinarily kept. The court is permitted to sanction a party for non-compliance with the electronic discovery act. This brings state law in line with federal regulations.

Arbitration Restrictions

The Defense Appropriations Act for 2010 restricts the use of mandatory arbitration clauses in employment contracts between defense contractors and their employees or independent contractors. All prime defense contractors that receive covered contract awards more than 180 days after December 19, 2009 must certify that their subcontractors have agreed to the restrictions in the arbitration Act. This certification requirement applies to all subcontractors that have subcontracts in excess of \$1 million. Any defense contractor that receives funds from the Act for over \$1 million for a contract awarded more than 60 days after December 19, 2009, must agree not to: enter into any agreement with employees or independent contractors where the following claims must be resolved through arbitration: claims under Title VII, torts relating to sexual assault, negligent hiring, supervision, or retention; or to take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates resolving such claims through arbitration.

GINA: Genetic Information Nondiscrimination Act

Effective November 21, 2009, federal law HR 493, elevated "genetic information" to a protected status under Title VII, under the Genetic Information Nondisclosure Act ("GINA"). GINA prohibits discrimination on the basis of genetic information regarding health insurance and employment. GINA bars employers from refusing to hire, discharge, or in any way discriminating against applicants and employees because of genetic information. "Genetic information" means an applicant's or employee's genetic tests or genetic tests of their family members, or the manifestation of a disease or disorder in family members.

Workers Comp Changes

There are several changes in workers compensation regulations. Under California AB 1093, effective January 1, 2010, the CA Labor Code §3600 is amended to prohibit an employer from denying a claim of an employee's injury or death that occurred during the course of the employee's work when the perpetrator's motives are based on the employee's race, religious creed, color, national origin, age, gender, disability, sex, or sexual orientation. No personal relationship or personal connection can be assumed to exist between the perpetrator and the employee based only on the fact that the perpetrator injured or killed the employee due to the perpetrator's hatred of or beliefs about the victim's characteristics.

AB 361 adds CA Labor Code § 4610.3, which provides that, regardless of whether an employer has a medical provider network, an employer that authorizes medical treatment shall not rescind or modify the authorization for medical treatment that has already been provided.

SB 186 repeals the December 31, 2009 sunset date for provisions pertaining to an employee's predesignation of a personal physician under CA Labor Code § 4600.

SB 313 increases penalties for failure to secure workers' compensation for their employees, up to \$1,500 per worker under, under amended CA Labor Code § 3722.

Computer Professionals Exemption

The rates for exempt computer professionals and licensed physicians do not change for 2010.

The current rates for these professions are:

- Computer Professionals:
 - \$37.94/hour
 - \$6,587.50/month
 - \$79,050/year
- Licensed Physicians:
 - \$69.13/hour

Civil Air Patrol Leave

Effective January 1, 2010, there is a new leave for employees who are volunteer members of the Civil Air Patrol. The leave affects employers with more than 15 employees and provides for 10 unpaid days per year to perform the volunteer civil air patrol service. Employees must give as much notice as possible to an employer when time off is needed. To be eligible for the leave, an employee must be employed by their current employer for no less than 90 days before the start date of the leave period.

Safety in Educational Institutions

SB 188, effective January 1, 2010, amends California Code of Civil Procedure § 527.85 to allow certain schools to provide protections for its students. Postsecondary educational institutions may now seek temporary restraining orders and/or injunctions on behalf of a student, which is similar to the regulation that permits employers to seek restraining orders on behalf of an employee. This regulation applies when a student has suffered a credible threat of violence from any individual and only with the written consent of the student.

Nooses Prohibited

AB 412, amends California's Hate Crimes Law to state that anyone who displays a noose in certain places, including a place of employment, for the purpose of terrorizing an occupant, shall be subject to imprisonment and a fine up to \$5,000. Certain symbols (swastikas, burned crosses, etc.) are already prohibited, this bill adds nooses to the list. This regulation is not targeted at employers but can impact employers if the symbol is displayed in the workplace.

