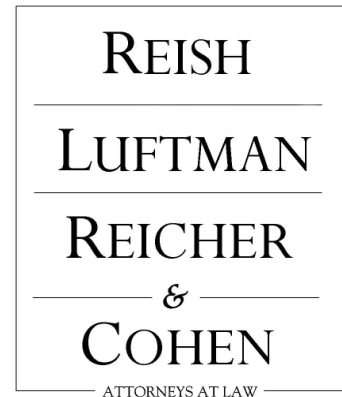


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**Employment Law Update  
Selected Law Changes That Impact 2009**

**Presented to:**

**ADP**

**Workforce Management Legislative Conference**

**October 2, 2008 –InterContinental Hotel, Century City, California**

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He served as general counsel for the UCLA Alumni Association from 1996 to 2000 and from 2004 to 2008 and served as a member of its Board of Directors for ten years. He was a member of the Board of Directors of the Children's Nature Institute from 2000 to 2004. He chaired the California CPA Education Foundation's Annual Employment Practices Conference for 4 years and has served on that Conference's Planning Committee for 9 years.

Mr. Terman served as a Superior Court appointed arbitrator in some 25 cases. His peers selected him as a 2004, 2005, 2006, 2007, and 2008 California "Super Lawyer" in which some 65,000 California lawyers were polled for each year. Mr. Terman speaks to and writes for client and industry groups on litigation avoidance and management, wage and hour issues, trade secret protection, and avoiding sexual harassment, among other employment law topics. Mr. Terman earned his Juris Doctorate in 1983 from Loyola Law School, where he served on the Law Review. In August 1986, he attended Hasting College of Law as an attorney for jury trial training. He earned his bachelor's degree in 1979 from University of California at Los Angeles.

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## **I. Recent Legislative and Regulatory Developments**

- ***Legislative Interest in Employers.*** 626 of the Bills introduced in the 2007-2008 California Legislative Session mention "employer." (There were 337 bills introduced in the 2006-2007 Legislative Session.) Of those passed in the current Session, the Governor had until midnight, September 30, 2008 to sign or veto them. Of all bills of all kinds passed this Session, according to the California Chamber of Commerce, Governor Schwarzenegger signed 771 bills and vetoed 415, or 35 percent -- the highest veto rate of any governor since the Legislature began meeting full-time 40 years ago.
- ***Employer Compelled False Statements.*** Effective January 1, 2009, A.B. 2075, makes it illegal to require an employee, as a condition of being paid, to sign a statement of the hours worked during the pay period if the employer knows the statement to be false. Any such "release" would be void and subject the employer to misdemeanor. This adds on to existing law 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.
- ***No Text or Email While Driving.*** SB 28 now 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 statute 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 plugged the gap left by SB 1613 which made, effective July 1, 2008, driving a motor vehicle while using a wireless telephone illegal unless the driver is using a hands free listening and speaking device.

- ***Employers' Right to Maintain Drug-Free Workplace.*** AB 2279 (VETOED 9/30) would make it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment or otherwise penalize a person, if the discrimination is based upon the person's status as a patient qualified to use medical marijuana or a positive drug test for marijuana of a qualified patient. The bill would authorize a person who has suffered such discrimination to pursue a civil action for damages, injunctive relief, attorney's fees and costs. The bill would also provide that it would not prohibit an employer from terminating the employment of, or taking other corrective action against, an employee who is impaired on the property or premises of the place of employment, or during the hours of employment, because of the medical use of marijuana.
- ***Limits on Credit Report Use by Employers.*** AB 2918 (VETOED 9/30) would prohibit the use of a consumer credit report, with the exception of certain financial institutions, for employment purposes unless the information is: (1) substantially job related, meaning that the information in the consumer credit report relates to the position for which the person who is the subject of the report is being evaluated because the position is (a) a highly compensated or managerial one; (b) a city, county, or both city and county position in which the employee holding the position has access to money, other assets, or confidential information; or (c) the report is procured as part of a background check for a sworn peace officer or other law enforcement position in which there is access to cash, assets, or confidential financial information; or (2) required by law to be disclosed to or obtained by the user of the report. The bill also would extend the exemption from liability for the maintenance of reasonable procedures to ensure compliance with the provisions specified in state law to encompass the new prohibition.
- ***Asking About An Employee's Criminal Past.*** AB 3063 (VETOED 9/30) would prohibit an employer from: (1) asking an applicant for employment to disclose, or utilizing in an employment-related decision, information concerning a criminal conviction the record of which has been judicially ordered sealed, expunged, or statutorily eradicated; or (2) information concerning a misdemeanor conviction for which probation has been successfully completed or otherwise discharged and the case has been judicially dismissed. Existing law prohibits an employer from asking an applicant to disclose, and an employer may not utilize in an employment-related decision, information concerning an arrest or detention that did not result in a conviction or information concerning participation in a pretrial or posttrial diversion program.
- ***Farm Labor Unionizing.*** AB 2386 (VETOED 9/30) would eliminate the requirement for secret-ballot elections for Union representation among farm employees supervised by the Agricultural Labor Relations Board ("ALRB") by providing an alternative process called an unsupervised "mediated election." Under this process, a Union representative can be