Lilly Ledbetter Fair Pay Act

The Lilly Ledbetter Fair Pay Act amends federal fair pay terms and overturns the *Ledbetter v Goodyear* case. The case had upheld a statute of limitations of 180 days for filing a claim with labor board. The amended law greatly expands the time period in which a claim can be filed by re-starting the statute of limitations period each time an employee is affected by the discriminatory practice.

Recognition of Out-Of-State Marriages

Effective January 1, 2010, Senate Bill 54 enacts CA Family Code § 308, which states that same-sex marriages performed out of state before November 5, 2008 will be recognized in California. Same-sex couples who married out of state on or after November 5, 2008, will receive all the rights, benefits, and responsibilities of traditional marriages. These regulations are not specifically directed at employers will impact employers in benefit and health care administration.

New I-9 Form

The U.S. Citizenship and Immigration Services (USCIS) released a new I-9 form to verify work authorization on August 7, 2009. The form contain an updated list of acceptable documents. The form is available on the USCIS website (<http://www.uscis.gov>).

IRS Mileage Reimbursement

Effective January 1, 2010, the new IRS mileage rate will be 50 cents per mile. This is a reduction from the prior standard business mileage reimbursement rate of 55 cents per mile, effective through December 31, 2009.

New Wage Withholding Table

On November 1, 2009 through 2010, there is a 10% increase in the amount of taxes withheld from paychecks. CA imposed a 0.6% increase in supplemental wage withholding and a 1.20% increase on wage stock options and bonus payments. The withholding rates have been increased in order to accelerate tax collections by the State and to prevent under withholding by employees due to the economic crisis. Employees may complete new a DE-4 form to adjust their state withholding.

E-Verify Program

Effective January 15, 2009, Federal Acquisition Regulation (FAR) requires contractors and subcontractors doing business with U.S. government to use the E-Verify program to check employment eligibility of all new hires and employees directly performing work under federal contracts, unless an exemption applies. There is no charge to use the system.

Furlough Days For Exempt Employees

The Labor Commissioner issued an Opinion on August 19, 2009, regarding permitting a reduction in salary for reduced hours of work. Due to economic downturn, an employer may reduce the hours of an exempt employee with a corresponding reduction in pay. The DLSE stated that this is consistent with the “salary basis” test so long as the reduction is not designed to circumvent paying regular salary and the employee still meets the requirement of being paid twice the minimum wage.

Deduction for Absences

The Labor Commissioner issued an Opinion on November 23, 2009, regarding deducting vacation time for a partial day of missed work for an exempt employee. The DLSE stated that benefits can be charged on an hour-for-hour basis for partial days missed but salary cannot be charged. This is consistent with the “salary basis” test and this brings state law in line with the

federal law.

Brinker Meal Break Case Update

The case *Brinker Restaurant Corp. v. Hohnbaum*, 165 Cal. App. 4th 25 (2008) is pending before California Supreme Court. In *Brinker*, there is a class action by 59,000 restaurant workers who are non-exempt that includes servers and other non-management personnel. The class claimed that the employer failed to provide non-exempt employees with mandated 10-minute rest periods for every 4 hours worked; failed to provide 30-minute meal periods; and required employees to perform work “off the clock” when they were “punched out” for their meal periods. The case is not yet scheduled for oral argument, and decision after that will take 90 days. We can expect to hear a result some time around summer of 2010.

Text Message Privacy Case Update

The US Supreme Court has granted review of *City of Ontario v. Quon* (US-Cert granted 08-1332 12/14/09), which is regarding privacy of text messages on company issued mobile devices. In *Quon*, a police department issued pagers to employees. The department required employees to pay any charges that were over the plan limit or overage charges. A supervisor told employees that the department would not read the content of the text messages if the employees paid for the overage charge. The court found that the supervisor gave employees a reasonable expectation of privacy in the messages by his statements.

Forfeiture Provision in Stock Plan

In the case, *Schachter v. Citigroup, Inc.*, 47 Cal.4th 610 (2009), the CA Supreme Court held that a voluntary bonus plan provision that has a forfeiture provision did not violate the California Labor Code. In *Schachter*, an employee was a stock broker that participated in his employer’s restricted stock program. Under the plan, an employee would allocate a portion of his wages to the plan; he would received a deep discount on the stock, but the stock is forfeited if he leaves the employer within 2 years. The employee quit, forfeited 5% of his pay as he resigned before the vesting date, and brought suit against his employer. The court upheld the forfeiture of unvested restricted stock and the cash compensation he used to pay for the stock. The court stated that the plan was a bilateral agreement with the employee to apply a portion of his pay and that the forfeiture was permissible as the employee chose to enter the plan voluntarily.

Harassment/ Damages

In a recent case, *Roby v. McKesson Corp.* (SC S149752 11/30/09), the California Supreme Court ruled that evidence of personnel actions can support harassment claims but that the amount of punitive damages awarded was constitutionally excessive. In *Roby*, an employee was frequently absent due to panic attacks, and due to the nature of the panic attacks, the employee did not provide advance notice of the absence in accordance with the employer’s absence policy. A jury found that the employee was wrongfully discharged based on her disability, both harassment and discrimination occurred, and it awarded \$3,511,000 in compensatory damages and \$15 million in punitive damages against the employer, and \$500,000 in compensatory damages and \$3,000 in punitive damages against the harassing supervisor. The supervisor’s acts included refusing to respond to the employee’s greetings, making facial expression of disapproval when she took rest breaks because of her panic attacks, ignoring her at staff meetings, excluding her from office parties by designating her to cover the telephones, and frequently reprimanding her in front of

her coworkers. The Court found that conduct that traditionally supports a discrimination claim such as written warnings, termination, etc., and conduct that traditionally support a harassment claim such as inappropriate comments, discriminatory behavior, etc., could be presented to support both theories. On the issue of punitive damages, the Court ruled that the jury's \$15 million punitive damages award was constitutionally excessive, and that any amount of punitive damages in excess of the amount of compensatory damages (\$1.9 million) would violate due process.

Disparate Treatment / Disparate Impact

In the case, *Ricci v DeStefano* (SC 071428 6/29/09), the issues of disparate treatment and disparate impact were reviewed. In *Ricci*, a New Haven, CT fire department used an exam to select firefighters for promotion. When white candidates outperformed minority candidates on the exam, the city threw out the results based on the racial disparity. White and Hispanic candidates that passed the test but were denied promotions because the test was thrown out brought suit based on discrimination. The court stated that disparate treatment (intentional discrimination) trumps disparate impact (neutral on face, but results in discrimination). The court ruled against the city, in favor of the test takers that passed the test, holding the decision to throw out the test results was based on race. The court held that an employer can only invoke fear of "disparate impact" defense if there was a "strong basis in evidence" to believe the results were discriminatory.

Family and Medical Leave Act (FMLA)

President Obama signed the National Defense Authorization Act of 2010 ("NDAA 2010"), which included changes to FMLA. Effective October 28, 2009, the NDAA 2010 expands the family military leave entitlements that went into effect last January. The FMLA regulations apply to covered employers and eligible employees. A covered employer is one who employs 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or preceding year. An eligible employee is an employee who has been employed by the employer for at least 12 months; has worked at least 1,250 hours; and, works at a worksite where 50 or more employees are employed by the employer within a 75-mile radius. Under the new regulation, military leave is expanded to include members of the armed forces under the "qualifying exigency" leave under the FMLA. Family members of servicemembers are entitled to military caregiver leave for up to 5 years after the servicemember's military service concludes; and leave to care for an injured servicemember is expanded to cover existing or pre-existing conditions that were aggravated in the line of duty, rather than just injuries or illnesses that were first incurred in the line of duty.

The FMLA rules implement 2 new military family leave entitlements for eligible 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.

Military leave is subject to the usual requirements applicable to FMLA leave, including adequate notice, medical certifications, use of available paid leave, and reinstatement after leave. The following forms should be provided to eligible employees:

- Designation Notice to Employee of FMLA Leave (WH-382)
- Certification of Qualifying Exigency for Military Family Leave (WH-384)
- Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave (WH-385)

The forms can be downloaded at <http://www.dol.gov/esa/whd/forms>.

New Poster Requirements

The revised FMLA regulations and GINA create new poster and notice requirements. New posters can be ordered at: <http://www.calbizcentral.com/store/products/pages/california-employment-poster.aspx>. 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).

The 2010 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.