appointed if a majority of employees to sign a card which Union personnel ask them to sign, and the Union turns the cards into the ALRB.

- ***When the Statute of Limitations Can Mean Everything.*** AB 437 (VETOED 9/30) would reject, for purposes of California statutes of limitation, the interpretation given to federal law by the 2007 United States Supreme Court decision in *Ledbetter v. The Goodyear Tire & Rubber Company*, which provided for the commencement of statutes of limitation for lawsuits relating to discrete employer decisions and effectively blocked recovery for alleged employer wrongs committed before such commencement.
- ***Incentives to Sue Employers.*** SB 1113 (VETOED 9/30) would amend *Code of Civil Procedure Section 1021.5* and authorize the court to award attorney's fees and costs, including expert witness fees, to a successful party against one or more opposing parties in any lawsuit that has resulted in the enforcement of an important right affecting the public interest if all of the following are met: (1) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons; (2) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate; (3) those fees should not, in the interest of justice, be paid out of the recovery, if any. There is no provision for employers to recover their attorneys' fees where the plaintiffs' claims are defeated
- ***Bad Advice on Independent Contractor Designation.*** SB 1583 (VETOED 9/28) would provide that a person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for the individual shall be jointly and severally liable with the employer if the individual is not found to be an independent contractor. This bill would exempt a person who provides advice to his or her employer or an attorney who provides legal advice in the course of practicing law.
- ***Mass Layoffs Closings Could Have Become More Onerous for Employers.*** AB 1989 (STALLED IN COMMITTEE) would have increased employer requirements under the "Cal-WARN Act" to: (1) require employer notice to also be given if an employer orders an off shoring, which is defined as the removal of an employer's operations to a location outside the borders of the United States; (2) increase the layoff notice period from 60 to 90 days; (3) increase employer penalties for non-compliance. Existing law provides that an employer, with certain exceptions, may not order a mass layoff, relocation, or termination, as defined, at a covered establishment without giving 60 days' prior written notice to employees and the Employment Development Department and other local agencies, as well as complying with specified federal guidelines.
- ***Universal Sick Pay Died.*** AB 2716 (STALLED IN COMMITTEE) would have provided that an employee who works in California for 7 or more days in a calendar year is entitled to paid sick days accrued at a rate of no less than one hour for every 30 hours worked. An employee would have been entitled to use accrued sick days beginning on the 90th calendar day of employment. The bill would have required employers to provide paid sick days, upon the request of the employee, for diagnosis, care, or treatment of health conditions of the employee or an employee's family member, or for leave related to

domestic violence or sexual assault. An employer would be prohibited from discriminating or retaliating against an employee who requests paid sick days.

- ***Employer-Paid Transportation Costs in San Francisco.*** On September 18, 2008, the City of San Francisco signed into law a new ordinance that requires employers with at least 20 employees to offer their workers at least one of three transportation benefit options by January 2009: (1) a pre-tax election of a maximum of \$110 per month; (2) an employer-provided (or reimbursed) transportation pass equal in value to at least \$45 per month; or (3) employer-provided transportation at no cost to employees. Civil penalties for non-compliance include a first violation fine not to exceed \$100, a second violation within the same year fine of \$200 and, for each additional violation within the same year, a \$500 fine. Administrative fines may be assessed instead. San Francisco's enforcement costs also may be recovered.
- ***Military Spouse Leave.*** AB 392 (2007) enacted *California Military and Veterans Code Section 395.10* requiring employers of 25 or more employees to permit an employee who is the spouse of a member of the federal or state Military to take up to 10 days of unpaid leave while the Military member is on leave from deployment. To qualify for leave, the employee must work an average of 20 or more hours per week and be married to a member of the United States Armed Forces deployed during a period of military conflict to a combat zone or to member of the National Guard or Reserves deployed during a period of military conflict.

The employee seeking leave must provide the employer with notice within at least two business days of receiving official notice that their spouse will be on leave from deployment that he or she wishes to take leave and also provide the employer with written documentation certifying the spouse will be on leave from deployment. An employer may not retaliate against any employee for requesting or taking this AB 392 leave. Registered Domestic Partners are also eligible for these leave rights.

- ***School Activity Leave for Parents.*** For employers of 25 employees or more, *Labor Code Section 230.8* entitles an employee who is a parent, guardian, or grandparent with custody of a child in grades Kindergarten through 12, or attending a licensed day care facility, to take off up to 40 hours each year (no more than 8 hours each month) to participate in the activities of the school or day care if reasonable advance notice is given. This leave is unpaid and employer may require use of accrued vacation, personal, or comp time.
- ***Independent Contractors; EDD Employment Determination Guide (Form DE38).***  
<http://www.edd.ca.gov/taxrep/de38.pdf>
- ***Wage and Hour Orders:*** <http://www.dir.ca.gov/IWC/WageOrderIndustries.htm>
- ***What is the Status of Pending California Legislation?***  
Find out at: <http://www.leginfo.ca.gov/>

- ***Federal ADA Amended.*** Effective January 1, 2009, Congress enacted the ADA Amendments Act of 2008 which: (1) provides that the “[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted”; (2) rejects several US Supreme Court decisions, Equal Employment Opportunity Commission regulations and many years of legal decisions based upon them which narrowed who was “disabled” and therefore entitled to protections under the ADA; (3) and states that “[i]t is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their [reasonable accommodation] obligations.” Some specifics include: (1) prohibits consideration of “mitigating measures” (such as prosthetics and medicine) when determining whether a condition causes a substantial limitation of a major life activity; (2) states that says conditions that are episodic or in remission are disabilities if they would substantially limit a major life activity when active; (3) increases the scope of what a major life activity is to, “the operation of a major bodily function.” Does it matter in California?

- ***Revised Federal EEO-1 Survey Report Form Required – Reports Due September 30.*** The EEO-1 Report — formally known as the “Employer Information Report” — is a federal Equal Employment Opportunity Commission survey requiring certain employers to provide a count of their employees by job category, ethnicity, race, and gender. The EEO-1 Report must be filed by employers with 100 or more employees, as well as those with federal government contracts of \$50,000 or more and 50 or more employees by September 30 of each year. The report must use employment numbers from any pay period in July through September of the reporting year.

The EEOC uses the data to support civil rights enforcement and to analyze employment patterns, such as the representation of female and minority workers within companies, industries, or regions. OFCCP uses EEO-1 data to determine which employer facilities to select for compliance evaluations. OFCCP’s system uses statistical assessment of EEO-1 data to select facilities where the likelihood of systematic discrimination is the greatest.

- The revised EEO-1 Report Form is at [http://www.eeoc.gov/eo1/eo1\\_2007\\_d.pdf](http://www.eeoc.gov/eo1/eo1_2007_d.pdf)
- ***New Employment Eligibility Verification (I-9) Form Required.*** Effective December 26, 2007, employers must use a new U.S. Citizenship and Immigration Services Form I-9 form to verify employment eligibility of all new hires or re-verifications or be subject to penalties. The new Form I-9 can be found at [www.uscis.gov/files/form/i-9.pdf](http://www.uscis.gov/files/form/i-9.pdf)
- ***IRS Business Mileage Reimbursement.*** Effective July 1, 2008, the rate increased from 50.5 to 58.5 cents per mile through December 31, 2008. See, <http://www.irs.gov/newsroom/article/0,,id=184163,00.html>
- ***Update Workplace Notices and Pamphlets Annually.*** Workplace posters, notices and pamphlet requirements tend to change at least once a year, usually January 1. The California Chamber of Commerce and other vendors can usually provide a complete set of required posters and notices at a cost more reasonable than researching all the requirements and obtaining them piecemeal. Consider vendors such as the California Chamber of Commerce (e.g., “Required Notices Kit;” See, [www.calchamberstore.com](http://www.calchamberstore.com)).

## II. Recent Court Decisions

- ***Attempt at Creating a New Exception to Non-Compete Agreements Was Denied.*** On August 7, 2008, the California Supreme Court in *Raymond Edwards II v. Arthur Andersen LLP*, 44 Cal.4th 937 (2008), held that there is no “narrow restraint” exception to general rule voiding noncompetition agreements, even though the restriction was narrowly drawn to leave open for employee a substantial portion of the market. It also left open the door for enforceability of agreements not to solicit customers where necessary for protection of an employer’s trade secrets.

Specifically, the Court held: “We conclude that Andersen’s noncompetition agreement was invalid. As the Court of Appeal observed, ‘The first challenged clause prohibited Edwards, for an 18-month period, from performing professional services of the type he had provided while at Andersen, for any client on whose account he had worked during 18 months prior to his termination. The second challenged clause prohibited Edwards, for a year after termination, from ‘soliciting,’ defined by the agreement as providing professional services to any client of Andersen’s Los Angeles office.’ The agreement restricted Edwards from performing work for Andersen’s Los Angeles clients and therefore restricted his ability to practice his accounting profession. (See *Thompson v. Impaxx, Inc.* (2003) 113 Cal.App.4th 1425, 1429 [distinguishing ‘trade route’ and solicitation cases that protect trade secrets or confidential proprietary information].) The noncompetition agreement that Edwards was required to sign before commencing employment with Andersen was therefore invalid because it restrained his ability to practice his profession. (See *Muggill*, supra, 62 Cal.2d at pp. 242-243.)”

- ***Conflict Over Meal and Rest Periods is Still 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, among other things, that: (1) 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; (2) 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 (3) 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. On August 29, 2008, a Petition for Review was filed with the California Supreme Court; if the Court accepts the case, it will effectively *stay the decision* until the Court decides it.
- ***No Individual Liability for Retaliation Under FEHA.*** In *Jones v The Lodge At Torrey Pines*, 42 Cal 4<sup>th</sup> 1158 (2008), the California Supreme Court held that an individual supervisor cannot be personally liable for their acts of retaliation under California’s Fair Employment and Housing Act (FEHA), although the employer can be liable. In this case, Plaintiff sued for sexual orientation harassment and retaliation. The Supreme Court observed that a supervisor cannot perform his or her job functions without making personnel decisions. By contrast, harassment is wholly unrelated to a supervisor’s job duties. As such, Court reasoned that the negative impact of allowing retaliation liability

on supervisors' ability to carry out the regular decision making functions of their positions, would outweigh the benefit to claimants in allowing individual liability.

- ***“Me Too” Evidence Might be Admissible.*** In *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008), the United States Supreme Court held that the admissibility of “me too” evidence in employment discrimination cases depends on a case by case analysis. Plaintiff, suing for age discrimination, attempted to present at trial testimony from five other former employees, each of whom would testify that their supervisors had discriminated against them because of their age (*i.e.*, “it happened to me too”). However, none of the five shared a supervisor with plaintiff or worked in the same division of the company. As such the trial court barred the evidence as “per se” irrelevant and the potential prejudice to the employer outweighed the probative value of the evidence, particularly since they were not similarly situated to the plaintiff. The Supreme Court unanimously decided that the admissibility of such evidence depends on an the Judge’s analysis of factors in each case such as how closely related the evidence is to the facts of the particular plaintiff’s action and the theory of the case. Employers should take note of this decision, notwithstanding its noncommittal nature, because it may lead to an increase in the number of cases alleging a company-wide pattern or practice of discrimination.
- ***Reasonable Expectation of Privacy in Text Messages.*** In *Quon v. Arch Wireless Operating Co., Inc.*, No. 07-55282 (9th Cir., June 18, 2008), the Ninth Circuit Court of Appeals held that employees of the Ontario, California police department could sue in federal court for invasion of privacy and other claims because they had a reasonable expectation of privacy in text messages in this particular case. Here, the employer’s contract with the alphanumeric pager service provider allotted 25,000 characters per month, after which the City was required to pay overage charges. The employees were told that if they paid the monthly overage charges, the police department would not review their text messages to determine if they were personal or work related. Months later, during a City audit of personal text message use, the City found that many of the messages sent during normal work hours were personal in nature and sexually explicit. The Court noted that, had the City had simply followed its general policy on computer, internet and e-mail use, the employees would probably be unable to claim any reasonable expectation of privacy in the content of their text messages. That policy prohibited personal use of City-owned computers, e-mail, Internet and other systems, and permitted the City to search these resources.
- ***Stop Using Employer’s E-mail Systems for Union Solicitation.*** The National Labor Relations Board in *Guard Publishing Company*, NLRB Case No. 36-CA-08743-1 (December 16, 2007) held that employers may restrict the use of company e-mail, even if such restriction includes a ban on the use of e-mail for “union business,” as long as the employer prohibits solicitations on behalf of all third-party organizations (e.g., unions, political groups, churches, insurance sales). Although the employer in this case allowed personal e-mails, the NLRB upheld discipline of employees for using company e-mail to announce union rallies and other related union activities.
- ***Law Firm Partners Brought Within Protection of Federal Employment Law Against Age Discrimination.*** Pursuant to a consent decree approved by a federal judge in late

2007, the international law firm of Sidley Austin LLP agreed to pay \$27.5 million to 32 former partners who the U.S. Equal Employment Opportunity Commission alleged were forced out of the partnership because of their age under age based retirement policy. The EEOC brought the suit in 2005 under the federal Age Discrimination in Employment Act (ADEA). A major issue in the case was whether partners in the law firm were protected as employees under the ADEA. The decree provides that “Sidley agrees that each person for whom EEOC has sought relief in this matter was an employee with the meaning of the ADEA.” The consent decree also includes an injunction that bars the law firm from “terminating, expelling, retiring, reducing the compensation of or otherwise adversely changing the partnership status of a partner because of age” or “maintaining any formal or informal policy or practice requiring retirement as a partner or requiring permission to continue as a partner once the partner has reached a certain age.”

### **III. Sample Damage/Penalty Exposure in a Civil Case Brought by Employee(s)**

- **Time Frames: Four years prior to the date the Complaint was filed**  
**Time from Complaint filing to settlement or judgment**
- **Regular Rate of Pay: Salary (and possibly guaranteed bonuses) divided by 2080 for a full time employee**
- **Attorneys Fees: Recoverable by a successful Plaintiff**
- **Interest on Damages**
- **Single Plaintiff or Class Action**

#### **FAILURE TO PAY OVERTIME**

**Damages:** All unpaid overtime at applicable OT rate of 1.5 or 2 times regular rate of pay.  
(Note: employer obligation to maintain time records).

#### **FAILURE TO PAY MINIMUM WAGE**

**Damages:** Difference between amount paid and minimum wage in effect. Liquidated damages equal to wage not paid and interest subject to court discretion.

**Civil penalties:** \$100 per employee for first intentional violation or \$250 per employee for each subsequent intentional violation.

#### **FAILURE TO PROVIDE MEAL PERIODS**

**Damages:** One additional hour of pay at Employee's regular rate of compensation for each work date that the meal is not provided. Possible that hours worked may trigger unpaid overtime obligation.

#### **FAILURE TO PROVIDE REST PERIODS**

**Damages:** One additional hour of pay at Employee's regular rate of compensation for each work date that the rest period is not provided. Possible that hours worked may trigger unpaid overtime obligation.

#### **FAILURE TO PROVIDE ITEMIZED STATEMENTS**

**Civil Penalties:** \$50 per employee for first violation and \$100 per employee for subsequent violations, up to \$4,000 in the aggregate per employee.

#### **FAILURE TO PAY EMPLOYEES ALL WAGES DUE UPON END OF EMPLOYMENT**

**Civil Penalty:** Daily rate of pay for up to 30 days of waiting.

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